UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS552)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF REPORTS

SHORT TITLE	FULL CITATION
Canada – Periodicals (AB)	Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997
Chile – Price Band System (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
China – Auto Parts (Panel)	Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R / WT/DS340/R / WT/DS342/R / Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R
EC – Commercial Vessels (Panel)	Panel Report, *European Communities – Measures Affecting Trade in Commercial Vessels*, WT/DS301/R, adopted 20 June 2005
EC – Chicken Cuts (AB)	Appellate Body Report, European Communities – Customs Classification of Frozen Boneless Chicken Cuts, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1
EC – IT Products	Panel Reports, European Communities and its member States – Tariff Treatment of Certain Information Technology Products, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010
EU- Poultry Meat (China)	Panel Report, *European Union – Measures Affecting Tariff Concessions on Certain Poultry Meat Products*, WT/DS492/R, adopted 19 April 2017
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and 4

SHORT TITLE	**FULL CITATION**
Indonesia – Iron or Steel Products (AB)	Appellate Body Reports, *Indonesia – Safeguard on Certain Iron or Steel Product*, WT/DS490/AB/R, WT/DS496/AB/R, and Add. 1, adopted 27 August 2018
Japan – Alcoholic Beverages II (AB)	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
Russia – Traffic in Transit	Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R and Add.1, adopted 26 April 2019
United States – Welded Carbon Quality Line Pipe (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002
US – Shrimp (AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998

Table of Exhibits

EXHIBIT	DESCRIPTION
U.S. First Written Submission	
US-1	Section 232 statute, 19 U.S.C. 1862
US-2	Section 232 Regulations, 15 C.F.R., Part 705
US-3	U.S. President, "Memorandum on Steel Imports and Threats to National Security," Weekly Compilation of Presidential Documents, April 20, 2017, https://www.govinfo.gov/content/pkg/DCPD-201700259/pdf/DCPD-201700259.pdf
US-4	U.S. President, "Memorandum on Aluminum Imports and Threats to National Security," Weekly Compilation of Presidential Documents, April 27, 2017, https://www.govinfo.gov/content/pkg/DCPD-201700284/pdf/DCPD-201700284.pdf
US-5	DOC, Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, 82 Fed. Reg. 19205 (Apr. 26, 2017)
US-6	DOC, Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Aluminum, 82 Fed. Reg. 21509 (May 9, 2017)
US-7	U.S. Department of Commerce, Bureau of Industry and Security, Office of Technology Evaluation, The Effect of Imports of Steel on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended (Jan. 11, 2018)
US-8	U.S. Department of Commerce, Bureau of Industry and Security, Office of Technology Evaluation, 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 (Jan. 17, 2018)
US-9	Presidential Proclamation 9705 of March 8, 2018, Adjusting Imports of Steel into the United States, including the Annex, To Modify Chapter 99 of the Harmonized Tariff Schedule of the United States, 83 Fed. Reg. 11625 (Mar. 15, 2018)
US-10	Presidential Proclamation 9704 of March 8, 2018, Adjusting Imports of Aluminum into the United States, including the Annex, To Modify

EXHIBIT	DESCRIPTION
	Chapter 99 of the Harmonized Tariff Schedule of the United States, 83 Fed. Reg. 11619 (Mar. 15, 2018)
US-11	Presidential Proclamation 9711 of March 22, 2018, Adjusting Imports of Steel into the United States, amending Proclamation 9705 of March 8, 2018, 83 Fed. Reg. 13361 (Mar. 27, 2018)
US-12	Presidential Proclamation 9710 of March 22, 2018, Adjusting Imports of Aluminum into the United States, amending Proclamation 9704 of March 8, 2018, 83 Fed. Reg. 13355 (Mar. 28, 2018)
US-13	Presidential Proclamation 9740 of April 30, 2018, Adjusting Imports of Steel into the United States, amending Proclamation 9705 of March 8, 2018, as amended by Proclamation 9711, 83 Fed. Reg. 20683 (May 7, 2018)
US-14	Presidential Proclamation 9739 of April 30, 2018, Adjusting Imports of Aluminum into the United States, amending Proclamation 9704 of March 8 2018, as amended by Proclamation 9710 of March 22, 2018, 83 Fed. Reg. 20677 (May 7, 2018)
US-15	Presidential Proclamation 9759 of May 31, 2018, Adjusting Imports of Steel into the United States, amending Proclamation 9705 of March 8, 2018, as amended by Proclamation 9711 of March 22, 2018 and Proclamation 9740 of April 20, 2018, 83 Fed. Reg. 25857 (June 5, 2018)
US-16	Presidential Proclamation 9758 of May 31, 2018, Adjusting Imports of Aluminum into the United States, amending Proclamation 9704 of March 8, 2018, as amended by Proclamation 9710 of March 22, 2018 and Proclamation 9739 of April 30, 2018, 83 Fed. Reg. 25849 (June 5, 2018)
US-17	Intentionally Omitted
US-18	Presidential Proclamation 9777 of Aug. 29, 2018, Adjusting Imports of Steel Into the United States, 83 Fed. Reg. 45025 (Sep. 4, 2018)
US-19	Presidential Proclamation 9776 of Aug. 29, 2018, Adjusting Imports of Aluminum Into the United States, 83 Fed. Reg. 45019 (Sep. 4, 2018)
US-20	Department of Commerce, Bureau of Industry and Security, 15 CFR Part 705, Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of

EXHIBIT	DESCRIPTION
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US-21	Department of Commerce, Bureau of Industry and Security, 15 CFR Part 705, Interim Final Rule, Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum, 83 Fed. Reg. 46026 (Sep. 11, 2018)
US-22	*The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993) (excerpts)
US-23	*Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II
US-24	GATT Contracting Parties Third Session, Agenda (Revised 8th April), GATT/CP.3/2/Rev.2 (Apr. 8, 1949)
US-25	Statement by the Head of the Czechoslovak Delegation, Mr. Zdeněk Augenthaler to Item 14 of the Agenda, GATT/CP.3/33 (May 30, 1949)
US-26	Reply by the Vice-Chairman of the United States Delegation, Mr. John W. Evans, to the Speech by the Head of the Czechoslovak Delegation under Item 14 of the Agenda, GATT/CP.3/38 (June 2, 1949)
US-27	Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949) & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949)
US-28	GATT, Decision of 8 June 1949, BISD vol. II at 28
US-29	Note by the Secretariat, Article XXI, Negotiating Group on GATT Articles, MTN/GNG/NG7/W/16 (Aug. 18, 1987)
US-30	Ian Sinclair, THE VIENNA CONVENTION ON THE LAW OF TREATIES, Manchester University Press, 2nd edition (1984) (excerpt)
US-31	Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33 (Oct. 31, 1946), Annexure 11, United States Draft Charter
US-32	Preparatory Committee of the International Conference on Trade and Employment, E/PC/T/C.II/W.5 (Oct. 31, 1946)

EXHIBIT	DESCRIPTION
US-33	Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947)
US-34	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23 (May 6, 1947)
US-35	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/236 (July 4, 1947).
US-36	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Committee on Chapters I, II and VIII, E/PC/T/139 (July 31, 1947)
US-37	Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/180 (Aug. 19, 1947)
US-38	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, (Draft) General Agreement on Tariffs and Trade, E/PC/T/189 (Aug. 30, 1947)
US-39	United Nations Conference on Trade and Employment, An Informal Summary of the ITO Charter, E/CONF.2/INF.8 (Nov. 21, 1947)
US-40	Summary Record of the Thirty-Third Meeting of Commission A, Second Session of the Preparatory Committee, E/PC/T/A/SR/33 (July 24, 1947)
US-41	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947)
US-42	United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30, at 2 (Jan 9, 1948)
US-43	United Nations Conference on Trade & Employment, Sixth Committee: Organization, Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation), January 13, 1948, E/CONF.2/C.6/W.41 (Jan. 13, 1948)

EXHIBIT	DESCRIPTION
US-44	United Nations Conference on Trade & Employment, Sixth Committee: Organization, Amendment to Article 94 Proposed by the United Kingdom Delegation, E/CONF.2/C.6/W.48 (Jan. 16, 1948)
US-45	Final Act of the United Nations Conference on Trade and Employment (excerpt)
US-46	United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Eighth Meeting (Article 94), E/CONF.2/C.6/W.123 (Feb. 28, 1948)
US-47	United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Fourth Meeting (Article 94), E/CONF.2/C.6/W.60 & E/CONF.2/C.6/W.60/Corr.1 (Jan. 20, 1948)
US-48	U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 2, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 - July 30, 1947." – 8:00 p.m. meeting – July 2, 1947
US-49	U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Seymour J. Rubin dated July 14, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – July 14, 1947, Memo from Seymour J. Rubin, Legal Advisor of US Delegation, regarding Thorp and Neff Memo
US-50	*Young Loan Arbitration,* (UK, US, France, Belgium and Switzerland v. Federal Republic of Germany), Arbitral Award of 16 May 1980, ILR 59 (1980)
US-51	Permanent Court of Arbitration, *Iron Rhine ('Ijzeren Rhin') Railway Arbitration (Belgium v, Netherlands*), 27 RIAA 35, (2005)
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EXHIBIT	DESCRIPTION
US-53	U.S. Delegation (Internal), Services Economic Disarmament Argument Draft (1946)
US-54	U.S. Delegation (Internal), Letter from Coppock to Wilcox, "National Security Provisions in the Draft Charter" July 3, 1946, NARA, Record Group 43, International Trade Files, Box 13, In Folder "ITO Charter – Security" July, 3 1946
US-55	Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Draft Charter, E/PC/T/A/SR/186 (Sep. 10, 1947)
US-56	U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – July 4, 1947, at 2
US-57	Summary Record of the Twelfth Session, SR.19/12 (Dec. 21, 1961)
US-58	Report by the Working Party on Accession of the United Arab Republic, L/3362 (Feb. 25, 1970)
US-59	GATT Council, Minutes of Meeting, C/M/157 (June 22, 1982)
US-60	Communication to the Members of the GATT Council, L/5319/Rev.1 (May 15, 1982)
US-61	GATT Council, Minutes of Meeting, C/M/159 (Aug. 10, 1982)
US-62	Decision Concerning Article XXI Of The General Agreement, L/5426 (Dec. 2, 1982)
US-63	Minutes of Meeting of May 29, 1985, C/M/188 (June 28, 1985)
US-64	Minutes of Meeting of March 12, 1986, C/M/196 & C/M/196/Corr.1(April 2, 1986)
US-65	GATT Panel Report, *United States – Trade Measures Affecting Nicaragua*
US-66	Minutes of Meeting of November 5-6, 1986, C/M/204 (Nov. 19, 1986)

EXHIBIT	DESCRIPTION
US-67	Tom Miles, *Adjudicator says any security defense of U.S. auto tariffs at WTO 'very difficult'*, REUTERS BUSINESS NEWS (May 27, 2019), https://www.reuters.com/article/us-usa-trade-autos-wto-idUSKCN1SX1I7
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US-69	Black's Law Dictionary, ed. Bryan A. Garner, Eighth edition, 2004
First Panel Meeting	
US-70	Letter to the Chairman of the Panel on U.S. Trade Measures Affecting Nicaragua from the Office of the United States Trade Representative (June 4, 1986) (excerpt)
US-71	Intentionally Omitted
US-72	G20 Global Steel Forum Report (Nov. 30, 2017), https://www.ghy.com/images/uploads/default/Global-Steel-Forum-Report-Nov2017.pdf (excerpt)
US-73	Agreement Establishing the European Free Trade Association & Treaty on the Functioning of the European Union (excerpts)
US-74	National Security Strategy of the United States of America (Dec. 2017)
US-75	Setting the course for Norwegian foreign and security policy, Meld. St. 36 (2016-2017), Report to the Storting (white paper), Recommendation of 21 April 2017 from the Ministry of Foreign Affairs, approved in the Council of State the same day (White paper from the Solberg Government)
US-76	Intentionally Omitted
US-77	Intentionally Omitted
US-78	Intentionally Omitted
U.S. Responses to the Panel's First Set of Questions	
US-79	WTO Committee on Safeguards, Notification under Article 12.1(b) of the Agreement on Safeguards on Finding a Serious Injury or Threat Thereof Caused by Increased Imports, G/SG/N/8/IDN/16/Suppl.1, G/SG/N/10/IDN/16/Suppl.1, & G/SG/N/11/IDN/14 (July 28, 2014)

EXHIBIT	DESCRIPTION
US-80	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),
US-81	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)
US-82	WTO Committee on Safeguards, Communication from the United States, G/SG/168 (Apr. 5, 2018)
US-83	U.S. Mission to International Organizations in Geneva, Ambassador Dennis Shea's Statement at the WTO General Council (May 8, 2018),
US-84	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 (excerpts)
US-85	WTO Committee on Market Access, Notification Pursuant to the Decision on Notification Procedures for Quantitative Restrictions (G/L/59/Rev.1), G/MA/QR/N/USA/4 (Oct. 3, 2018),
US-86	*The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993) (excerpts)
US-87	Negotiating Group on Safeguards, Drafting History of Article XIX and Its Place in The GATT: Background Note by the Secretariat, MTN.GNG/NG9/W/7 (Sep. 16, 1987)
US-88	*The Oxford French Dictionary*, 4th edn, (Oxford University Press, 2007)
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US-90	General Agreement on Tariffs and Trade Second Session of the Contracting Parties, Rules of Procedure GATT/CP.2/3 Rev.1 (Aug. 16, 1948)
US-91	General Agreement on Tariffs and Trade Rules of Procedure for Sessions of the Contracting Parties GATT/CP/30 (Sept. 6, 1949)
US-92	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report, E/PC/T/A/PV/33.Corr.3 (July 30, 1947)

EXHIBIT	DESCRIPTION
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US-94	THE CLASSIC GUIDE TO BETTER WRITING (Ruldolf Flesch & A. H. Lass, HarperPerrenial, 1996)
US-95	MERRIAM-WEBSTER'S GUIDE TO PUNCTUATION AND STYLE 233 (1st edn. 1995) (excerpts)
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US-103	Decision of the Trade Negotiations Committee (TNC) on "Corrections to be Introduced in the General Agreement on Tariffs and Trade" MTN.TNC/41 (Mar 30, 1994)
US-104	Instrumentos Básicos y Documentos Diversos (IBDD), Vol. III (1958) (excerpt)
US-105	Instrumentos Básicos y Documentos Diversos (IBDD), Vol. IV, 41 (1969) (excerpt)
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EXHIBIT	DESCRIPTION
US-107	OPPENHEIM'S INTERNATIONAL LAW, vol. I (excerpt)
US-108	Vienna Convention on the Law of Treaties
US-109	U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517
US-110	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137
US-111	U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3
US-112	U.N. Convention on the Use of Electronic Communications in International Contracts, Nov. 23, 2005, 2898 U.N.T.S. 3
US-113	Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37
US-114	U.N. Convention on Independent Guarantees and Stand-By Letters of Credit, Dec. 11, 1995, 2169 U.N.T.S. 163
US-115	U.N. Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 1695 U.N.T.S. 3
US-116	Convention on Registration of Objects Launched into Outer Space, Nov. 12, 1974, 1023 U.N.T.S. 15
US-117	U.N. Convention on Conditions for Registration of Ships, Feb. 7, 1986, 26 I.L.M. 1229
US-118	Convention on the Limitation Period in the International Sale of Goods, June 14, 1974, 1511 U.N.T.S. 3
US-119	International Sugar Agreement, Mar. 20, 1992, 1703 U.N.T.S. 203
US-120	U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3
US-121	Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crime Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73

EXHIBIT	DESCRIPTION
US-122	James Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (8th ed. 2012)
US-123	UNIDIR, The United Nations, Cyberspace and International Peace and Security: Responding to Complexity in the 21st Century (2017) (excerpt)
US-124	International Telecommunication Union (ITU), Definition of cybersecurity, https://www.itu.int/en/ITU-T/studygroups/com17/Pages/cybersecurity.aspx
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US-126	United Nations General Assembly, Resolution adopted by the General Assembly on 5 December 2016, A/RES/71/28
US-127	New Zealand Government, New Zealand's cybersecurity strategy (2019) (excerpt)
US-128	Australian Government, Australia's Cyber Security Strategy (2016) (excerpt)
US-129	Turkey's National Cyber Security Strategy (2016)
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US-131	India, Call for Comments, National Cyber Security Strategy 2020 (2019)
US-132	India, National Cyber Security Policy 2013
US-133	The Ministry of Foreign Affairs of the Netherlands, Working Worldwide for the Security of the Netherlands: An Integrated International Security Strategy 2018-2022, at 19 (2018) (excerpt)
US-134	The Netherlands Government, National Security Strategy (2019)
US-135	Switzerland, National Strategy for the Protection of Switzerland against Cyber Risks 2018-2022, at 1 (Apr. 2018)
US-136	ENISA, NCSS Good Practice Guide (Nov. 2016) (excerpt)

EXHIBIT	DESCRIPTION
US-137	Canada's National Cyber Security Action Plan 2019-2024 (2019) (excerpt)
US-138	National Security Law of the People's Republic of China (2015)
US-139	Cybersecurity Law of the People's Republic of China (2017)
US-140	Russian National Security Strategy (Dec. 2015)
US-141	Tass.com (Russian News Agency), Kremlin says cyber attacks against Russia perpetually initiated from US territory (Feb. 27, 2019), https://tass.com/world/1046641
US-142	National Security Strategy of the United States of America (Dec. 2017)
US-143	National Cyber Strategy of the United States of America (Sept. 2018)
US-144	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Amendment Proposed by the Australian Delegation, Article 35 – paragraph 2, E/PC/T/W/170 (June 6, 1947)
US-145	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Summary Record of the 35th meeting of Commission A, held on Monday 11 August 1947, E/PC/T/A/SR/35 (Aug. 12, 1947)
US-146	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Chapter V, Articles 34, 35 and 38, Report by the Sub-Committee for submission to Commission A on Monday, 4th August, 1947, E/PC/T/146 (July 31, 1947)
US-147	Report of the Tariff Negotiations Working Party, General Agreement on Tariffs and Trade, E/PC/T/135 (July 24, 1947)
US-148	Second Session of the Preparatory Committee of the United Nations Conference on Trade And Employment, Verbatim Report, E/PC/T/EC/PV.2/22 (Aug. 22, 1947)
US-149	Negotiating Group on GATT Articles, Meeting of 3 March 1987, Note by the Secretariat, MTN.GNG/NG7/1/Rev.1 (Apr. 3, 1987)
US-150	Negotiating Group on GATT Articles, Article XXI Proposal by Nicaragua, MTN.GNG/NG7/W/48 (June 18, 1988).

EXHIBIT	DESCRIPTION
US-151	Negotiating Group on GATT Articles, Communication from Argentina, MTN.GNG/NG7/W/44 (Feb. 19, 1988)
US-152	Negotiating Group on GATT Articles, Communication from Nicaragua, MTN.GNG/NG7/W/34 (Nov. 12, 1987)
US-153	Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988)
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US-155	WTO, A Handbook of the WTO Dispute Settlement System (2nd edn. 2017) (excerpt)
US-156	Summary Record of Thirty-Seventh Meeting, Aug. 8, 1949, GATT/CP.3/SR.37 (Aug. 8, 1949)
US-157	Austrian Security Strategy, Security in a new decade – Shaping security (2013) (excerpt)
US-158	Defence Ministry of the Republic of Indonesia, Defence White Paper (2015) (excerpt)
US-159	The Federal Government, White Paper on German Security Policy and the Future of the Bundeswehr (excerpt)
US-160	Japan, National Security Strategy (Dec. 17, 2013) (excerpt)
US-161	Netherlands Government, National Risk Profile 2016 (excerpt)
US-162	New Zealand Government, Strategic Defence Policy Statement 2018 (excerpt)
US-163	Setting the course for Norwegian foreign and security policy, Meld. St. 36 (2016-2017), Report to the Storting (white paper), Recommendation of 21 April 2017 from the Ministry of Foreign Affairs, approved in the Council of State the same day (White paper from the Solberg Government) (excerpts)
US-164	Opening Ceremony of the 12th Asia-Pacific Programme for Senior National Security Officers (APPSNO) - Speech by Mrs. Josephine Teo, Minister for Manpower and Second Minister for Home Affairs (May 7, 2018)

EXHIBIT	DESCRIPTION
US-165	Spain, The National Security Strategy, Sharing a Common Project (2013) (excerpt)
US-166	Turkey, Ministry of Foreign Affairs, Turkey's Perspectives and Policies on Security Issues
US-167	Negotiating Group on Safeguards, Communication from Switzerland, MTN.GNG/NG9/W/10 (Oct. 5, 1987)
US-168	Negotiating Group on Safeguards, Communication by the Nordic Countries, MTN.GNG/NG9/W/16 (May 30, 1988)
US-169	*The Oxford Spanish Dictionary*, 2st edn (revised), (Oxford University Press, 2001) (excerpt)
US-170	Ortografia Y Gramática, https://gramatica.celeberrima.com/
US-171	SIDE BY SIDE SPANISH & ENGLISH GRAMMAR (3rd edn. 2012) (excerpt)
US-172	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/12 (June 12, 1947)
US-173	Summary Record of the Twelfth Meeting, E/PC/T/A/SR/12 (June 12, 1947)
U.S. Second Written Submission	
US-174	Collins Dictionary
US-175	Ian Sinclair, The Vienna Convention on the Law of Treaties, Manchester University Press, 2nd edn (1984) (excerpt)
US-176	Intentionally Omitted
US-177	THE NEW YORK PUBLIC LIBRARY WRITER'S GUIDE TO STYLE AND USAGE (1994)
US-178	The Grammar Bible: Everything You Always Wanted to Know About Grammar but Didn't Know Whom to Ask 146-147 (2nd edn 2004)
US-179	Intentionally Omitted
US-180	Intentionally Omitted

EXHIBIT	DESCRIPTION
US-181	Treaty of Rome (excerpt)
US-182	Treaty on the Functioning of the European Union (excerpt)
US-183	Communication from Switzerland, MTN.GNS/W/102 (June 7, 1990)
US-184	Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay, MTN.GNS/W/95 (Feb. 26, 1990)
US-185	Communication from the United States, MTN.GNS/W/75 (Oct. 17, 1989)
US-186	Proposal by the European Community, MTN.GNS/W/105 (June 18, 1990)
US-187	Communication from Japan, MTN.GNS/W/107 (July 10, 1990)
US-188	Draft Multilateral Framework for Trade in Services, MTN.GNS/35 (July 23, 1990)
US-189	Trade Negotiations Committee, Draft Final Act Embodying The Results of the Uruguay Round of Multilateral Trade Negotiations, Revision, MTN.TNC/W/35/Rev.1 (Dec. 3, 1990) (excerpts)
US-190	Trade Negotiations Committee, Draft Final Act Embodying The Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (Dec. 20, 1991) (excerpts)
US-191	Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Status of Work in the Negotiating Group, Chairman's Report to the GNG, MTN.GNG/NG11/W/76 (July 23, 1990)
US-192	Communication from Nicaragua, MTN.GNG/NG13/W/15 (Nov. 6, 1987)
US-193	Negotiating Group on Dispute Settlement, Meeting of November 20, 1987, Note by the Secretariat, MTN.GNG/NG13/5 (Dec. 7, 1987)
US-194	Negotiating Group on Dispute Settlement, Meeting of November 20, 1987, Note by the Secretariat, Addendum, MTN.GNG/NG13/5/Add.1 (Apr 29, 1988)
US-195	Negotiating Group on Dispute Settlement, Meeting of 25 June, 1987, Note by the Secretariat, MTN.GNG/NG13/2 (July 15, 1987)

EXHIBIT	DESCRIPTION
US-196	Negotiating Group on Dispute Settlement, Meeting of July 11, 1988, Note by the Secretariat, MTN.GNG/NG13/9, para. 7 (July 21, 1988)
US-197	Agreement on the Establishment of a Free Trade Area between the Government of Israel and the Government of the United States of America (excerpt)
US-198	Tokyo Round Code on Government Procurement (1979) (excerpt)
US-199	Agreement on Government Procurement, Revised Text (1988) (excerpt)
US-200	Agreement on Government Procurement, Article XXIII (1994) (excerpt)
US-201	Agreement on Government Procurement (2012) (excerpt)
US-202	Intentionally Omitted
US-203	Ortografia Y Gramática (excerpt)
US-204	The Oxford Spanish Dictionary, 2nd edn, (University Press, 2001)
US-205	The New Shorter Oxford English Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, Oxford, 1993) (excerpts)
US-206	GATT Contracting Parties, Summary Record of the Fourteenth Meeting, GATT/CP.5/SR.14 (Nov. 30, 1950)
US-207	Schedule XX – United States, Withdrawal of Item 1526(a) under the Provisions of Article XIX, GATT/CP/83 (Oct. 19, 1950)
US-208	*United States – Fur Felt Hats* (GATT Panel)
US-209	Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report of the Seventh Meeting, E/PC/T/C.II/PV/7 (Nov. 1, 1946)
US-210	Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report of the Ninth Meeting, E/PC/T/C.II/RO/PV/9 (Nov. 9, 1946)
US-211	Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report of the Eleventh Meeting, E/PC/T/C .II/PRO/PV/11 (Nov. 14, 1946)

EXHIBIT	DESCRIPTION
US-212	Preparatory Committee of the International Conference on Trade and Employment, Addition to Report of Sub-Committee Procedures, E/PC/T/C.II/57/Add.1 (Nov. 20, 1946)
US-213	Work Already Undertaken in the GATT on Safeguards, MTN.GNG/NG9/W/1, (Apr. 7, 1987),
US-214	Declaration of Ministers Approved at Tokyo on 14 September 1973
US-215	Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25 (June 27, 1989)
US-216	Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25/Rev.1 (January 15, 1990)
US-217	Negotiating Group on Safeguards, Chairman's Report on Status of Work in the Negotiating Group, MTN.GNG/NG9/W/25/Rev.2 (July 13, 1990)
US-218	Negotiating Group on Safeguards, Additional United States' Proposals on Safeguards, MTN.GNG/NG9/W/31 (Oct. 31, 1990)
US-219	Negotiating Group on Rule Making and Trade-Related Investment Measures, Safeguards, Note by the Secretariat MTN.GNG/RM/W/3 (June 6, 1991)
US-220	Negotiating Group on Safeguards, Draft Text of an Agreement, MTN.GNG/NG9/W/25/Rev.3 (Oct. 31, 1990)
US-221	Agreement on the European Economic Area (excerpt)

I. Introduction

1. In previous submissions, the United States explained that 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. In this submission, the United States will focus on arguments made by the complainant in its oral statement at the First Substantive Meeting and its responses to the Panel's Questions.

2. Section II demonstrates that the complainant's argument that a Member's invocation of Article XXI(b) is subject to testing by the Panel is contrary to the text and grammatical structure of the provision. In addition, supplementary means of interpretation – including negotiating history of the Uruguay Round – confirm that a Member's exercise of its rights under Article XXI(b) is not subject to testing in the manner suggested by the complainant, and that Uruguay Round drafters understood that this provision was (and would remain) self-judging by the acting Member. Section II also explains that, contrary to the complainant's argument, nothing in Article XXI(b) suggests that a Member invoking the provision is required to specifically identify the subparagraph with respect to which it is invoking the right reflected in Article XXI(b), or that the Member must furnish information supporting its invocation for the Panel's review. In fact, the complainant's argument should be rejected not only because it is not supported by the text of the provision but also because such an interpretation would undermine a responding Member's rights under Article XXI(a).

3. The interpretation that emerges based on the ordinary meaning of the text of the subparagraphs in the English and French language versions, however, is not fully supported by the Spanish text of the subparagraphs. This means that, under Article 33 of the VCLT, the meaning that best reconciles the three authentic texts, having regard to the object and purpose of the treaty, must be adopted. Reconciling the texts changes the U.S. interpretation of the text of subparagraphs (i) and (ii) from modifying the term "interests" – the meaning most natural and consistent with rules of grammar and convention in English and French – to modifying the terms "any action which it considers" – a meaning that is also permitted in all three authentic texts. This interpretation does not alter the plain meaning of the chapeau or the overall structure of Article XXI(b), however. The terms of the provision still form a single relative clause that begins in the chapeau and ends with each subparagraph, and therefore the phrase "which it considers" still modifies the entirety of the chapeau and the subparagraph endings. Therefore, reconciling the three authentic texts leads to the same fundamental meaning the United States has presented, committing the determination of whether an action is necessary for the protection of a Member's essential security interests in the relevant circumstances to the judgment of that Member alone.

4. Section III explains that the function of a panel under DSU Article 11 to make an "objective assessment of the matter before it" does not render the Member's determination under Article XXI(b) subject to testing by the Panel. Because the panel's objective assessment of the text of Article XXI leads to the conclusion that the provision is self-judging and does not subject a Member's invocation of Article XXI(b) to further review, the U.S. interpretation of Article XXI(b) as self-judging is consistent with the Panel's terms of reference and the DSU. In this situation, the sole finding that the Panel can make is to note the U.S. invocation of Article

XXI(b). Furthermore, the type of review proposed by the complainant would necessarily require a panel to substitute its judgment for the judgment that Article XXI(b) reserved to the Member alone. The approach advanced by the United States is the only way to fulfil the Panel's role under the DSU without substituting its judgment for that of the United States.

5. Section IV explains that, contrary to the arguments presented by the complainant, the U.S. measures at issue in this dispute are not safeguards. A necessary, condition precedent for the application of safeguards disciplines is that the acting Member invokes Article XIX as the legal basis for its action. Here, the United States has not invoked Article XIX as the basis for the measures at issue, and instead has repeatedly made clear that it has sought and taken these measures pursuant to Article XXI. Accordingly, the measures at issue are not safeguards and the safeguards disciplines do not apply to them.

6. Finally, Section V addresses the order of analysis that the Panel should adopt in this dispute. As the United States explains there, due to the self-judging nature of Article XXI(b), the sole finding that the Panel may make in this dispute is to note the Panel's recognition that the United States has invoked its essential security interests. Accordingly, the United States suggest that the Panel should begin by addressing the United States' invocation of GATT 1994 Article XXI(b).

II. Complainant's Arguments Fail to Rebut the U.S. Interpretation of Article XXI

7. The United States has invoked Article XXI(b) in this dispute, and as discussed in Section II.A, this invocation applies to all of the complainant's claims. Furthermore, the United States has shown that 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. 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 chapeau and the subparagraph endings.

8. As discussed in Section II.B, the complainant dismisses the U.S. interpretation, arguing that "which it considers" does not qualify all of the elements in the chapeau and the subparagraph endings. The complainant's argument artificially separates the single relative clause that follows the word "action" and is contrary to the text and grammatical structure of Article XXI(b). The complainant also asserts that the Panel can objectively determine existence of a "war or other emergency in international relations" within the meaning of Article XXI(b)(iii). Contrary to complainant's argument, the text of subparagraph ending (iii) – particularly the terms "emergency" and "security", which each Member may interpret differently – supports the interpretation that the applicability of Article XXI(b)(iii), like all of Article XXI(b), is self-judging. The complainant suggests that Article XXI(a) is not relevant to this dispute. Pointing to superficial similarities between Article XX and Article XXI(b), however, the complainant argues that the Panel should apply a two-step test the panel uses in reviewing Article XX invocation. Such an argument, however, ignores the important textual differences between the two provisions.

9. Furthermore, as set forth in Section II.C, the U.S. interpretation is confirmed by supplementary means of interpretation, including the negotiating history of Article XXI(b) and

negotiations that occurred during the Uruguay Round. Finally, as discussed in Section II.D, the customary rules of interpretation support adopting an interpretation of Article XXI(b) that best reconciles the English, Spanish, and French versions. Reconciling the three authentic texts leads to the same fundamental meaning the United States has presented, committing the determination of whether an action is necessary for the protection of a Member's essential security interests in the relevant circumstances to the judgment of that Member alone.

A. The United States Has Invoked Article XXI(b) With Respect To All Of Complainant's Claims

10. The United States recalls that it has invoked Article XXI(b) in relation to all claims raised in this dispute.[1] The complainant's own assertions demonstrate that Article XXI is a defense to such claims. Article XXI(b) states that "Nothing in this Agreement shall be construed… to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests." In essence, the complainant's claims seek to *prevent* the United States from taking action it considers necessary for the protection of its essential security interests; that is, action that the complainant considers contrary to Article XXI.

11. Precisely this type of finding or assessment would be contrary to Article XXI and the sovereign right of a state that it reflects. As the United States has previously explained, Article XXI applies to alleged breaches of the Agreement on Safeguards, as well as to alleged breaches of the GATT 1994.[2]

B. Ordinary Meaning of Article XXI(b) Establishes that Article XXI(b) is Self-Judging

12. As the United States has explained in prior submissions, the self-judging nature of Article XXI(b) of GATT 1994 is established by the text of that provision, in its context, and in the light of the treaty's object and purpose. For the reasons below, none of complainant's new arguments is supported by the text of Article XXI(b) or by customary rules of interpretation under public international law; therefore, complainant's arguments fail to rebut the U.S. interpretation of Article XXI(b) as self-judging.

13. As discussed in Section II.B.1, Norway's understanding of the term "considers" is erroneous, and the immediate context of the term in Article XXI(b) demonstrates that the U.S. understanding of "considers" is appropriate. Furthermore, as described in Section II.B.2, the ordinary meaning of the terms of Article XXI(b) establishes that, contrary to Norway's arguments, the word "considers" qualifies all the terms in the chapeau and the subparagraph endings of Article XXI(b). Norway is also wrong, as explained in Section II.B.3, when it argues that a responding Member must identify a specific subparagraph of Article XXI(b) to invoke its right to take measures for the protection of its essential security interests. Furthermore, the text of subparagraph ending (iii), discussed in Section II.B.4, supports the interpretation that the

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[1] U.S. First Written Submission, para. 9. *See also* 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).

[2] *See* U.S. Oral Opening Statement in the First Meeting of the Panel with the Parties, Section G.

applicability of Article XXI(b)(iii), like all of Article XXI(b), is self-judging. Finally, as described in Section II.B.5, the context provided by Article XXI(a) and Article XX supports the interpretation of Article XXI(b) as self-judging.

1. Complainant's Understanding of the Term "Considers" is Erroneous

14. Norway recognizes that "[t]he legal effect of the term 'which it considers' is to establish a more deferential standard of review,"[3] but then asserts the word "consider" "must be interpreted as imposing an obligation to contemplate or reflect on…available pertinent information".[4] Norway nowhere explains how the verb "considers" in a relative (adjectival) clause describing "action" can impose an "obligation" on a Member. Norway's proposed definition of "consider" fails to take into account the context in which the term is used. Norway's interpretation is contrary to the general rules of interpretation and an attempt to extend the meaning of treaty provisions illegitimately.

15. Norway defines "consider" as "to contemplate mentally, fix the mind upon; to think over, meditate or reflect on, bestow attentive thought upon, give heed to, take note of."[5] However, this definition is not consistent with the usage of this term in Article XXI. Given the immediate context in which the term "consider" is used here—"which it considers necessary"—the more appropriate definition is the one offered by the United States: "[r]egard in a certain light or aspect; look upon as" or "think or take to be."[6] That is, a Member regards, looks upon as, or thinks (considers) an action necessary.

16. Dictionary examples of different usage of the term "consider" are informative. For example, the Collins Dictionary provides the following definitions and examples of "consider", among others: (1) "If you consider a person or thing to be something, you have the opinion that this is what they are. *We don't consider our customers to be mere consumers; we consider them to be our friends.*"; (2) If you consider something, you think about it carefully. *The administration continues to consider ways to resolve the situation.*"[7]

17. The first example reflects the usage offered by the United States, and the second example reflects the usage offered by Norway. The use of the term "consider" in Article XXI(b) aligns with the first example. Often, "consider" used in this manner to express a subjective opinion is followed by the infinitive "to be". In this way, Article XXI(b) could be read as "it [Member] considers [the action] [to be] necessary for the protection…". The verb "consider" acts upon the

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[3] Norway's Response to the Panel's Question 38, para. 331.

[4] Norway's Response to the Panel's Question 41(b), para. 357. Norway argues that the panel must review "the Member's own alleged action of 'consider[ing]' the different factors specified in the chapeau" and therefore "a respondent must, at a minimum, be able to offer a plausible and rational basis in support of that consideration." *See* Norway's Response to the Panel's Question 38, para. 334. Norway also cites to DSU Article 11 in its Response to the Panel's Question 38. Norway's argument concerning DSU Article 11 is addressed in Section III.

[5] Norway's Response to the Panel's Question 41(b), para. 352.

[6] *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 485 (US-22).

[7] Collins Dictionary, https://www.collinsdictionary.com/us/dictionary/english/consider (emphasis in the original)(US-174).

object "action". The phrase "to be" is omitted from the text because it is implied. A Member making the determination under Article XXI(b) is not merely thinking carefully about the "action". It is determining whether it regards such "action" "to be" "necessary" in the circumstances provided in Article XXI(b). Replacing the term "considers" with the definitions offered by Norway would have the text read: "which it [contemplates mentally] necessary" – a phrasing which does not make sense. The definition offered by the United States more accurately, and logically, reflects the usage of the term "considers" within the text, such that it would read "which it [looks upon as] necessary."

18. The use of the terms "estimar" and "estimer" in the Spanish and French texts, respectively, supports the definition of "consider" proposed by the United States, and further demonstrates that the definition offered by Norway is not appropriate. The Spanish word "estimar" has the following English translations: (1) (a) "to respect, hold" and (b) "to value"; (2) "to **consider**, deem"; and (3) "to estimate".[8] The most appropriate translation for purposes of Article XXI(b) is the second as shown from the following examples (accompanying the second definition): "no estimo necessario que se tomen esas medidas" (translated "I do not consider it necessary to take those measures") and "estimé conveniente que otra persona lo sustituyese" (translated "I considered it advisable for someone else to replace him").[9]

19. The French word "estimer" has the following English translations: (1) "to feel" or "to **consider**"; (2) "to think highly of"; (3) "to value" or "to assess"; (4) "to estimate"; and (5) "to reckon".[10] The most appropriate translation is the first one, as demonstrated from the following examples (accompanying the first definition): "elle a estimé indispensable/prematuré de faire" (translated "she felt it essential/too early to do"); "~nécessaire de fair" (translated "to consider…it necessary to do"); and "ces mesures, estime l'opposition, sont insuffisantes" (translated "the opposition considers these measures to be inadequate").[11] Both the Spanish and French terms confirm that the word "consider" refers to the subjective opinion held by a person or, in this case, a Member—consistent with the English text.

20. In fact, the definitions and translations offered by Norway of the Spanish and French texts support the interpretation of the English term proposed by the United States, and not that proposed by Norway: "estimar" ("*Considérer après réflexion que* (translation: to consider after reflection that") and "estimer" ("*Creer o considerar algo a partir de los datos que se tienen* (translation: to believe or consider something from/in light of available data").[12]

21. Contrary to the ordinary meaning of the word "consider" as used in the context of Article XXI(b), Norway argues that the drafters opted for language that "constrain[s] the types of action that a respondent may take" under Article XXI(B) and that "an interpretation of the verb

[8] *The Oxford Spanish Dictionary*, 1st edn, (Oxford University Press, 1994), at 327 (emphasis added) (US-89).

[9] *The Oxford Spanish Dictionary*, 1st edn, (Oxford University Press, 1994), at 327 (emphasis added) (US-89).

[10] The *Oxford French Dictionary*, 4th edn, (Oxford University Press, 2007), at 331 (emphasis added) (US-88).

[11] The *Oxford French Dictionary*, 4th edn, (Oxford University Press, 2007), at 331 (emphasis added) (US-88).

[12] Norway's Response to the Panel's Question 41(b), para. 352.

'consider' . . . that affords absolute discretion would empty the legal condition in the remainder of the chapeau of meaning."[13] Norway suggests that the U.S. interpretation of "it considers" would "deprive those words and surrounding context of meaning."[14] Not only does the United States disagree with Norway's unsupported statement that the drafters opted for language that constrains a Member's action under Article XXI(b) – as the choice of the word "consider" and its ordinary meaning demonstrates – but it also disagrees with Norway's suggestion that for treaty terms to be effective or to have meaning, a Member's adherence to the terms must be subject to testing by an arbitral body. Norway's statement assumes the conclusion that the text expresses the intention of the parties to have an invocation of Article XXI(b) subject to review. But the text does not reflect such intention, and appealing to the principle of effective treaty interpretation cannot change the meaning of the text. Norway is misconstruing the principle and attempting to read into Article XXI(b) meaning not reflected in the text of the provision.

22. As discussed in the U.S. Response to the Panel's Question 47, this principle is expressed in the maxim *ut res magis valeat quam pereat*, meaning "parties are assumed to intend the provisions of a treaty to have a certain effect, and not to be meaningless."[15] This principle is embodied in the general rule of interpretation in Article 31 of the VCLT, for example, through the reference to "interpret[ation] in good faith" and "in the light of the object and purpose" of the treaty.[16]

23. In preparing Article 31, the ILC recognized that in certain circumstances recourse to this principle may be appropriate. However, the ILC cautioned against applying it in a manner that would result in adopting an interpretation that diverges from to the ordinary meaning of the treaty text.[17] In fact, it appears that the ILC deliberately did not include a separate provision on the principle of effective treaty interpretation out of concern that it would be applied in a manner inconsistent with the general rules of treaty interpretation:

> Properly limited and applied, the maxim does not call for an "extensive" or "liberal" interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty. Accordingly, it did not seem to

[13] Norway's Response to the Panel's Question 41(b), paras. 355-356.

[14] Norway's Response to the Panel's Question 41(b), para. 356.

[15] OPPENHEIM'S INTERNATIONAL LAW, vol. I at 1280-1281 (Robert Jennings & Arthur Watts eds, 9th edn. 1992) (US-107).

[16] Ian Sinclair, THE VIENNA CONVENTION ON THE LAW OF TREATIES, Manchester University Press, 2nd edn (1984), at 118 (US-175).

[17] *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 219 (US-23) ("The Commission, however, took the view that, in so far as the maxim *Ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in article 27, paragraph 1, which requires that a treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to its terms in the context of the treaty *and in the light of its objects and purposes*. When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.").

> the Commission that there was any need to include a separate provision on this point. Moreover, to do so might encourage attempts to extend the meaning of treaties illegitimately on the basis of the so-called principle of "effective interpretation".[18]

24. The ILC further discussed, citing an ICJ opinion, that "the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which ... would be contrary to their letter and spirit" and "emphasized that to adopt an *interpretation which ran counter to the clear meaning of the terms would not be to interpret but to revise the treaty*."[19]

25. The ILC's statement is consistent with conclusions stated in Oppenheim's International Law. As stated in Oppenheim, "[t]he absence of a full measure of effectiveness may be the direct result of the inability of the parties to reach agreement on fully effective provisions; in such a case the court cannot invoke the need for effectiveness in order in effect to revise the treaty to make good the parties' omission. The doctrine of effectiveness is thus not to be thought of as justifying a liberal interpretation going beyond what the text of the treaty justifies."[20]

26. Norway's argument is contrary to the general rules of interpretation and an attempt to extend the meaning of treaty provisions illegitimately—precisely the type of misuse the ILC commentary warned against. For the reasons stated above, Norway's interpretation of the phrase "which it considers" in Article XXI(b) is without merit.

2. Complainant's Argument that "Considers" Does Not Qualify All of the Terms in the Chapeau and the Subparagraph Endings is Inconsistent with the Ordinary Meaning of the Terms of Article XXI(b)

27. Norway's argument that "the phrase 'which it considers' qualifies the *chapeau* of Article XXI(b), but does not qualify the subparagraphs" is unsupported by the text and grammatical structure of Article XXI(b).[21] According to Norway, Article XXI(b) contains two sets of qualifying clauses such that there are "two sets of distinct and independent conditions on a Member's 'action'": (1) the action must relate to the circumstances set forth in subparagraph (i) or (ii); and (2) it must be action that the Member considers necessary for the protection of its essential security interests. Norway further argues, "[b]ecause subparagraph (iii) necessarily qualifies the word 'action,' interpretive coherence and consistency require that the other two

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[18] *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 219 (US-23).

[19] *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 219 (citing Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, 1950 I.C.J. 229 (Mar. 30)) (emphasis added) (US-23).

[20] OPPENHEIM'S INTERNATIONAL LAW, vol. I at 1280-1281 (Robert Jennings & Arthur Watts eds, 9th ed. 1992) (US-107).

[21] Norway's Response to the Panel's Question 35, para. 308.

subparagraphs qualify that same word."[22] In support of this argument, Norway refers to the Spanish and French versions of Article XXI(b).[23]

28. Norway's argument artificially separates the terms in the single relative clause[24], which begins with the phrase "which it considers necessary" and ends at the end of each subparagraph.[25] The clause follows the word "action" and describes the situation which the Member "considers" to be present when it takes such an "action". Because the relative clause describing the action begins with "which it considers", the other elements of this clause are committed to the judgment of the Member taking the action.

29. Norway's argument that subparagraph endings (i) and (ii) modify the term "action" as opposed to "essential security interests" also is inconsistent with the ordinary meaning of the English text of Article XXI(b)(i) and Article XXI(b)(ii). Under the ordinary meaning of the English text of Article XXI(b), the subparagraph endings (i) and (ii) modify the phrase "essential security interests"; each relate to the kinds of interests for which the Member may consider its action necessary to protect. In this way, the subparagraph endings (i) and (ii) indicate the types of essential security interests to be implicated by the action taken.[26]

30. This is because, under English grammar rules, a participial phrase, which functions as an adjective[27], normally follows the word it modifies or is otherwise placed as closely as possible to the word it modifies.[28] In fact, a common mistake in English grammar is the use of "misplaced

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[22] Norway's Response to the Panel's Question 35, para. 315.

[23] Norway's Response to the Panel's Question 35, paras. 308-317.

[24] ENGLISH GRAMMAR 631 (Sydney Grenbaum ed., Oxford Univ. Press, 1996) ("Relative clauses postmodify nouns ('the house *that I own*'), pronouns ('those *who trust me'*), and nominal adjectives *(*'the elderly *who are sick*).") (US-93); THE CLASSIC GUIDE TO BETTER WRITING 69 (Ruldolf Flesch & A. H. Lass, HarperPerrenial, 1996) ("**Who** and **which** are called *relative pronouns* and introduce *relative clauses*…The point is that by using **who** or **which** you have made an independent clause into a relative or dependent clause—a group of words that can't stand by itself.") (emphasis in the original) (US-94).

[25] A clause is a group of words containing both a subject and a predicate (which includes a verb). MERRIAM-WEBSTER'S GUIDE TO PUNCTUATION AND STYLE 233 (1st edn 1995) (US-180). Under Article XXI(b)(i), the subject is "it [the Member]" and the predicate is "considers necessary for the protection of its essential security interests relating to relating to fissionable materials or the materials from which they are derived". Under Article XXI(b)(ii), the subject is "it [the Member]" and the predicate is "considers necessary for the protection of its essential security interests relating to the traffic in arms, ammunition and implements of war . . ." Under Article XXI(b)(iii), the subject is "it [the Member]" and the predicate is "considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations."

[26] Those subparagraphs provide that a Member may take any action it considers necessary for the protection of its essential security interests "relating to fissionable materials or the materials from which they are derived," and its essential security interests "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 for military establishment."

[27] MERRIAM-WEBSTER'S GUIDE TO PUNCTUATION AND STYLE 232 (1st edn 1995) ("A participial phrase includes a participle and functions as an adjective.") (US-95).

[28] The Merriam-Webster's Guide to Punctuation and Style provides that "[t]he adjective clause modifies a noun or pronoun and normally follows the word it modifies" and "[u]sage problems with phrases occur most often when a

modifier," which is "a word, phrase, or clause that is placed incorrectly in a sentence, thus distorting the meaning."[29]

31. The final subparagraph ending provides that a Member may take any action which it considers necessary for the protection of its essential security interests "taken in time of war or other emergency in international relations." It does not speak to the nature of the security interests, but provides a temporal limitation related to the action taken. Although an adjectival phrase normally follows the word it modifies, it is "actions" – not "interests" – that are taken. In this case, the drafters departed from typical English usage in placing the modifier next to "its essential security interests" as opposed to "action." However, this departure does not mean that subparagraphs (i) and (ii) should be read in a manner that is inconsistent with English grammar rules. The subparagraphs of Article XXI(b) are *not* connected by a conjunction, such as "and" or "or", that would suggest they modify the same term in the chapeau. Rather, the text used in this provision suggests that the drafters saw each subparagraph ending as having a different meaning, and structured them accordingly. Despite Norway's arguments, this interpretation of Article XXI does not render its terms incoherent or inconsistent.

3. A Responding Member Need Not Identify a Specific Subparagraph of Article XXI(b) to Invoke Its Right to Take Measures for the Protection of Its Essential Security Interests

32. Norway suggests that the U.S. invocation of Article XXI(b) must be rejected because the United States "has failed to identify which subparagraph of Article XXI(b) is applicable to its measures."[30] However, Article XXI(b) does not require a responding Member to invoke a specific subparagraph of the provision to invoke that Member's right to take any action which it considers necessary for the protection of its essential security interests. Norway cites nothing in the text of Article XXI(b) that suggests one or more specific subparagraphs must be invoked.

33. As explained in Section II.A.1, the single relative clause in Article XXI(b) that follows "action" begins with the phrase "which it considers necessary" and ends at the end of each subparagraph, and describes the situation which the Member "considers" to be present when it takes such an "action". Because the relative clause describing the action begins with "which it

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modifying phrase is not placed close enough to the word or words that it modifies." MERRIAM-WEBSTER'S GUIDE TO PUNCTUATION AND STYLE 232, 233 (1st edn 1995) (US-95). The Harper's English Grammar also provides that "adjectives and adverbial phrases, like adjectives and adverbs themselves should be placed as closely as possible to the words they modify." HARPER'S ENGLISH GRAMMAR 186-187 (Harper & Row, 1966) (US-96).

[29] THE NEW YORK PUBLIC LIBRARY WRITER'S GUIDE TO STYLE AND USAGE 181 (1994) (US-177). The following example from a grammar book is informative: "A nine-year-old girl has been attacked by a pack of pit bulls returning home from school." The author explains that "[t]he present participle phrase **returning home from school** appears to modify the noun **pack**. The sentence implies that the pit bulls were home from school, not the girl." The author corrects the sentence by placing "returning home from school" closer to the noun it modifies: "A nine-year old girl returning home from school has been attacked by a pack of pit bulls." The Grammar Bible: Everything You Always Wanted to Know About Grammar but Didn't Know Whom to Ask 146-147 (2nd edn 2004)(emphasis in the original)(US-178).

[30] Norway's opening statement at the first meeting of the panel, paras 30 and 61. *See also* Norway's Response to the Panel's Question 50, para 427.

considers", the other elements of this clause are committed to the judgment of the Member taking the action.

34. Therefore, the text of Article XXI(b) does not require the Member exercising its right under Article XXI(b) to identify the relevant subparagraph ending to that provision that an invoking Member may consider most relevant. Furthermore, nothing in the text of Article XXI(b) suggests that the subparagraphs are mutually exclusive. By invoking Article XXI(b), the Member is indicating that one or more of the subparagraphs is applicable.

35. Neither is there any text in Article XXI(b) that imposes a requirement to furnish reasons for or explanations of an action for which Article XXI(b) is invoked. This understanding is supported by the text of Article XXI(a), which confirms that Members are not required "to furnish any information the disclosure of which it considers contrary to its essential security interests." It may be that a Member invoking Article XXI(b) nonetheless chooses to make information available to other Members. Indeed, the United States did make plentiful information available in relation to its challenged measures. While such publicly available information could be understood to relate most naturally to the circumstances described in Article XXI(b)(iii), the text of Article XXI does not require a responding Member to provide details relating to its invocation of Article XXI, including by identifying a specific subparagraph.

4. Contrary to Complainant's Arguments, The Terms Of Article XXI(b)(iii) Support a Finding That Article XXI(b) Is Self-Judging

36. Norway argues that, under Article XXI(b)(iii), "[a] respondent bears the burden of proving, with argument and evidence, that the relevant facts amount to a 'war or other emergency in international relations.'"[31] According to Norway, "[a] panel does not make its own judgment about whether the facts do – or do not – amount to a 'war or other emergency'" meaning that "[a] panel does not . . . second-guess the judgment of the respondent" but rather the panel "reviews objectively whether the respondent has properly established that the events amount to a 'war or other emergency', as defined."[32]

37. Norway acknowledges that "[t]he ordinary meaning of the phrase 'other emergency in international relations' could, in principle, extend to certain types of emergency in commercial or trade relations, *i.e.*, when such an emergency meets the terms of Article XXI(b)(iii)."[33] A few sentences later, however, Norway suggests that "to fall within [Article XXI(b)(iii)] an emergency caused by commercial or trade relations ('economic emergency") would have to give rise to events that pose an existential threat to the stability and/or functioning of the state, including the basic functioning of its law and public order."[34]

38. For this latter assertion – which mirrors a conclusion of the *Russia – Traffic in Transit* panel[35] – Norway appears to rely on its own construction of the words "its essential security

[31] Norway's Response to the Panel's Question 51, para. 456.

[32] Norway's Response to the Panel's Question 51, para. 456.

[33] Norway's Response to the Panel's Question 51, para. 429.

[34] Norway's Response to the Panel's Question 51, para. 430 (emphasis in original).

[35] *Russia – Traffic in Transit*, para. 7.75.

interests", "war" and "emergency," and subparagraphs (i) and (ii) of Article XXI(b).[36] Norway provides dictionary definitions for some, but not all, of the terms it purports to define,[37] and notably none of these definitions (even those for which Norway does not cite a dictionary definition) actually uses the words that Norway ultimately concludes are relevant to the meaning of "other emergency in international relations", that is, "existential threat to the stability and/or functioning of the state, including the basic functioning of its law and order."[38]

39. Contrary to Norway's assertions, the terms of Article XXI(b)(iii) do not refer to "events" or require that the "other emergency in international relations" constitute an "existential threat to the stability and/or functioning of the state, including the basic functioning of its law and order." Rather, the text of subparagraph ending (iii), including use of the phrase "other emergency in international relations" in subparagraph ending (iii) supports interpreting Article XXI(b)(iii), like all of Article XXI(b), as self-judging.

40. The term "emergency" can be defined as "a serious, unexpected, and often dangerous situation requiring action."[39] In addition to being modified by the phrase "which it considers," whether a certain situation is "serious, unexpected, and . . . dangerous" is, also by nature, a subjective determination that involves consideration of numerous factors that will vary from Member to Member. Similarly, Members may vary – based on their own unique circumstances – in their determinations of whether they consider that a particular situation "requires action." Just as a panel cannot determine – without substituting its judgment for that of the Member – which are the essential security interests of a Member, a panel cannot determine - without substituting its own judgment for that of the Member – whether a Member considers its action to be taking place "in time of war or other emergency in international relations."

41. In addition, Norway misconstrues the role of context in the interpretative exercise when it attempts to read into subparagraph (iii) the terms of the other two subparagraphs. Particularly in light of the absence of any conjunction between the subparagraphs of Article XXI(b), as discussed in more detail in the U.S. Response to the Panel's Question 40, Norway's reliance on subparagraphs (i) and (ii) to construe subparagraph (iii) makes little sense. Indeed, a Member may consider a variety of "security interests" to be "essential" even if they are not addressed in the subparagraph endings (i) and (ii). A prominent example is cybersecurity which, as the United States set forth in its response to the Panel's Question 49, is recognized by numerous WTO Members – including Norway – as an essential security interest, the protection of which is fundamental to a sovereign state's rights and responsibilities.[40]

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[36] Norway's Response to the Panel's Question 51, para. 432 -445.

[37] Norway states, for example, that "'war' means a state of usually open and declared armed hostile conflict between states or nations" but provides no citation for this assertion. Norway's Response to the Panel's Question 51, para. 432. Norway likewise fails to define "international relations." Norway's Response to the Panel's Question 51, para. 444.

[38] Norway's Response to the Panel's Question 51, para. 445.

[39] The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 806 (US-86).

[40] In its Cyber Security Strategy, Norway recognizes the interrelationship between cybersecurity and national security: "[C]yber security challenges in the civilian sector are also of significance to Norway's ability to handle security-political crises and to carry out military operations. In a worst-case scenario, cyber attacks on civilian infrastructure may challenge Norway's ability to safeguard national security." National Cyber Security Strategy for

42. As the United States observed in its response to the Panel's Questions 51 and 74(d) to (e), the term "security" is broad, such that a number of WTO Members appear to include a variety of considerations – including economic considerations – in their understanding of what constitutes "security." Norway's proposed construction of Article XXI(b)(iii) – based on subparagraphs (i) and (ii) – would exclude from Article XXI(b)(iii) actions that a Member considered necessary to protect such interests unless the acting Member could "properly demonstrate" that the action was taken during a time that "events . . . pose[d] an existential threat to the stability and/or functioning of the state, including the basic functioning of its law and public order." Norway is attempting to read into Article XXI(b) meaning not reflected in the text of the provision.

43. As discussed in the U.S. Closing Statement of the First Substantive Meeting of the Panel with the Parties, Norway's assertions in this regard differ from other official statements it has made, particularly those set forth in a White Paper called "Setting the course for Norwegian foreign and security policy."[41] There, Norway asserts that "[t]he importance of a strong economy for a country's security *cannot be overstated*. Economic strength enhances resilience in the face of difficult situations and makes it possible to give priority to defence and promote national interests."[42] In the same document, Norway observes that "[t]his white paper focuses on security policy from the perspective of Norway. In other parts of the world, *the security landscape looks different*."[43]

44. In its response to the Panel's question about this document, Norway acknowledges that "[a]s a policy matter Norway maintains that a 'strong economy' is important for the promotion of a country's security interest."[44] Norway attempts to qualify this statement, however, by adding that "[t]he promotion of a strong economy, including for security reasons, is best achieved through adherence to a Member's WTO obligations" because "the balance of rights and obligations in the WTO covered agreements is ultimately directed towards strengthening the economies of its Members."[45] The United States, of course, does not disagree. But Norway's comments only highlight the salient issue: the inclusion in this balance of rights and obligations of an exception to a Member's international trade obligations when a Member considers an action necessary for the protection of its essential security interests. Therefore, while Norway's delegation in this dispute may disagree with the concerns described in the U.S. measures, as its government has acknowledged, "In other parts of the world, *the security landscape looks*

Norway, at 9 (2019) (US-130). Recognizing the importance of international cooperation in this area, the strategy states that "cyber crime and cyber attacks from both state and non-state actors constitute extremely serious threats to national security and economy." National Cyber Security Strategy for Norway, at 10 (2019) (US-130).

[41] First Substantive Meeting of the Panel with the Parties, Closing Statement of the United States, paras. 4-5.

[42] Setting the course for Norwegian foreign and security policy, Meld. St. 36 (2016-2017), Report to the Storting (white paper), Recommendation of 21 April 2017 from the Ministry of Foreign Affairs, approved in the Council of State the same day (White paper from the Solberg Government), at 19 (emphasis added) (US-75).

[43] Setting the course for Norwegian foreign and security policy, Meld. St. 36 (2016-2017), Report to the Storting (white paper), Recommendation of 21 April 2017 from the Ministry of Foreign Affairs, approved in the Council of State the same day (White paper from the Solberg Government), at 44 (emphasis added) (US-75)

[44] Norway's Response to the Panel's Question 51, paras. 463.

[45] Norway's Response to the Panel's Question 51, paras. 463.

different."[46] For precisely this reason, Article XXI(b) is self-judging, including the determination as to whether particular action is necessary for the protection of a Member's essential security interests taken in time of war or other emergency in international relations within the meaning of Article XXI(b)(iii).

45. Norway's construction of the phrase "other emergency in international relations" – particularly its emphasis on "events"[47] and its references to "law and public order" – is more consistent with the terms of security exceptions of other treaties than with the terms of Article XXI(b)(iii). For example, the Treaty of Rome, which is mirrored in relevant part by the Treaty on the Functioning of the European Union (TFEU), includes an exception that states:

> Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the *event* of serious internal disturbances affecting the *maintenance of law and order*, in the *event* of war, serious international tension *constituting a threat of war*, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.[48]

46. Similar language appears in the Agreement on the European Economic Area (EEA), to which Norway is a party:

> Nothing in this Agreement shall prevent a Contracting Party from taking any measures . . . which it considers essential to its own security *in the event of* serious internal disturbances affecting the *maintenance of law and order*, in time of war or serious international tension constituting threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security[49]

47. Thus, the EEA, the Treaty of Rome, and the TFEU refer to measures taken "in the *event* of serious internal disturbances", and discusses "serious internal disturbances affecting *the maintenance of law and order*,"[50] language that is absent from Article XXI(b)(iii). Mirroring the language of the EEA, the Treaty of Rome, and the TFEU (rather than the GATT 1994), Norway suggests in this dispute that "the text and context [of Article XXI(b)(iii) provide that the 'state of things' – *events* – giving rise to an "emergency in international relations' must be of a nature and gravity *akin to a war*, by posing an existential threat to the functioning and/or stability of the state, including *the*

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[46] Setting the course for Norwegian foreign and security policy, Meld. St. 36 (2016-2017), Report to the Storting (white paper), Recommendation of 21 April 2017 from the Ministry of Foreign Affairs, approved in the Council of State the same day (White paper from the Solberg Government), at 44 (emphasis added) (US-75)

[47] See Norway's Response to the Panel's Question 51, paras. 430, 432, 434, 435 442, 444, & 445.

[48] Treaty of Rome Art. 224 (emphases added) (US-181); TFEU Art. 347 (emphases added) (US-182).

[49] *See* Agreement on the European Economic Area, Art. 123 (emphases added) (US-221).

[50] *See* Agreement on the European Economic Area, Art. 123 (emphases added) (US-221); Treaty of Rome Art. 224 (emphases added) (US-181); TFEU Art. 347 (emphases added) (US-182).

basic functioning of its law and public order. Additionally, the *events* must be 'unexpected', and demand 'urgent' action."[51]

48. As discussed further below at Section II.C.4, Uruguay Round negotiators decided to retain the text of Article XXI(b) unchanged from the GATT 1947 – including subparagraph (iii) – despite the existence of other, narrower security exceptions at that time, such as those in the EEA Agreement, the Treaty of Rome, and the TFEU. Therefore, the Panel should decline to adopt Norway's approach, which appears to be based not on the text of the GATT1994, but on that of the EEA Agreement, the Treaty of Rome and the TFEU.

5. The Context Provided By Article XXI(a) and Article XX of the GATT 1994 Supports an Understanding of Article XXI(b) as Self-judging

a. Article XXI(a) Supports that Article XXI(b) is Self-Judging

49. Norway dismisses the U.S. argument that Article XXI(a) supports the U.S. interpretation of Article XXI(b) as self-judging, claiming that "the argument is based on speculation about the amount of evidence that might (or might not) be available to a panel in applying Article XXI(b) to a particular set of facts."[52] Norway's suggestion that the immediate context of Article XXI(b) – Article XXI(a) – is not relevant to the interpretation of Article XXI(b) in this dispute is erroneous and inconsistent with customary rules of interpretation under international law.

50. Under the Vienna Convention, the Panel must interpret the terms of the GATT 1994 according to their ordinary meaning, in context and in light of the object and purpose of the GATT 1994. Article XXI(a) is immediate context for understanding the ordinary meaning of the terms of Article XXI(b). Article XXI(a) states that "[n]othing in this Agreement shall be construed . . . to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests." That is, a Member need not provide any information—to a WTO panel or other Members—regarding its essential security measures or its underlying security interests. In this way, Article XXI(a) anticipates that there may not be facts on the record before a panel that could be used to "test" (as complainant urges) a Member's invocation of Article XXI(b).

51. Article XXI(b) cannot be interpreted so as to undermine a responding Member's rights under Article XXI(a). Interpreting Article XXI(b) as subjecting a Member's security measures to review by a panel effectively requires that Member to furnish information concerning its essential security measure. This would mean that a Member exercising its rights under Article XXI(a) to withhold "information the disclosure of which it considers contrary to its essential security interests" may thereby not be able to demonstrate that its measure meets whatever standard is applied by a panel. In such a situation, a Member may be required to choose between exercising its rights under Article XXI(a) and Article XXI(b). While it may not be that such a

[51] Norway's Response to the Panel's Question 51, para. 445 (emphases added).

[52] Norway's Response to the Panel's Question 53, para. 480.

conflict would arise in every instance, the Panel must avoid any interpretation of one provision that could undermine or even invalidate the effectiveness of another.[53]

b. Article XX Supports that Article XXI(b) is Self-Judging

52. Pointing to certain similarities between Article XX and Article XXI(b), Norway argues that Article XXI(b) is an "exception" to the obligation in the GATT 1994 "in the nature of an 'affirmative defence'."[54] Therefore, Norway argues that the structure of Article XXI(b) "requires the Panel to undertake a two-step analysis: *first*, does the measure fall under one of the subparagraphs' and *second*, are the conditions in the chapeau satisfied."[55] For this proposition, Norway cites to an Appellate Body report explaining that such a sequence is "mandatory based on the 'fundamental structure and logic of Article XX."[56] However, the Panel is tasked with interpreting Article XXI(b)—not Article XX—in this dispute, and Norway's argument ignores important textual differences between Article XX and Article XXI(b).

53. In both Article XX and Article XXI, the sentence begins in the chapeau and ends at the end of each subparagraph ending. But while there may be surface-level similarities between Article XX and Article XXI, there are numerous important textual differences between the provisions.

54. In Article XX, for example, the subparagraphs themselves – not the chapeau – contain the operative language regarding the relation between the measure taken and the Member's objective; namely, the measure must be, for example, "necessary to," "relating to," or "essential to" the relevant objective. The exception provided in Article XX(a) therefore reads: (from the chapeau) "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures…" (from the subparagraph) "necessary to protect public morals." In this way, it is the subparagraph that indicates on what basis a Member may avail itself of the exception – when the measure in question is "necessary to protect public morals."

55. The chapeau of Article XX includes an additional non-discrimination requirement, which subjects a Member's action to additional scrutiny based on the particular factual circumstances. Specifically, the chapeau states that "*Subject to the requirement that* such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent…".[57] Under Article XX(a), then, a Member: 1) may take a measure that is necessary to protect public morals, *but only if* 2) that measure does not arbitrarily or unjustifiably discriminate or constitute a disguised restriction on

[53] As scholars have noted, "the principle of good faith in the process of interpretation underlies the concept that interpretation should not lead to a result which is manifestly absurd or unreasonable." Ian Sinclair, THE VIENNA CONVENTION ON THE LAW OF TREATIES, Manchester University Press, 2nd edn (1984), at 120 (US-175).

[54] Norway's Response to the Panel's Question 52(b), para. 470.

[55] Norway's Response to the Panel's Question 52(b), para. 470.

[56] Norway's Response to the Panel's Question 52, para. 472.

[57] Emphasis added.

trade. It was these two substantive obligations set out in the text, therefore – not the mere presence of a chapeau followed by subparagraphs – that led the Appellate Body to its statement that the "structure and logic of Article XX"[58] suggests a two-step analysis.[59] That the analysis began with the requirement set out in the subparagraphs and then moved to the requirement set out in the chapeau is coincidental.

56. By contrast, in Article XXI(b), the operative language regarding the relationship between the measure and the objective is in the chapeau —"any action which it considers necessary for the protection of its essential security interests." As the United States has explained, the requirement for applicability of the exception is that the Member taking the action must consider that action necessary for the protection of its essential security interests. The subparagraphs of Article XXI(b), rather than identifying the obligation itself, modify the nature of the security interests involved, or in the case of subparagraph (iii), provide a temporal requirement regarding when the measure would be taken. This key difference explains why, although a panel examining an Article XX defense might look to the relationship between the measures and the objectives set out in the subparagraph endings of Article XX first, it would make no sense for a panel examining an Article XXI defense to first determine applicability of the subparagraphs. The fundamental structure and logic of Article XXI(b) is simply different, and the Appellate Body's finding based on the structure and logic of Article XX of the GATT 1994 is therefore not applicable.

57. Regarding Norway's claim that the United States must satisfy "the burden of proof" because Article XXI(b) "is in the nature of an affirmative defence", the United States recalls that neither the term "affirmative defence" nor "burden of proof" are legal terms reflected in the DSU or any other covered agreement.[60] These are useful concepts employed by panels and the Appellate Body to explain the legal approach taken in a particular case; they do not impose a particular order of analysis or method of evaluation on panels. Moreover, with respect to Article XXI(b), the self-judging nature of the provision is not a function of standard of review, or some general concept of discretion or deference. The self-judging nature of this exception is reflected in the text of Article XXI(b) itself. As the United States explained in the U.S. Response to the Panel's Question 52, what is required of the party exercising its right under Article XXI(b) is that the Member consider one or more of the circumstances set forth in Article XXI(b) to be present. The invoking Member's burden is discharged once the Member indicates, in the context of dispute settlement, that it has made such a determination.[61] Complainant's characterization of Article XXI(b) as an "affirmative defense" does not change the ordinary meaning or function of its terms.

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[58] Norway's Response to the Panel's Question 52, para. 472.

[59] *US – Shrimp (AB)*, paras. 119-120.

[60] Norway's Response to the Panel's Question 52, para. 475; U.S. Response to the Panel's Question 52.

[61] U.S. Response to the Panel's Question 52.

C. Supplementary Means of Interpretation – Including Uruguay Round Negotiating History – Confirm that Actions Under Article XXI are not Subject to Review

59. Although not necessary in this dispute, supplementary means of interpretation – including negotiating history of the Uruguay Round – confirms that Article XXI(b) is self-judging. First, Uruguay Round drafters retained the text of Article XXI(b) – unchanged and in its entirety – when that provision was incorporated into the GATT 1994. Uruguay Round drafters also incorporated security exceptions with the same self-judging terms into GATS and TRIPS. In addition, Uruguay Round negotiators of the DSU discussed the reviewability of Article XXI, and decided *not* to include in the DSU specific terms that would have diverged from the longstanding understanding that actions taken pursuant to Article XXI are not reviewable.

60. These decisions by Uruguay Round negotiators are notable, particularly in light of the alternative approaches to security exceptions that had been incorporated into other treaties between 1947 and 1994. While some treaties simply incorporated by reference Article XXI or used very similar terms, other treaties offered significantly different approaches to when security exceptions would apply and the extent to which action taken pursuant to such exceptions could be reviewable. By retaining Article XXI unchanged in the GATT 1994, incorporating the same text into the GATS and TRIPS security exceptions, and by not including in the DSU specific terms that would have diverged from the longstanding interpretation of Article XXI(b), the Uruguay Round drafters indicated that they were well aware of the manner in which Article XXI had been interpreted since its drafting, and were comfortable continuing with that interpretation.

61. As the United States has explained, the drafting history of Article XXI(b) dates back to negotiations to establish the International Trade Organization of the United Nations (ITO). Numerous statements by the drafters of the text that became Article XXI(b) confirm that negotiators intended for this provision to be self-judging by the acting Member, and that the appropriate remedy for such measures is a non-violation, nullification or impairment claim.[62] For example, in a meeting of July 24, 1947, Australia withdrew an objection to the essential security provision after receiving assurance that a Member affected by essential security actions would have redress pursuant to then-Article 35(2) of the draft ITO Charter.[63] At that time, Article 35(2) permitted consultations concerning the application of any measure which nullified or impaired any object of the ITO charter, "whether or not it conflicts with the terms of this Charter."[64]

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[62] *See* U.S. Responses the Panel's Questions 59 and 62; U.S. Oral Opening Statement, Part D; U.S. First Written Submission of the United States of America, Section III.A.3.

[63] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 26-30 (US-41).

[64] Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947), Chapter V, General Commercial Provisions, Most-Favoured-Nation Treatment, Section H, General Exceptions, Article 35, Consultation—Nullification or impairment, at 30 (US-33).

62. In the same meeting, the Chairman asked whether actions taken pursuant to the essential security exception "should not provide for any possibility of redress."[65] The U.S. delegate responded that such actions "could not be challenged in the sense that it could not be claimed that the Member was **violating** the Charter," although "redress **of some kind** under Article 35" would be available.[66] The record reveals no disagreement with the U.S. delegate, and in fact the Australian delegate expressed appreciation for this assurance. The exchange demonstrates that the delegates were referring to a non-violation claim – not an alleged violation of the Charter – when discussing the redress available to Members affected by essential security actions.[67]

63. Norway challenges the relevance of these and other statements in the negotiating history of Article XXI(b) and states that "[t]he historical materials relating to the GATT 1947 and the Havana Charter are not the negotiating history of the GATT 1994, which was concluded much later in time. The negotiating history of the earlier agreements cannot, therefore, reveal the common intention of the drafters of the later agreements."[68] Norway further suggests that this negotiating history is "remote in substantive terms, as well as temporal terms, because GATT and WTO dispute settlement rules evolved considerably after the two historic agreements were negotiated."[69]

64. As an initial matter, the complainant's arguments fail because the interpretive value of the negotiating history of Article XXI is not diminished merely because negotiations took place in 1947.[70] On the contrary, the text of Article XXI was retained – unchanged and in its entirety – when incorporated into the GATT 1994; moreover, statements by the original negotiators of Article XXI were publicly available for *decades* before the Uruguay Round negotiators made the specific decision to retain Article XXI in the GATT 1994, as discussed in Section II.C.1 below.

65. Furthermore, with knowledge of the statements by the original negotiators of the terms of Article XXI, Uruguay Round negotiators also decided to incorporate security exceptions with the same self-judging terms in GATS and TRIPS, as discussed in Section II.C.2 below. That is, in addition to retaining this language in the GATT 1994, all of which remained unchanged, Uruguay Round negotiators also chose to retain the original GATT 1947 language in new covered agreements, the language of which was drafted at that time. Had Uruguay Round

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[65] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 26 (US-41).

[66] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 26—27 (emphases added) (US-41).

[67] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 26—27 (emphases added) (US-41) & Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report, E/PC/T/A/PV/33.Corr.3 (July 30, 1947) (US-92).

[68] Norway's Response to the Panel Questions 57-58, para. 501.

[69] Norway's Response to the Panel's Questions 57-58, para. 504.

[70] In fact, the Appellate Body and numerous WTO panels have consulted the negotiating history of the ITO charter in prior disputes. *See, e.g. Japan – Alcoholic Beverages II (AB)*, para. 51 and note 52*; Canada – Periodicals (AB)*, at 34; *United States – Welded Carbon Quality Line Pipe (AB)*, para. 175 & note 171; *EC – Commercial Vessels (Panel)*, para. 7.67 & note 205; *EU- Poultry Meat (China)*, para. 7.357; *Indonesia – Autos*, para. 5.164.

negotiators disagreed with their predecessors regarding the proper interpretation of this language, it seems surprising that they would have repeated that language verbatim in two other agreements concluded during that round. In addition, as discussed in Section II.C.3 below, Uruguay Round negotiators of the DSU also discussed the reviewability of Article XXI, and decided *not* to include in the DSU specific terms that would have diverged from the longstanding understanding that actions taken pursuant to Article XXI are not reviewable.

66. These decisions by the Uruguay Round negotiators are striking, particularly considering that, as discussed in Section II.C.4, some trade agreements negotiated between 1947 and the Uruguay Round, including agreements negotiated by GATT contracting parties, had in fact developed security exceptions that differed in important ways from the GATT 1947. That Uruguay Round negotiators also decided not to follow the approach of these intervening trade agreements, however – neither in the GATT 1994, nor in GATS or TRIPS, nor in the DSU – reflects that the Uruguay Round negotiators, by retaining the unchanged text of Article XXI, did not intend to depart from their predecessors regarding the interpretation of Article XXI. These intentions of the drafters – including the Uruguay Round drafters – must be given effect in this dispute.

1. Uruguay Round Negotiators Rejected Proposals to Alter the Terms of Article XXI

67. Uruguay Round discussions indicate that these negotiators in fact *agreed* with the statements made by their predecessors in 1947. As discussed in the U.S. Response to the Panel's Question 62, during the Uruguay Round the Negotiating Group on GATT Articles rejected proposals by Nicaragua and Argentina to amend Article XXI in a manner that would have limited Members' discretion when taking action under that provision.[71] In these discussions – which took place in June 1988 – some delegates emphasized the sensitivity of issues presented under Article XXI and the need to preserve Members' discretion with respect to such issues.[72] These Members further suggested that "it was unrealistic to think of a GATT body placing conditions on [Article XXI's] use since only the individual contracting party concerned was ultimately in a position to judge what its security interests were."[73] Another delegation opined that "since the GATT has no competence in the determination of questions of security or of a political nature, it seemed doubtfully useful to set up any institutional test to determine whether a matter was security-related or political."[74]

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[71] *See* Negotiating Group on GATT Articles, Article XXI Proposal by Nicaragua, MTN.GNG/NG7/W/48 (June 18, 1988) (US-150); Negotiating Group on GATT Articles, Communication from Argentina, MTN.GNG/NG7/W/44 (Feb. 19, 1988) (US-151).

[72] Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988), at 2 (US-153).

[73] Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988), at 2 (US-153).

[74] Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988), at 2—3 (US-153).

68. With these statements, negotiators during the Uruguay Round expressed views consistent with those expressed by the negotiators of Article XXI – namely, that matters of essential security under Article XXI are left to the judgment of the invoking Member. In fact, even those delegations that agreed with Nicaragua and Argentina acknowledged this meaning of the existing text of Article XXI. Meeting minutes indicate that some delegations "shared the view that there was a danger of [Article XXI] being abused if governments were not cautious in its invocation."[75] As such statements indicate, Uruguay Round negotiators did not intend to alter the self-judging nature of Article XXI, and they rejected proposals that would have done so.

2. Uruguay Round Negotiators Decided to Repeat the Pivotal Language of Article XXI in the Security Exceptions of GATS and TRIPS

69. Uruguay Round negotiators also decided to include, in GATS and TRIPS, security exceptions that mirror Article XXI in relevant part. Specifically, like Article XXI, the security exceptions in GATS and TRIPS refer to actions that a Member "considers necessary"; security exceptions are separate from general exceptions for public morals, health, and other matters; and general exceptions – but not security exceptions – are explicitly subject to review. The Uruguay Round drafters' decision to use, in the GATS and TRIPS security exceptions, the same text as was used in Article XXI further confirms that Uruguay Round drafters were aware of the self-judging nature of this exception and did not intend to alter it.

70. The negotiating history of the GATS demonstrates the deliberate choice of Uruguay Round negotiators to repeat these crucial aspects of Article XXI. During GATS negotiations, some Members suggested draft security exceptions that would have diverged from the text of Article XXI by merging the security exceptions with general exceptions, omitting the pivotal "it considers" language from the security exceptions, and subjecting essential security measures to review for non-discrimination.[76]

71. For example, in its GATS proposal of June 1990, Switzerland included a provision called "Exceptions for Public Order and National Security" which referred to "measures that are necessary to protect" certain interests, rather than using Article XXI's pivotal "it considers" language.[77] Switzerland's proposal also would have treated in the same manner both measures necessary to protect "essential national security interests" and measures necessary to protect "public morals, public order, safety, health, or the environment," and required that "measures necessary to protect" these interests "shall not be applied in a manner that would constitute a

[75] Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988), at 3 (US-153).

[76] *See* Communication from Switzerland, MTN.GNS/W/102 (June 7, 1990), at 10 (US-102); Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay, MTN.GNS/W/95 (Feb. 26, 1990), at 9 (US-183).

[77] *See* Communication from Switzerland, MTN.GNS/W/102 (June 7, 1990), at 10 (US-183).

means of arbitrary or unjustifiable discrimination between PARTIES, a disguised restriction on trade in services, or a means of circumventing the objectives of the Agreement."[78]

72. Similarly, a joint proposal by Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago, and Uruguay, included an exception for "measures consistent with international law that are . . . necessary,"[79] and did not include the pivotal "it considers" language from Article XXI. This joint proposal also would have treated in the same manner measures "[n]ecessary to protect national security" as measures "necessary to protect public morals, cultural and social values, public order, safety or health."[80] Finally, similar to the Swiss proposal, this joint proposal required that "[s]uch measures [including national security measures] shall not be used as a means to circumvent the objectives, principles and disciplines of this Framework nor as disguised restrictions on international trade in services."[81]

73. By contrast, the security exceptions in GATS proposals put forward by the United States (in October 1989), the EC (in June 1990), and Japan (in July 1990) mirrored Article XXI in relevant part.[82] Specifically:

- First, all three proposals used the pivotal language from Article XXI and referred to action that a Member "considers necessary" for the protection of its essential security interests.[83]

- Second, all three proposals also separated the exceptions for essential security matters from the exceptions for public morals, health, and other matters.

[78] *See* Communication from Switzerland, MTN.GNS/W/102 (June 7, 1990), at 10 (US-183).

[79] Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay, MTN.GNS/W/95 (Feb. 26, 1990), at 9 (US-184).

[80] Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay, MTN.GNS/W/95 (Feb. 26, 1990), at 9 (US-184).

[81] Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay, MTN.GNS/W/95 (Feb. 26, 1990), at 9 (US-184).

[82] *See* Communication from the United States, MTN.GNS/W/75 (Oct. 17, 1989), at 12 (US-185); Proposal by the European Community, MTN.GNS/W/105 (June 18, 1990), at 13 (US-186); Communication from Japan, MTN.GNS/W/107 (July 10, 1990), at 12 (US-187).

[83] *See* Communication from the United States, MTN.GNS/W/75 (Oct. 17, 1989), at 12 (US-185); Proposal by the European Community, MTN.GNS/W/105 (June 18, 1990), at 13 (US-186); Communication from Japan, MTN.GNS/W/107 (July 10, 1990), at 12 (US-187).

- Third, all three proposals included a non-discrimination requirement in the exception for public morals, health, and similar matters – but did not include such a requirement in the essential security exception.[84]

- Fourth, the GATS proposals from the United States, Japan, and the EC also repeated the language of Article XXI(b)(iii) referring to action "taken in time of war or other emergency in international relations."[85] The repetition of this language in these three proposals (and in the final version of the agreement) is particularly notable in light of the existence of alternative approaches, as discussed in Section II.C.4 below.

74. Notably, the EC's GATS proposal appears to acknowledge the self-judging nature of essential security actions by including the following text at the end of its proposed sub-paragraph on security exceptions: "In taking action under this paragraph, *parties* shall take into consideration the interests of third parties which may be affected."[86] By stating that "parties shall take into consideration" the interests of third parties, the EC acknowledged that it was the parties – now Members – that would be choosing whether to take action under this provision. The EC also acknowledged the 1982 Decision Concerning Article XXI by providing in its proposal that "All parties affected by action under this Article retain their full rights under this Agreement."[87] This language indicates that the EC was mindful of the 1982 Decision when it prepared its draft GATS text – and yet retained the self-judging reference to actions a Member "considers necessary for the protection of its essential security interests."

75. In the GATS draft prepared by the chairman of the negotiating group in late July 1990, the security exceptions provision reflected in relevant part the proposals by the United States, Japan, and the EC.[88] Specifically, in this July 1990 chairman's draft, the security and general exceptions were separate sub-paragraphs of the exceptions provision at Article XIV, and the sub-paragraph on security exceptions lacked a non-discrimination proviso while permitting measures that a Member "considers necessary" to protect its essential security interests.[89] This deliberate choice of exceptions language demonstrates that the GATS drafters—like the drafters of the GATT 1947 (and the GATT 1994)—intended to distinguish security exceptions from general exceptions, and that security exceptions were to be self-judging and not subject to review for non-discrimination.

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[84] *See* Communication from the United States, MTN.GNS/W/75 (Oct. 17, 1989), at 12 (US-185); Proposal by the European Community, MTN.GNS/W/105 (June 18, 1990), at 13 (US-186); Communication from Japan, MTN.GNS/W/107 (July 10, 1990), at 12 (US-187).

[85] Communication from the United States, MTN.GNS/W/75 (Oct. 17, 1989), at 12 (US-185); Proposal by the European Community, MTN.GNS/W/105 (June 18, 1990), at 13 (US-186); Communication from Japan, MTN.GNS/W/107 (July 10, 1990), at 12 (US-187).

[86] Proposal by the European Community, MTN.GNS/W/105 (June 18, 1990), at 13 (emphasis added) (US-186).

[87] Proposal by the European Community, MTN.GNS/W/105 (June 18, 1990), at 13 (using language similar to the Decision Concerning Article XXI Of The General Agreement, L/5426 (Dec. 2, 1982) (US-62)) (US-186).

[88] *See* Draft Multilateral Framework for Trade in Services, MTN.GNS/35 (July 23, 1990), at 11—12 (US-188).

[89] *See* Draft Multilateral Framework for Trade in Services, MTN.GNS/35 (July 23, 1990), at 11—12 (US-188).

76. These aspects of the draft GATS exceptions text remained in the December 1990 draft of the agreement.[90] The December 1991 draft GATS text further distinguished security exceptions from general exceptions, as the general exceptions remained in Article XIV while the security exceptions were placed into a new article, Article XIVbis.[91] This adjustment further confirms that the GATS essential security exception that was finally incorporated at GATS Article XIVbis(2)(b) is self-judging, and unlike the general exceptions that remained in the final Article XIV, this provision is not subject to review for non-discrimination.

77. The TRIPS negotiations similarly show that the drafters intended to incorporate into that agreement a security exception that would mirror the self-judging security exception at GATT Article XXI(b) and that would not be subject to review for non-discrimination. In fact, a July 1990 draft TRIPS agreement would have explicitly incorporated GATT exceptions by providing that "[o]ther provisions of the [GATT] shall apply to the extent that [TRIPS] does not provide for more specific rights, obligations and exceptions thereof."[92] By December 1991, however, this reference to GATT had been replaced in relevant part by language that mirrored GATT 1994 Article XXI(b),[93] and this language remained in the final TRIPS text.

78. Thus, presented again with the choice of whether to diverge from the language of Article XXI—and the discretion it bestows upon a Member taking action it considers necessary for the protection of its essential security interests—Uruguay Round negotiators again decided to use the language of Article XXI in the security exceptions at TRIPS Article 73 and GATS Article XIVbis. This decision by the Uruguay Round negotiators confirms that these negotiators were well aware of the manner in which this provision had been interpreted, and were comfortable continuing with that interpretation.

3. Uruguay Round Negotiators Declined to Include Language in the DSU that Would Alter the Longstanding Interpretation of Article XXI

79. Finally, Uruguay Round negotiators discussed the potential reviewability of Article XXI in the context of dispute settlement negotiations and decided *not* to include in the DSU language that would alter the longstanding interpretation of Article XXI as self-judging.

80. In a November 1987 communication to the Negotiating Group on Dispute Settlement, Nicaragua described its "disappointing" experiences with dispute settlement under the GATT 1947, including its 1985 dispute with the United States in which the United States

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[90] *See* Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/35/rev.1 (Dec. 3, 1990), at 347—48 (US-189).

[91] Draft Final Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC.W.FA (Dec. 20, 1991), at Annex II, pp. 17—19 (US-190)).

[92] *See* Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Status of Work in the Negotiating Group, Chairman's Report to the GNG, MTN.GNG/NG11/W/76 (July 23, 1990), at 78 (US-191).

[93] Draft Final Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (Dec. 20, 1991), at 90 (setting forth Article 73: Security Exceptions in the draft TRIPS Agreement) (US-190).

invoked Article XXI.[94] Nicaragua proposed, among other things, that when a panel had been established to resolve a dispute, "[n]o contracting party may oppose examination of the applicability of GATT provisions and compliance with them" and that "[a]ny panel must reach a clear conclusion regarding nullification and impairment of benefits."[95]

81. At a meeting shortly after Nicaragua made this proposal, negotiators of the DSU discussed a variety of topics, including "GATT Article XXI and its review by a GATT panel."[96] Minutes from that meeting suggest that negotiators did not discuss Nicaragua's proposal in a substantive way. Certainly nothing in the record of this meeting indicates that negotiators intended that the DSU would alter the manner in which Article XXI had been interpreted during the previous four decades. In an addendum to the minutes of that meeting, Chile agreed with some portions of Nicaragua's statement, but disagreed with other portions, including the lack of any reference to Article XXI, which it described as "fully valid."[97] Nicaragua's proposal was not incorporated into the DSU.

82. Numerous statements by the drafters of the DSU further confirm that the DSU does not alter the ordinary meaning of the terms of the covered agreements. For example, in a meeting of the Negotiating Group on Dispute Settlement on June 25, 1987, negotiators "expressed the view that the GATT dispute settlement procedures should not be used to create, by constructive interpretation, obligations which were not established in the text of the General Agreement."[98] Instead, these negotiators opined that "[p]anels should merely interpret and apply existing GATT rules to the particular sets of circumstances in the disputes before them without purporting to create new obligations."[99] Similarly, during the group's discussions of developing countries and dispute settlement, one delegation "noted that the Group's mandate did not include the negotiation of new substantive rights for contracting parties."[100]

83. In sum, numerous decisions of the Uruguay Round negotiators – their rejection of proposed changes to Article XXI, their repetition of Article XXI's pivotal language in the GATS and TRIPS security exceptions, and their decision not to include language in the DSU that would alter the interpretation of Article XXI – confirm that these Uruguay Round negotiators were well

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[94] Negotiating Group on Dispute Settlement, Communication from Nicaragua, MTN.GNG/NG13/W/15 (Nov. 6, 1987), at 2, 8 (US-192).

[95] Negotiating Group on Dispute Settlement, Communication from Nicaragua, MTN.GNG/NG13/W/15 (Nov. 6, 1987), at 2, 8 (US-192).

[96] Negotiating Group on Dispute Settlement, Meeting of November 20, 1987, Note by the Secretariat, MTN.GNG/NG13/5 (Dec. 7, 1987), at 3 (US-193).

[97] Negotiating Group on Dispute Settlement, Meeting of November 20, 1987, Note by the Secretariat, Addendum, MTN.GNG/NG13/5/Add.1 (Apr. 29, 1988), at 2 (US-194).

[98] Negotiating Group on Dispute Settlement, Meeting of June 25, 1987, Note by the Secretariat, MTN.GNG/NG13/2 (July 15, 1987), at 5 (US-195).

[99] Negotiating Group on Dispute Settlement, Meeting of June 25, 1987, Note by the Secretariat, MTN.GNG/NG13/2 (July 15 1987), at 5 (US-195).

[100] Negotiating Group on Dispute Settlement, Meeting of July 11, 1988, Note by the Secretariat, MTN.GNG/NG13/9, para. 7 (July 21, 1988) (US-196).

aware of the existing interpretation of Article XXI, and that they agreed with that interpretation. This Uruguay Round negotiating history further confirms the interpretation of Article XXI. Notably, other GATT and WTO agreements also used language similar to that of Article XXI and maintained the same self-judging approach to essential security exceptions.[101]

4. Uruguay Round Negotiators Made These Decisions Despite the Existence of Other Approaches to Security Exceptions at that Time

84. These decisions by Uruguay Round negotiators are particularly notable in light of the various approaches to security exceptions that had been included in trade agreements since 1947. Some post-1947 agreements, such as the 1985 Agreement on the Establishment of a Free Trade Area between Israel and the United States, simply incorporated by reference Article XX and Article XXI of the GATT 1947.[102] Other agreements, such as the Treaty of Rome and Agreement on the European Economic Area (EEA Agreement), reflect significant deviations from the text of Article XXI, including by expressly providing for the review of measures taken by a government for essential security purposes.

Treaty of Rome

85. The Treaty of Rome, now known as the Treaty on the Functioning of the European Union (TFEU) was signed on March 25, 1957 by representatives of Belgium, Germany, France, Italy, Luxembourg, and The Netherlands. Since that time, other EU Member States have joined the agreement and it has been renamed the TFEU and its provisions renumbered. The security exceptions remain the same as they were in 1957, however, and these provisions are very different from those present in the GATT 1947. As the relevant Treaty of Rome (and TFEU) provisions state:

> ARTICLE 223 [now TFEU Article 346]
>
> 1. The provisions of this Treaty shall not preclude the application of the following rules:

[101] Specifically the Tokyo Round Agreement on Government Procurement retained the distinction between security exceptions and general exceptions and mirrored the pivotal "it considers" language of Article XXI in the security exception. *See* Tokyo Round Code on Government Procurement (1979), Article VIII (US-198). By doing so, the Tokyo Round GPA– consistent with Article XX and Article XXI – ensured that a party would judge for itself whether it considers action considers necessary for the protection of its essential security interests while measures sought to be justified under the general exceptions would be subject to review for necessity and non-discriminatory application. *See* Tokyo Round Code on Government Procurement (1979), Article VIII (US-198). The text of this provision remained largely unchanged as the GPA was revised in 1988, 1994, and 2012. *See* Agreement on Government Procurement, Revised Text (1988), Article VIII (US-199) (same as Article VIII 1979 GPA); Agreement on Government Procurement, Article XXIII (1994) (same as Article VIII of 1979 GPA except adding a colon in Article VIII(2) as follows "imposing or enforcing measures**:** necessary to protect public morals") (emphasis added) (US-200); Agreement on Government Procurement, Article III (same as Article XXIII of the 1994 GPA, except dividing the text of subparagraph 2 into sub-paragraphs) (US-201).

[102] See Agreement on the Establishment of a Free Trade Area between the Government of Israel and the Government of the United States of America, Article 7 ("[GENERAL AND SECURITY EXCEPTIONS] Article XX and XXI of the GATT are hereby incorporated into and made a part of this Agreement.") (US-197).

> (a) No Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;
>
> (b) Any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.
>
> 2. During the first year after the entry into force of this Treaty, the Council shall, acting unanimously, draw up a list of products to which the provisions of paragraph 1(b) shall apply. 3. The Council may, acting unanimously on a proposal from the Commission, make changes in this list.
>
> ARTICLE 224 [now TFEU Article 347]
>
> Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.
>
> ARTICLE 225 [now TFEU Article 348]
>
> If measures taken in the circumstances referred to in Articles 223 and 224 have the effect of distorting the conditions of competition in the common market, the Commission shall, together with the State concerned, examine how these measures can be adjusted to the rules laid down in this Treaty. By way of derogation from the procedure laid down in Articles 169 and 170, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in Articles 223 and 224. The Court of Justice shall give its ruling in camera.[103]

86. With the terms of these provisions, the drafters of the Treaty of Rome – writing just 10 years after the GATT 1947 – approached security matters differently from the drafters of the GATT 1947. Article 223 of the Treaty of Rome – similar to Article XXI(b) – refers to "measures as it [a Member State] considers necessary for the protection of the essential interests of its security." Slightly different language appears in Article 224 of the Treaty of Rome, however, which refers to "measures which a Member State may be called upon to take" and requires Member States to "consult each other with a view to taking together the steps needed to

[103] Treaty of Rome, Articles 223-225 (US-181)

prevent the functioning of the common market being affected" in the circumstances described in that article.[104]

87. Notably, the Treaty of Rome drafters included *additional* language in Article 225 which would explicitly subject such measures to review in certain circumstances. Specifically, Article 225 imposes Commission review of "measures taken in the circumstances referred to in Articles 223 and 224" when such measures have "the effect of distorting the conditions of competition in the common market." Article 225 further describes the manner in which this review shall occur, and states that "the Commission shall, together with the state concerned, examine how these measures can be adjusted to the rules laid down in this treaty." Article 225 further permits involvement by the European Court of Justice, and states that "the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in Articles 223 and 224. The Court of Justice shall give its ruling in camera."

88. Thus, in Article 225, the Treaty of Rome drafters provided specific instructions that permit review of action that a Member State "considers necessary" in certain circumstances. Their decision to add a specific provision permitting review – and specifying the manner in which this review should occur – indicates that they felt additional language was necessary to ensure that actions taken pursuant to Article 223 and Article 224 would be subject to review. Put differently, the Treaty of Rome drafters apparently concluded that the reference in Article 223 to "measures as it [a Member State] considers necessary", by itself, was not necessarily subject to review.

89. Furthermore, the Treaty of Rome refers to measures taken "in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war [or] serious international tension constituting a threat of war."[105] This language is significantly different from the reference in Article XXI(b)(iii) to "in time of war or other emergency in international relations." Specifically, the Treaty of Rome only permits action if the "serious international tension" in question "constitut[es] a threat of war," while the GATT 1947 (and the GATT 1994) Article XX(b)(iii) permits a Member to take action it considers necessary for the protection of its essential security interests in time of an "other emergency in international relations" – without requiring that this "other emergency" constitute a threat of war. In addition, the Treaty of Rome refers to "the event of" certain situations, while the GATT 1994 simply refers to "time of war or other emergency in international relations."

Agreement on the European Economic Area

90. Another approach to security exceptions can be seen in the EEA Agreement, which was established in 1992 and which has been ratified by the EU Member States, Norway, Iceland, and Liechtenstein. The security exception in that agreement provides:

> Article 123

[104] Treaty of Rome, Article 224 (US-181).

[105] Treaty of Rome, Article 224 (US-181).

> Nothing in this Agreement shall prevent a Contracting Party from taking any measures:
>
> > (a) which it considers necessary to prevent the disclosure of information contrary to its essential security interests;
> >
> > (b) which relate to the production of, or trade in, arms, munitions and war materials or other products indispensable for defence purposes or to research, development or production indispensable for defence purposes, provided that such measures do not impair the conditions of competition in respect of products not intended for specifically military purposes;
> >
> > (c) which it considers essential to its own security in the event of serious internal disturbances affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.[106]

91. Similar to the Treaty of Rome, this provision of the EEA Agreement refers to "serious internal disturbances affecting the maintenance of law and order" and "war or serious international tension constituting threat of war", rather than using the language of Article XXI(b)(iii), "war or other emergency in international relations." Thus, like the Treaty of Rome – but unlike the GATT 1994 – the EEA Agreement permits action only if the "serious international tension" in question "constitut[es] a threat of war," while the GATT 1947 (and the GATT 1994) Article XX(b)(iii) permits a Member to take action it considers necessary for the protection of its essential security interests in time of an "other emergency in international relations" – without requiring that this "other emergency" constitute a threat of war.

92. The EEA Agreement also refers to measures "which [a party] considers essential to its own security", as opposed to the GATT 1994's reference to action that a Member "considers necessary for the protection of its essential security interests." Notable here is the EEA Agreement's use of the word "essential" rather than "necessary", and the EEA Agreements reference to "measures" which a party considers "essential to its own security", as opposed to as "action" that a Member "considers necessary for the protection of its essential security interests."

93. Neither Article XXI(b) of the GATT 1994 – nor the analogous security exceptions in GATS or TRIPS, nor the DSU – reflects the approaches taken in the Treaty of Rome or the EEA Agreement. None of these agreements include a provision along the lines of Article 225 of the Treaty of Rome that would explicitly provide for review of measures that a Member "considers necessary", set out the circumstances in which this review could occur, and the manner in which review should take place. None of these agreements – particularly the DSU – contains a provision stating that any body "shall" examine a Member's national security measures. Had the Uruguay Round drafters intended to make actions taken under Article XXI(b) reviewable in some manner, they could have adopted this language of the Treaty of Rome.

[106] Agreement on the European Economic Area, Art. 123 (US-221).

94. Furthermore, none of these agreements limits a Member's action to action "in the event of war [or] serious international tension constituting a threat of war," as stated in the Treaty of Rome or "in time of war or serious international tension constituting threat of war" as stated in the EEA Agreement. Nor did the Uruguay Round drafters incorporate into Article XXI any reference to "the maintenance of law and order" despite the existence of such language in both the Treaty of Rome and the EEA Agreement. Had the Uruguay Round drafters intended to limit the scope of the reference to "other emergency in international relations" to "events" that constitute a "threat of war" or refer to "the maintenance of law and order", they could have done so by adopting this language of the Treaty of Rome and the EEA Agreement. These decisions by the drafters should be given effect.

95. In sum, the existence of alternative approaches to security exceptions makes the decisions of the Uruguay Round negotiators even more striking. With knowledge of these alternative approaches to security exceptions, Uruguay Round negotiators not only *rejected* proposals to change the terms of Article XXI, but they also incorporated into the GATS and TRIPS security exceptions language identical to Article XXI and declined to include in the DSU text that would require a change to the longstanding approach to Article XXI as self-judging. In other words, Uruguay Round negotiators were aware of the possibility that essential security actions *could* be subject to review – and they chose not to incorporate into the text modifications or additional language providing for such review.

96. Among the errors of in the analysis of the panel in *Russia – Traffic in Transit* was that it interpreted Article XXI(b)(iii) on the basis of text found in other treaties, even though that text is *not* reflected in the GATT 1994. That panel suggested, "[a]n emergency in international relations" within the meaning of Article XXI(b)(iii) "appear[s] to refer generally to a situation of armed conflict, or latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state."[107] In reaching its erroneous interpretation of the phrase "other emergency in international relations" in Article XXI(b)(iii), the *Russia – Traffic in Transit* panel relied on a provision in the Covenant of the League of Nations that refers to "[a]ny war or threat of war," terms are significantly different from those in Article XXI(b(iii) – but terms that appear in both the Treaty of Rome and the EEA Agreement.[108] Thus, the *Russia – Traffic in Transit* panel appears to have deliberately inserted a meaning drawn from other treaties with different essential security text in place of the actual text used in Article XXI. This Panel should not repeat such an error, particularly in light of the numerous decisions by Uruguay Round negotiators that indicate they did not intend to diverge from the longstanding interpretation of Article XXI.

D. Article 33 of the VCLT Supports Adopting an Interpretation that Best Reconciles the English, Spanish and French versions of Article XXI(b)

[107] *Russia – Traffic in Transit*, para. 7.76.

[108] *Russia – Traffic in Transit,* para. 7.76 & note 153. As the United States explained in its response to the Panel's Question 51, the correct understanding of the phrase "other emergency in international relations" in Article XXI(b)(iii) is as a category that includes "war" as well as other circumstances that may or may not be similar to war.

97. As discussed in Section II.B, the ordinary meaning of the English text of Article XXI(b) establishes that the provision is self-judging. As discussed in Section II.D.1 below, however, the interpretation that emerges based on the ordinary meaning of the text of the subparagraphs in the English and French language versions, however, is not fully supported by the Spanish text of the subparagraphs. Specifically, the Spanish text of the three subparagraphs indicates that they must be read to modify the term "actions" in the chapeau of Article XXI(b); whereas the ordinary meaning of subparagraphs (i) and (ii) in the English and French versions is most naturally read to modify the term "interests" in the chapeau. Thus, as discussed in Section II.D.2 below, the meaning that best reconciles the texts, having regarding to the object and purpose of the treaty, must be adopted under Article 33 of the VCLT.

98. Reconciling the texts leads to the interpretation that all of the subparagraphs modify the terms "any action which it considers" in the chapeau, because this reading is consistent with the Spanish text, and also – while less in line with rules of grammar and conventions – permitted by the English and French texts. This reading of the text of the subparagraphs does not alter the plain meaning of the chapeau or the overall structure of Article XXI(b), however. The terms of the provision still form a single relative clause that begins in the chapeau and ends with each subparagraph, and therefore the phrase "which it considers" still modifies the entirety of the chapeau and the subparagraph endings. Therefore, reconciling the three authentic texts leads to the same fundamental meaning the United States has presented, committing the determination of whether an action is necessary for the protection of a Member's essential security interests in the relevant circumstances to the judgment of that Member alone.

1. Idiosyncrasies in the Spanish Text Do Not Warrant Interpreting the English Text of Article XXI(b) in a Manner Inconsistent with the Ordinary Meaning of the Text

99. Norway argues, in error, that idiosyncrasies in the Spanish text—including the colon in the chapeau, the inclusion in the chapeau of the word "relativas" preceded by a comma, and the fact that "relativas" is feminine plural and therefore cannot modify the masculine plural noun "intereses"— demonstrate that the phrase "which it considers" does not qualify all of the terms in the relative clause and that the subparagraph endings modify "action" in the chapeau.[109]

100. Specifically, Norway contends that a "colon in the chapeau of the Spanish and French versions serves to introduce the list of subparagraphs, thereby marking a break between the chapeau and the subparagraphs."[110] Norway also argues that the comma preceding "relativas" operates to separate the clause in the chapeau "que estime necessarias para la protección de los intereses esenciales de su seguridad" from the word "relativas".[111] According to Norway, "the comma shows that the chapeau does not constitute a single clause" and "it underscores that the word 'relativas' cannot be linked to the noun 'intereses' that precedes it".[112] Norway concludes

[109] Norway's Response to the Panel's Questions 41 and 42, paras. 349-381.

[110] Norway's Response to the Panel's Question 41(c), para. 365.

[111] Norway's Response to the Panel's Question 41(e), para. 371.

[112] Norway's Response to the Panel's Question 41(e), para. 372.

that "the comma, together with the gender of the word 'relativas', shows that the subparagraphs are not subject to the deferential 'que estime'".[113]

101. The United States agrees with Norway that a colon is used to introduce a list, but disagrees with Norway's assertion that the colon in the chapeau marks a grammatical "break" between the chapeau and the subparagraphs. Spanish linguistic sources describe a colon's function as calling into attention the words that follow: "Los **dos puntos** se escriben para llamar la atención sobre lo que se escribe a continuación. Después de los dos puntos se prefiere escribir minúscula cuando el texto continua en la misma línea, y mayúscula cuando el texto continua en otra línea."[114] These sources demonstrate through examples that, when a colon follows an introductory clause in a list, a colon indicates a continuation of the sentence that began in the introductory clause: "Ejemplo: *«Para aplicar a la vacante es necesario presentar**:** dos fotografías, comprobante de estudios, comprobante médico y fotocopia de identificación personal.»*"[115] French linguistic sources provide likewise: "The colon establishes a semantic relation between what precedes and what follows. This relation can be: — the introduction of a list of examples: Ex: Tout le mond était là: Paul, Catherine, Anne-Marie et Françoise."[116]

102. The use of a colon in security exceptions in other covered agreements that form part of the immediate context for Article XXI(b) of the GATT 1994 also undermines the complainant's argument that the use of a colon has a particular grammatical function. For example, a colon appears at the end of the chapeau in the English text of the security exception in the GATS though not in the English text of Article XXI(b) of the GATT 1994. The use of a colon in English also does not establish a "grammatical break", and there is no indication that the drafters intended to change the meaning of the security exception in the GATS by adding a colon; instead, it appears to be a stylistic modification. [117]

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[113] Norway's Response to the Panel's Question 41(e), para. 372.

[114] Ortografia Y Gramática, https://gramatica.celeberrima.com/dos-puntos-uso-reglas-y-ejemplos/(emphasis in the original) (US-203).

[115] Ortografia Y Gramática, https://gramatica.celeberrima.com/dos-puntos-uso-reglas-y-ejemplos/(emphasis in the original) (US-203).

[116] ADVANCED FRENCH GRAMMAR 60 (Cambridge Univ. 1999) (US-106).

[117] The Oxford English Grammar provides the following examples:

> To install the application:
>
> 1. Put the OECD2 compact disc in the CD drive.
> 2. Run Windows.
> 3. Put the floppy disk distributed with the package in your floppy-disk drive.
>
> . . . .
>
> You can choose to pay:
>
> - the whole amount on 3rd May

103. Moreover, in both the English and French texts of Article XXI, there is no colon after the phrase "Nothing in this Agreement shall be construed"/"Aucune disposition du present Accord ne sera interprété" in the chapeau; while in the Spanish text of Article XXI, there is a colon after the chapeau: "No deberá interpretarse ninguna disposición del presente Acuerdo en el sentido de que:". The colon in the Spanish text does not alter the relationship between the chapeau of Article XXI and the subparagraphs (a), (b), and (c): the sentence that begins in the chapeau continues on to the subparagraphs.

104. As the United States explained in detail in the U.S. Response to the Panel's Questions 41 and 42, the inclusion of "relativas" preceded by a comma (and resulting addition of "a las" in subparagraph (iii)) is likely a translation error, resulting from over-reliance on the Spanish translation of the essential security exception in the ITO Charter. The flaws in the Spanish text of Article XXI(b) become especially clear when Article XXI(b)(iii) is examined.

105. The Spanish text of Article XXI(b)(iii) is "No deberá interpretarse ninguna disposición del presente Acuerdo en el sentido de que: . . . b) impida a una parte contratante la adopción de todas las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad, relativas: . . . iii) a las aplicadas en tiempos de guerra o en caso de grave tensión internacional". This text reads as if the action ("medidas") referred to in the chapeau must relate to ("relativas a") *another* set of measures ("las [medidas] aplicadas""), those that are applied in the temporal circumstance set forth in subparagraph (b)(iii). This reference to another set of measures does not appear in either the English or the French texts of Article XXI(b)(iii). For a chart comparing Article XXI(b) of the GATT 1994 in English, French and Spanish, please see Annex 1.

106. The comparison of the Spanish text of Article XXI(b) against the Spanish text of the security exceptions in Article XIVbis(b) of GATS and Article 73(b) of TRIPS supports the understanding that the Spanish text of Article XXI(b) is idiosyncratic. First, the inclusion of "relativas" preceded by a comma appears to be a translation error. In the Spanish Article XIVbis(b) of GATS and Article 73(b) of TRIPS, the word "relativas" is not in the main text (chapeau) but instead appears in the subparagraph endings (i) and (ii) (just as in the English and French). Second, the comma that precedes "relativas" in Article XXI(b) is also absent from the main text in the Spanish Article XIVbis(b) of GATS and Article 73(b) of TRIPS. Third, the "a las" in subparagraph (iii) of Article XXI(b) is also absent from the Spanish GATS and TRIPS texts. For a chart comparing Article XXI(b) of the GATT, Article XIVbis(b) of GATS and Article 73(b) of TRIPS, please see Annex 2.

107. Given this context, the Spanish text of Article XXI(b) should be understood as conveying the same meaning as the Spanish Article XIVbis(b) of GATS and Article 73(b) of TRIPS. There is no reason to consider that these GATT 1994, GATS, and TRIPS exceptions, that are written almost identically in three languages, were meant to be understood according to one, slightly different language version of one agreement. Rather, it is logical not to attach a difference in

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- two instalments on 3rd May and 3rd November
- eight monthly instalments from 3rd May to 3rd November . . .

THE OXFORD ENGLISH GRAMMAR 524-526 (Sydney Grenbaum ed., Oxford Univ. Press, 1996) (US-93).

meaning to the inclusion of a comma, placement of "relativas", and addition of the confusing "a las" in the Spanish text of the GATT Article XXI(b)(iii).

108. While Norway points to the French version of Article XXI(b) in support of its argument, noting that the feminine plural word "appliquées" can only be linked to the word "mesures" in the chapeau, the French version in fact supports the U.S. interpretation of Article XXI(b). As the United States explained in its Response to the Panel's Question 41, the ordinary meaning of the English text of Article XXI(b) establishes that the subject matters in subparagraphs (i) and (ii) modify "its essential security interests" while the temporal limitation in subparagraph (iii) relates to "action." As the United States explained in Section II.B.2 of this submission, English grammar dictates such a reading. Similarly, the ordinary meaning of the French text of Article XXI(b) establishes that the subject matters in subparagraphs (i) and (ii) modify "des intérêts essentiels de sa sécurité" while the temporal limitation in subparagraph (iii) relates to "action"/ "mesures". Therefore, the English and French versions are in accord.

109. In contrast, under the Spanish text of Article XXI(b), each subparagraph modifies "action"/"medidas" and cannot modify "intereses", because the feminine plural term "relativas" cannot modify the masculine plural noun "intereses". This reveals a difference in meaning between the English and French versions on one hand and the Spanish version on the other. Under Article 33 of the VCLT, this means that the interpreter – rather than interpreting the English and French according to the grammar and structure of the Spanish and thereby interpreting them *in*consistently with their ordinary meaning, as Norway would have the Panel do – should adopt a meaning that best reconciles the texts, as explained in Section II.D.2.

110. Norway also argues that the Spanish terms "los intereses esenciales de su seguridad" and the French terms "des intérêts essentiels de sa sécurité" can be translated to "essential interests regarding its security".[118] According to Norway, the subject matter of the phrase is therefore the noun "security" and "[t]hus, the provision addresses actions necessary to protect a state's essential interests regarding its security."[119] Norway concludes that "[t]he focus on the word 'security' – and not simply 'security interests' – highlights that Article XXI(b) is concerned with situations or circumstances that implicate the 'security' of the state, i.e., its stability and functioning, including the basic functioning of its law and public order."[120]

111. Norway's argument comes to nothing. The distinction that Norway draws between (1) "word 'security' merely qualifying the type of 'interests' at stake" and (2) "focus on the word 'security'" is artificial and has no significance – legal or otherwise – on how the phrase is understood. The term "security" refers to "[t]he condition of being protected from or not

[118] Norway's Response to the Panel's Question 42, para. 378.

[119] Norway's Response to the Panel's Question 42, para. 379. As an initial matter, the United States disagrees with the translation of "de su seguridad" or "de sa sécurité" as "*regarding* its security", as the more accurate translation is "*of* its security". The preposition "de" can be translated as "of". The Oxford Spanish Dictionary translates the preposition "de" as "en relaciones de pertenencia, posesión" and provides the following examples: "**es un amigo ~ mi hijo** a friend of my son's" "**es un amigo ~ la familia** he's a friend of the family *o* a family friend". *The Oxford Spanish Dictionary*, 2nd edn rev., (Oxford University Press, 2001), at 218 (US-204).

[120] Norway's Response to the Panel's Question 42, para. 378.

exposed to danger."[121] As this definition indicates, the term "security" is broad. Norway's narrow interpretation of the term "security" ("i.e., its stability and functioning, including the basic functioning of its law and public order") is not supported by the text of Article XXI(b) of the GATT 1994 or the dictionary definition of the term "security". Rather than interpreting the text of Article XXI(b) in accordance with its ordinary meaning, Norway appears to be interpreting the text to fit its desired outcome.

112. Furthermore – similar to its approach to the phrase "other emergency in international relations", as discussed in Section II.B – Norway is reading into the term "security" the language reflected in the Agreement on the European Economic Area (EEA), to which Norway is a party.[122] The relevant EEA provision refers to "serious internal disturbances affecting the **maintenance of law and order**", but this language does not appear in Article XXI. The Panel's task in this dispute, however, is to interpret the terms of Article XXI(b) of the GATT 1994 in accordance with the customary rules of interpretation; it is not tasked with importing into Article XXI certain text and concepts existing in some other treaty the complainant has otherwise agreed to. In fact, the "maintenance of law and order" language in the EEA's security provision highlights how the provision could have been written if the drafters intended for the security exception in the GATT 1994 to have the meaning that Norway proposes.

2. Reconciling the English, Spanish and French Versions of Article XXI(b) Leads To An Interpretation That Is Fundamentally The Same As That Presented By The United States

113. Norway's application of Article 33 of the VCLT to the text of Article XXI(b) is flawed. In addressing Article 33 of the VCLT, Norway argues that "the application of the rules of treaty interpretation in Articles 31 and 32 gives rise to a harmonious meaning across the different linguistic versions".[123] In other words, Norway discerns no difference in meaning between the English, French and Spanish texts. Even if there is a difference ("even if the presumption were rebutted"), Norway argues that its own interpretation best reconciles the authentic texts.[124] It explains, "Norway's interpretation that Article XXI(b) is subject to a panel's objective assessment promotes the object and purpose of the GATT 1994, by preventing unilateral circumvention of GATT 1994 obligations through mere unsubstantiated assertion."[125]

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[121] *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2754 (US-22).

[122] The Agreement on the European Economic Area (EEA) provides:

> Nothing in this Agreement shall prevent a Contracting Party from taking any measures . . . which it considers essential to its own security in the event of serious internal disturbances affecting the **maintenance of law and order**, in time of war or serious international tension constituting threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security[122]

See Agreement on the European Economic Area, Art. 123 (emphases added) (US-221).

[123] Norway's Response to the Panel's Question 43, para. 391.

[124] Norway's Response to the Panel's Question 43(c), para. 392.

[125] Norway's Response to the Panel's Question 43(c), para. 392.

114. Norway, however, fails to explain how its interpretation best reconciles the text, or even how its interpretation addresses the differences that emerge from a comparison of the texts. The Panel may look to the object and purpose of the GATT 1994 for purposes of understanding the ordinary meaning of the terms of the treaty, in context and *in light of* this object and purpose. The object and purpose of a treaty cannot serve to alter the ordinary meaning of the terms of its provisions. Far from reconciling the textual differences between the three texts, Norway's approach would simply ignore them.

115. As the United States explained above, there is a difference in meaning between the English and French texts of Article XXI(b) on one hand, and the Spanish text of Article XXI(b) on the other hand. Norway seems to recognize this difference—stemming from the fact that "relativas" cannot modify "intereses". It, however, rejects the ordinary meaning of the English text of Article XXI(b) offered by the United States, without reference to any relevant English linguistic sources, and urges the Panel to read the English text of Article XXI(b) to conform to the Spanish text of Article XXI(b).

116. Article 33(4) of the VCLT provides that "when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning that best reconciles the texts, having regarding to the object and purpose of the treaty, shall be adopted."[126] In applying this rule, the Appellate Body has found that it is not appropriate to use two language versions to adopt a meaning different from the ordinary meaning of the third language version rather than reconciling them.[127]

117. This approach is consistent with the ILC's commentary: "The existence of more than one authentic text clearly introduces a new element—comparison of the texts—into the interpretation of the treaty. But it does not involve a different system of interpretation."[128] The ILC instructed: "the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the term by applying the standard rules of interpretation of treaties."[129] It further explained:

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[126] Vienna Convention, Article 33(4).

[127] Finding error in the panel's interpretation of one provision, the Appellate Body in *Chile – Price Bands System* stated:

> Indeed, the Panel came to this conclusion by interpreting the French and Spanish versions of the term 'ordinary customs duty' to mean something *different* from the ordinary meaning of the English version of that term. It is difficult to see how, in doing so, the Panel took into account the rule of interpretation codified in Article 33(4) of the Vienna Convention whereby 'when a comparison of the authentic texts discloses a difference of meaning …, the meaning which best *reconciles* the texts…shall be adopted.'

Chile – Price Band System (AB), para. 271 (emphasis in the report).

[128] *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 225 (emphasis added)(US-23).

[129] *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 225 (US-23).

> The plurilingual form of the treaty *does not justify the interpreter in simply preferring one text to another* and discarding the normal means of resolving an ambiguity or obscurity on the basis of the objects and purposes of the treaty, travaux preparatoires, the surrounding circumstances, subsequent practice, etc. On the contrary, *the equality of the texts means that every reasonable effort should first be made to reconcile the texts* and to ascertain the intention of the parties by recourse to the normal means of interpretation.[130]

118. Article 33(4) does not say, as Norway suggests, that a panel shall adopt the meaning which best reconciles the text only when the "same meaning presumption" is rebutted.[131] The fact that the texts are presumed to have the same meaning in each authentic text[132] does not mean that the presumption needs to be rebutted before an interpreter seeks to reconcile the texts. Rather, in reconciling the texts, an interpreter is acting consistently with this presumption. In addressing the VCLT provision[133] which at the time combined Article 33(3) and Article 33(4), the ILC explained:

> (8) Paragraph 3 therefore provides, first, that the terms of a treaty are presumed to have the same meaning in each authentic text. Then it adds that—apart from cases where the parties have agreed upon the priority of a particular text—in the event of a divergence between authentic texts a meaning which so far as possible reconciles the different texts shall be adopted.[134]

119. As the United States explained in its Response to the Panel's Question 43, the most appropriate way to reconcile the textual differences between the English and French subparagraph texts on one hand, and the Spanish subparagraph text on the other—specifically the different relationship between the subparagraph endings and the chapeau terms—is to interpret Article XXI(b) such that all three subparagraph endings refer back to "any action which it considers". This reading is consistent with the Spanish text; and also – while less in line with rules of grammar and conventions – is a reading permitted by the English and French texts.

120. This reading of the text of the subparagraphs does not alter the plain meaning of the chapeau or the overall structure of Article XXI(b), however. The terms of the provision still

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[130] *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 225 (emphasis added) (US-23).

[131] Norway's Response to the Panel's Question 43(c), para. 387.

[132] Vienna Convention, Article 33(3).

[133] This provision provided: "The terms of the treaty are presumed to have the same meaning in each authentic text. Except in the case mentioned in paragraph 1, when a comparison of the texts discloses a difference of meaning, which the application of articles 27 and 28 does not remove, a meaning which as far as possible reconciles the texts shall be adopted."

[134] *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 225 (US-23).

form a single relative clause that begins in the chapeau and ends with each subparagraph, and therefore the phrase "which it considers" still modifies the entirety of the chapeau and the subparagraph endings. Thus, an invocation of Article XXI(b) would reflect that a Member considers two elements to exist with respect to its action. First, the action is one "which it considers necessary for the protection of its essential security interests". Second, the action is one "which it considers" relates to the subject matters in subparagraph endings (i) or (ii) or "taken in time of war or other emergency in international relations" as set forth in subparagraph ending (iii). Therefore, reconciling the three authentic texts leads to the same fundamental meaning the United States has presented, committing the determination of whether an action is necessary for the protection of a Member's essential security interests in the relevant circumstances to the judgment of that Member alone.

III. The U.S. Interpretation is Consistent with the DSU and the Panel's Terms of Reference

121. As the United States has described in Section II, the United States has invoked Article XXI(b) with respect to all of complainant's claims. As interpreted according to the customary rules of interpretation, Article XXI(b) is self-judging. In light of the self-judging nature of Article XXI(b), the sole finding that the Panel can make in this dispute is to note the U.S. invocation of that provision.

122. As discussed in Section III.A. below, this result is consistent with the Panel's role under the DSU, including the Panel's function to make an "objective assessment" of the matter before it. Indeed, it would not be consistent with making an "objective assessment" to read Article XXI contrary to its text as permitting a review of the action a Member considers necessary for the protection of its essential security interests. As discussed in Section III.B, the complainant's own arguments demonstrate that the Panel cannot test a Member's determination under Article XXI(b) without substituting the Panel's judgment for that of the Member.

A. The U.S. Interpretation is Consistent with the Panel's Role under the DSU, including the Panel's Function to Make an "Objective Assessment"

123. Norway argues that the U.S. interpretation of Article XXI(b) as self-judging is not consistent with the function of the Panel to make "an objective assessment of the matter before it".[135] Contrary to Norway's argument, the U.S. interpretation is consistent with the Panel's terms of reference and the DSU, including DSU Article 11. Norway simply asserts that "objective assessment" requires some degree of substantive review, but an "objective assessment" of Article XXI(b) demonstrates that this provision is self-judging, and drawing this conclusion is necessarily consistent with the Panel fulfilling the function assigned to it.

124. Under DSU Article 7.1, the standard terms of reference, the DSB has tasked the Panel: (1) "[t]o *examine*" the matter – that is, to "[i]nvestigate the nature, condition or qualities of (something) by close inspection or tests"[136]; and (2) to "make such *findings* as will assist the

[135] Norway's Response to the Panel's Question 38, para. 333.

[136] *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 870 (US-86).

DSB in making the recommendations or in giving the rulings provided for" in the covered agreement.

125. DSU Article 11 confirms this dual function of a panel. Article 11 of the DSU states that the "function of panels" is to make "an objective *assessment* of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements," and "such other *findings* as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

126. In this dispute, the Panel has been tasked by the DSB to examine the matter and to make such findings as may lead to a recommendation to bring a WTO-inconsistent measure into conformity with the WTO Agreement. Article 11 reflects this function of examination and making such findings. To make the "objective assessment" that may lead a panel to make findings to assist the DSB to make recommendations, the Panel is to make "an objective assessment of the facts of the case" and "of the applicability of and conformity with the relevant covered agreements". In the context of this dispute, such an assessment begins with interpreting Article XXI(b) in accordance with the customary rules of interpretation. And that objective assessment of Article XXI(b) leads to the understanding that the sole finding that the Panel may make is to recognize the Member's invocation of Article XXI(b).

127. The Panel objectively assesses the facts of the case by noting that the responding Member has invoked Article XXI(b). The Panel objectively assesses the applicability of and conformity with the relevant covered agreements by first interpreting Article XXI(b) in accordance with the customary rules of interpretation, and – once it has done so and determined Article XXI(b) to be self- judging – finding Article XXI(b) applicable. Nothing in the DSU – including Article 11 of the DSU – requires otherwise.

128. This result is consistent with DSU Article 19. Article 19.1 provides that "recommendations" are issued "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement" and are recommendations "that the Member concerned bring the measure into conformity with the agreement." DSU Article 19.2 clarifies that "in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreement."

129. Invocation of Article XXI(b) means that an essential security action cannot be found by a panel or the Appellate Body to be inconsistent with a covered agreement. It would diminish a Member's "right" to take action it considers necessary for the protection of its essential security interests if a panel or the Appellate Body purported to find such an action inconsistent with Article XXI(b). Thus, the sole finding that the Panel may make – consistent with its terms of reference and the DSU – is to note in the Panel's report that the United States has invoked its essential security interests. No additional findings concerning the claims raised by the complaining Member in its submissions would be consistent with the DSU, in light of the text of Article XXI(b).

130. In its responses to the Panel's questions, Norway makes much of the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (1979 Understanding) and the 1982 Decision Concerning Article XXI. Norway suggests that in these two documents

"the GATT contracting parties expressed a consensus position that invocations of Article XXI(b) are subject to objective review by a dispute settlement panel."[137] In support of this argument, Norway notes that "[t]he rules and procedures of the Tokyo Round DSU applied to 'any' disputes under the GATT 1947" and that "paragraph 16 of the Tokyo Round DSU required panels to make an 'objective assessment of the matter before it including an objective assessment of the facts of the case and the applicability of and conformity with the General Agreement."[138] Norway points to the 1982 Decision's statement that "all contracting parties retain their full rights" when action is taken under Article XXI, and states that "[t]hese rights necessarily included the right to an 'objective assessment' of the law and facts in disputes under Article XXI(b)."[139]

131. Norway's argument comes to nothing. As the United States explained earlier in this section and in its Oral Opening Statement,[140] the United States does not argue that the Panel should not make an objective assessment of the matter. The Panel should absolutely make an objective assessment of the matter – to examine the matter and to assess the self-judging nature of Article XXI. However, the Panel's ability to make an objective assessment does not convert every element of the Article XXI(b) text into a legal standard against which a measure is to be judged by a panel.

132. Neither the 1979 Understanding nor the 1982 Decision Concerning Article XXI changes this result. In fact, the 1979 Understanding actually argues against Norway's position in this dispute. The provision on "objective assessment" in the 1979 Understanding is essentially identical to DSU Article 11, and as the Agreed Description on the Customary Practice of Contracting Parties in the Field of Dispute Settlement (1979 Understanding, Annex, para. 3) makes clear, "objective assessment" had long been the "customary practice" in dispute settlement.[141] Such customary practice did not change the understanding of Contracting Parties of the self-judging nature of Article XXI. Further, as discussed above in Section II.C.3, Uruguay Round negotiators of the DSU discussed the reviewability of Article XXI, and decided *not* to include in the DSU specific terms that would have diverged from the longstanding interpretation of Article XXI that actions a Member considers necessary to protect its essential security interests are not reviewable.

133. Furthermore, as the United States observed in its First Written submission, the preamble to the 1982 Decision Concerning Article XXI *twice* confirms the self-judging nature of Article XXI. First, the preamble refers to preserving contracting parties' rights "when *they consider*"

[137] Norway's Response to the Panel's Question 70, para. 551.

[138] Norway's Response to the Panel's Question 25, paras. 264-65.

[139] Norway's Response to the Panel's Question 25, para. 267.

[140] Oral Opening Statement of the United States of America (DS552), para. 63.

[141] 1979 Understanding, Annex: Agreed Description on the Customary Practice of Contracting Parties in the Field of Dispute Settlement, para. 3) ("The function of a panel has normally been to review the facts of a case and the applicability of GATT provisions and to arrive at an objective assessment of these matters.").

that security issues are involved,[142] thus mirroring the pivotal self-judging language of Article XXI(b). Second, the preamble cautions that "the *contracting parties* should take into consideration" third-party interests "in taking action in terms of the exceptions provide in Article XXI,"[143] thus acknowledging that it is the *contracting parties* (now Members) who "take into consideration" relevant factors when the Members "tak[e] action in terms of" Article XXI.

134. In fact, the 1982 Decision specifically refers to a Member "taking action in *terms* of the exceptions provided in Article XXI."[144] This reference provides further indication that the CONTRACTING PARTIES did not seek to somehow alter the terms of Article XXI in the 1982 Decision Concerning Article XXI; instead, this language indicates that the CONTRACTING PARTIES intended to reaffirm the self-judging nature of this provision, as established by the ordinary meaning of its terms.

B. Complainant's Interpretation Would Require the Panel To Substitute Its Own Judgment For That of a Responding Member On Matters of Essential Security

135. In Panel Question 45, the Panel has specifically asked Norway, "How can objective assessment of a Member's invocation of Article XXI avoid substituting a panel's judgment for the judgment that is reserved to a Member's discretion?" Norway explains that the panel's objective assessment involves two steps: (1) assessing whether the Member has substantiated, with argument and evidence, its conclusion that the measure falls under one or more of the subparagraphs; and (2) assessing whether the Member has "substantiated, with argument and evidence, a plausible and rational basis for its consideration that the measure is necessary for the protection of its essential security interests."[145] Norway elaborates that the second step includes assessing whether there is a "'clear and objective relationship' between the 'action' and the protection of the articulated essential security interest."[146] According to Norway, a panel making such an assessment would not substitute its judgment for the judgment that is reserved to a Member's discretion because a panel "does not express its own view, or make its own judgment, as to whether the respondent's measure reflects, in an abstract or general sense, a good or bad, correct or incorrect, policy choice."[147]

136. Despite Norway's view that the Panel's assessment would not involve a judgment as to whether a Member's policy choice was "good or bad," Norway's interpretation necessarily requires a panel to judge, for itself, whether a particular circumstance warrants a particular response. A panel that determines that a challenged action is not "taken in time of war or other

[142] Decision Concerning Article XXI of The General Agreement, L/5426 (Dec. 2, 1982), at 1 (emphasis added) (US-62).

[143] Decision Concerning Article XXI of The General Agreement, L/5426 (Dec. 2, 1982), at 1 (emphasis added) (US-62).

[144] Decision Concerning Article XXI of The General Agreement, L/5426 (Dec. 2, 1982), at 1 (emphasis added) (US-62).

[145] Norway's Response to the Panel's Question 45, para. 401.

[146] Norway's Response to the Panel's Question 45, para. 408.

[147] Norway's Response to the Panel's Question 45, para. 403.

emergency in international relations" is making a judgment about what constitutes, for that Member, a war or an "emergency in international relations." Even more starkly, a panel that determines, as Norway requests this Panel to do, that a Member's determination is not "plausible" – that the Member could not plausibly consider its action necessary for the protection of its essential security interests based on evidence available to it is not – is expressly substituting its judgment for that of the Member. The requirement of Article XXI(b) comprises just that – that the *Member* taking the action "consider" it to be necessary. A panel could not make a judgment on this issue without determining, based on the panel's own review of the evidence, what constitutes that Member's "essential security interests" and what the Panel would consider "necessary for the protection of [those] interests".

137. Given the sensitive nature of essential security matters, Norway's proposal that the Panel assess whether there is a "clear and objective relationship" between the "action" and the "interest" is untenable. The proposal necessarily puts the Panel in a position where it must undertake the type of analysis – for example, of the political and security relationships between Members, of the geopolitical situation involved, and other issues – a trade expert sitting on a WTO panel is not suited to undertake. Norway's response to the Panel's question demonstrates that – contrary to its assertions—it is not possible for the Panel to test the U.S. determination under Article XXI(b) without substituting its judgment for that of the United States.

138. The approach suggested by the United States, consistent with the long-standing approach to Article XXI in the GATT and WTO, does permit the Panel to objectively assess the matter before it without substituting its judgment on a Member's essential security interests for the judgment of that Member. The Panel can objectively assess the facts of the case by noting that the Member has invoked Article XXI(b). The Panel can objectively assess the applicability of and conformity with the relevant covered agreements by first interpreting Article XXI(b) in accordance with the customary rules of interpretation, and – once it determines Article XXI(b) is self-judging – finding Article XXI(b) applicable. And the Panel can then assess that there are no findings that can be made in relation to the challenged essential security action that could lead the DSB to make a recommendation. The approach advanced by the United States is the only way to fulfil the Panel's role under the DSU – consistent with its terms of reference – without substituting its judgment for that of the United States, inconsistent with the text of Article XXI(b).

IV. The Measures at Issue are Not Safeguards Measures and the Agreement on Safeguards Does Not Apply

139. Article XIX of GATT 1994 establishes a right for a Member to deviate from its WTO obligations under certain conditions. In order to exercise that right to apply a safeguard measure, a Member must comply with those conditions precedent set out in Article XIX. One of those key conditions precedent 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.[148] The measures at issue in this dispute are not safeguard measures because the United States has not invoked Article XIX as the legal basis for this measure; instead, the United States

[148] *See* U.S. Response to the Panel's Question 5.

has (explicitly and repeatedly) invoked Article XXI. Accordingly, the safeguards disciplines of the GATT 1994 and Agreement on Safeguards do not apply.

140. Norway has essentially presented no new arguments beyond those already argued – and rebutted by the United States – at the first Panel meeting. Relying on the Appellate Body's report in *Indonesia – Iron or Steel Products*, Norway argues – incorrectly – that the measures at issue here are safeguard measures because they have the two "constituent features" identified in that report, failing to recognize even that this report did not purport to identify all of the conditions precedent for application of a safeguard measure.

141. Norway denies that invocation through notice is a necessary precondition to a Member's exercise of its right to take action under Article XIX,[149] and suggests that a contrary conclusion would "allow a WTO Member to choose for itself which WTO obligations apply to its conduct"[150] – erroneously ignoring that the Member remains subject to WTO obligations applicable to that action, or to potential consequences for invocation of a right such as Article XXI. Norway also suggests – incorrectly – that the U.S. has acted pursuant to both Article XIX and Article XXI in imposing the measures at issue in this dispute. [151]

142. As an initial matter, the Appellate Body's report in *Indonesia – Iron or Steel Products* does not even purport to identify features of safeguard measures that, by themselves, are sufficient to establish the existence of safeguard measures. Instead, the Appellate Body identified "certain constituent features, *absent which* [a measure] could not be considered a safeguard measure."[152]

143. In addition, Norway is wrong to deny the importance of invocation as a condition precedent to the application of safeguards disciplines. As discussed in Section IV.A, the text of Article XIX, as interpreted according to the customary rules of interpretation, establishes that invocation through written notice is a fundamental condition for a Member's safeguards action and the consequent application of safeguards rules to that action. This conclusion is also supported by the context provided by the Agreement on Safeguards, as well as the object and purpose of the Agreement on Safeguards and the negotiating history of that agreement, as described in Section IV.B.

144. As this discussion establishes, permitting a Member to exercise a right through invocation does not, as Norway suggests, permit WTO Members to choose which WTO obligations apply to their conduct. Instead, this structure is specifically provided for in Article XIX – as discussed by the drafters of that provision – and resembles a structure employed in

[149] Norway's Response to the Panel's Question 9(a), 108 ("[A] Member's notification of a measure as a safeguard is not a legal condition – or constituent feature – of a safeguard measure.").

[150] Norway's Response to the Panel's Question 5, para. 71.

[151] Norway's Response to the Panel's Question 20(d), para. 232 ("[O]n the US view, [Article 11.1(c)] excuses a sub category of safeguard measures from the safeguard disciplines, namely, those that are sought, taken, or maintained pursuant to Article XIX and some other GATT 1994 provision.").

[152] *Indonesia – Iron or Steel Products (AB)*, para. 5.60 (emphasis added).

numerous other WTO provisions, leaving to a Member the decision whether to seek to exercise a right, and setting conditions on that exercise.

145. Norway is also incorrect to suggest that the measures at issue were taken pursuant to Article XIX and Article XXI. The measures at issue are national security measures that were sought and taken pursuant to Article XXI, as the United States has stated in numerous communications to WTO Members.[153] The United States has *not* invoked Article XIX as the legal basis of the measures at issue in this dispute and accordingly, the United States is not seeking or taking action pursuant to Article XIX.

146. The Agreement on Safeguards reflects precisely this understanding that it is for a Member to decide to invoke its right to take an action under a particular provision. As established in Article 11.1(c) of the Agreement on Safeguards, a Member may decide to seek, take, or maintain a measure pursuant to other provisions of the GATT 1994, such as Article XXI, and in such a case, the Agreement on Safeguards does not apply. As set forth in Section IV.B, this conclusion is supported by the terms of Article 11.1(c), as well as the object and purpose of the Agreement on Safeguards and the negotiating history of Article 11.1(c)..

A. Article XIX Makes Clear That Invocation Through Notice is a Fundamental, Condition Precedent For a Member's Exercise of its Right to Take Action under Article XIX and the Application of Safeguards Rules to that Action

147. Interpreting Article XIX according to the customary rules of interpretation makes clear that invocation is a fundamental, condition precedent for a Member's exercise of its right to take action under that provision and for the application of safeguards rules to that action. The invocation requirement in Article XIX to apply a safeguard measure stems from the provisions of Article XIX requiring a Member to provide notice of a proposed action. Absent this invocation, a Member is not free to exercise its right to take safeguard measure and that measure cannot fall under the WTO's safeguard disciplines. This interpretation is clear from the text of Article XIX.

148. Norway attempts to argue that invocation is not required, relying on the Appellate Body's report in *Indonesia – Iron or Steel Products*, which found that "in order to constitute one of the 'measures provided for in Article XIX', a measure must present certain constituent features, absent which it could not be considered a safeguard measure."[154]

149. In Norway's view, "[b]esides the two features identified by the Appellate Body, the wording of these provisions does not provide for additional "constituent features" of a

[153] *See* U.S. Response to the Panel's Question 5(b)-(d) (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)).

[154] *Indonesia – Iron or Steel Products (AB)*, para. 5.60.

safeguard measure," and therefore, "the two constituent features are necessary and sufficient for the *Safeguards Agreement* to apply."[155] Norway acknowledges that "Article XIX of the GATT 1994 contains other elements in addition to the two constituent features identified by the Appellate Body,"[156] but rejects the notion that invocation through notice as set forth in Article XIX:2 is a necessary precondition for a Member's exercise of its right to take action under Article XIX and the application of safeguards disciplines to that action.

150. As an initial matter, contrary to complainant's representations, the Appellate Body's report in *Indonesia – Iron or Steel Products* does not support the assertion that the two "constituent features" named there are, by themselves, sufficient to establish the existence of a safeguard measure. Rather, the Appellate Body noted that "to constitute one of the 'measures provided for in Article XIX', a measure must present certain constituent features, *absent which* it could not be considered a safeguard measure."[157] In other words, the Appellate Body's reasoning only identifies certain "necessary" features.[158] Importantly, the Appellate Body did *not* say that a measure presenting both (to use the terms used by the Appellate Body) "constituent features" automatically or necessarily qualifies as a safeguard measure. Indeed, by recognizing that "whether a particular measure constitutes a safeguard measure for purposes of WTO law can be determined only on a case-by-case basis,"[159] the Appellate Body alluded to *other* conditions that might need to be met.

151. The Appellate Body in *Indonesia – Iron or Steel Products* did not discuss, for example, the GATT 1947 Working Party report in *Fur Felt Hats*, and the Working Party's reasoning in that report that "*three sets of conditions* have to be fulfilled" to meet the requirements of Article XIX.[160] As discussed further detail in Section IV.A.4, among the "three sets of conditions" discussed in this GATT 1947 Working Party report was the condition that:

> the contracting party taking action under Article XIX **must give notice** in writing to the CONTRACTING PARTIES **before taking action**. It must also give an opportunity to contracting parties substantially interested and to the Contracting Parties to consult with it. As a rule, consultation should take place before the action is taken, but, in critical circumstances, consultation may take place immediately after the measure is taken provisionally.[161]

[155] Norway's Response to the Panel's Question 5(f), para. 63.

[156] Norway's Response to the Panel's Question 5(f), para. 75 note 47.

[157] *Indonesia – Iron or Steel Products (AB)*, para. 5.60 (emphasis added).

[158] *See also* The New Shorter Oxford English Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, Oxford, 1993), at 488 (defining "constituent" as "A constituent part (of); an element of a complex whole") (US-205).

[159] *Indonesia – Iron or Steel Products (AB)*, para. 5.57.

[160] *US – Fur Felt Hats (GATT Panel)*, para 4 (emphasis added) (US-208).

[161] *US – Fur Felt Hats (GATT Panel)*, para 4 (emphasis added) (US-208).

152. With this statement, the *Fur Felt Hats* Working Party report confirms the U.S. understanding, based on the ordinary meaning of the terms of Article XIX, that invocation of Article XIX through notice is a precondition to applying a safeguard measure.

153. In addition, the complainant's proffered interpretation of what constitutes a safeguard measure is not consistent with Article XIX as interpreted based on customary rules of interpretation. As discussed in Section IV.A.1 below, the text of Article XIX, including the title of that provision and each paragraph, leads to the conclusion that notice is a condition precedent to taking action under Article XIX. The context of Article XIX also supports this interpretation, and reveals that numerous other WTO provisions contemplate a Member exercising a right through invocation and contain structural similarities to Article XIX, as discussed in Section IV.A.2. The object and purpose of the GATT 1994, as discussed in Section IV.A.3, also supports that invocation is a condition precedent for a Member's exercise of its right to take action under Article XIX. The adopted GATT 1947 Working Party Report – in the 1950 *Fur Felt Hats* dispute also confirms this understanding, as discussed in Section IV.A.4. Finally, although not necessary in this dispute, as discussed in Section IV.A.5, the drafting history of Article XIX confirms this interpretation of Article XIX.

1. The Ordinary Meaning of Article XIX Establishes That Invocation Is A Necessary Precondition for a Member's exercise of its right to take action under Article XIX and To The Application Of Safeguards Rules to that Action

154. In order to exercise that right to apply a safeguard measure under Article XIX, a Member must comply with those conditions precedent set out in Article XIX. That invocation through notice of a proposed measure to other Members is a necessary, condition precedent is established by the ordinary meaning of the terms of Article XIX, including the title of Article XIX and each of its paragraphs.

a. The Terms of Article XIX:2 Support This Interpretation

155. The text of Article XIX:2 explicitly sets out a requirement to invoke the provision through notice as a condition precedent to action under Article XIX:1. The first sentence of Article XIX:2 provides:

> **Before** any contracting party shall **take action pursuant to** the provisions of paragraph 1 of this Article, it shall **give notice in writing** to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the **proposed** action. (emphasis added)

156. The ordinary meaning of the terms in the first sentence of Article XIX:2 show that invocation is a precondition to the exercise of a Member's right to take safeguard action. The

term "before" is defined as "preceding an event."[162] The term "pursuant" means "in accordance with".[163] And the term "propose" means to "[p]ut forward or present for consideration" or "discussion".[164] Thus, invocation through a notice from the Member *proposing* to take action must "precede" (come before) action "in accordance with" (pursuant to) paragraph 1. Without such notice, a Member is not seeking legal authority pursuant to Article XIX to suspend an obligation or to withdraw or modify a concession and may not take the proposed action "in accordance with" that provision.

157. The third sentence of Article XIX:2 also supports the interpretation that invocation is a condition precedent for action under Article XIX. It states:

> In critical circumstances, where delay would cause damage which it would be difficult to repair, *action* under paragraph 1 of this Article *may be taken* provisionally *without prior consultation*, on the condition that consultation shall be effected immediately after taking such action.

158. With this text, the third sentence of Article XIX:2 provides a *limited exception* to the consultation requirement. Notably, this exception does *not* permit Members to take action without providing "notice." This exception to the consultation requirement – but not the notice requirement – establishes that Article XIX requires a Member to invoke through notice its right to take a safeguard action as a condition precedent to action under that provision.

b. The Terms of Article XIX:1 Support This Interpretation

159. That invocation is a precondition for a Member's exercise of its right to take action under Article XIX and to the consequent application of safeguards rules to that action is also confirmed by paragraph 1 of Article XIX.[165] Article XIX:1(a) establishes a right – the right to suspend obligations or modify or withdraw concessions – in the sense that Article XIX:1 permits a Member, when it has invoked this provision and under certain conditions, to take action that would otherwise be inconsistent with its WTO obligations.

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[162] *See* The New Shorter Oxford English Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, Oxford, 1993), at 205 (defining "before" as "Earlier in time; previously" and "preceding an event") (US-205)

[163] *See* The New Shorter Oxford English Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, Oxford, 1993), at 2,422 (defining the term "pursuant" as "in accordance with") (US-86).

[164] *See* The New Shorter Oxford English Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, Oxford, 1993), at 2,381 (defining the term "propose" as "Put forward or present for consideration, discussion") (US-205).

[165] As this provision states in full:

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

160. Article XIX:1(a) first sets out the following conditions that, if present, would give a Member the right to apply a safeguard: "[i]f, as a result of unforeseen developments and the effect of the obligations incurred by a contracting party under this Agreement . . . any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products."

161. Article XIX:1(a) also establishes that, where those conditions are met, the Member has the right ("shall be free") to apply a safeguard, subject to certain requirements. Namely, Article XIX:1(a) provides that the Member shall be free "to suspend the obligation in whole or in part or to withdraw or modify the [GATT] concession" with "respect" to the "like or directly competitive product" that meets the circumstances and conditions of the first part of Article XIX:1(a), and to "the extent and for such time as may be necessary to prevent or remedy such injury".

162. By setting out conditions that, when met, permit a Member to apply a safeguard, Article XIX:1(a) supports interpreting Article XIX to require invocation as a necessary, condition precedent for a Member's exercise of its right to take action under Article XIX and to the application of safeguards rules to that action. That is, a Member determines that developments are "unforeseen" and whether importation is occurring under "conditions as to cause or threaten serious injury" and – as set forth in Article XIX:2, discussed in Section IV.A.1.c – invokes its right to take action under Article XIX. Accordingly, the existence of these conditions supports interpreting Article XIX to require invocation through notice as a condition precedent for taking action under Article XIX.

c. The Terms of Article XIX:3 Support This Interpretation

163. The terms of Article XIX:3 of the GATT 1994 also show that invocation is a precondition for a Member's exercise of its right to take action under Article XIX and to the application of safeguards rules to that action. As Article XIX:3(a) provides:

> If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which **proposes to take or continue** the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which **written notice** of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1(b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

164. Under this provision, if the consultations envisioned by Article XIX:2 fail to address the concerns of affected Members, affected Members can suspend substantially equivalent concessions or other obligations. These envisioned consultations are triggered by the invocation and notice provision under Article XIX:2, however, underscoring that invocation through notice

is a condition precedent to action under Article XIX. Put in the terms of Article XIX:3(a), *without notice* of a proposed action, a Member "which proposes to take or continue the action shall [*not*] be free to do so." That is, *without invocation*, a Member cannot take (and has not taken) action pursuant to Article XIX.

165. Accordingly, the text of Article XIX – including the title and all three paragraphs – clearly provides that, absent invocation of the right to take action pursuant to Article XIX of the GATT, a measure cannot be characterized as a safeguard measure and the safeguards disciplines do not apply.

d. The Title of Article XIX Supports This Interpretation

166. The title of Article XIX, "Emergency Action on Imports of Particular Products," supports the conclusion that invocation is a condition precedent to taking action under Article XIX. In particular, the words "Emergency *Action on Imports* of Particular Products" indicate that Article XIX sets out rules for how a Member may choose to take "action" that would otherwise be inconsistent with obligations under the GATT 1994 affecting imports of particular products. Notably, the title does *not* focus on any particular type of measure or refer to any type of obligation.

167. Use of the word "emergency" in the title of Article XIX supports interpreting Article XIX to require invocation by the acting Member as a condition precedent to action under that provision. An "emergency" can be understood as a situation "that arises unexpectedly and requires urgent action."[166] Only the Member in question will know whether a situation has arisen that it did not expect and whether that Member considers the situation to require urgent action be taken under Article XIX. This circumstance is reflected in the text of Article XIX that requires affirmative invocation through notification to other Members of a proposed action under Article XIX in response to that unexpected situation.

2. The Context of Article XIX Supports This Interpretation

168. The context provided by other provisions of the WTO Agreement supports interpreting Article XIX as establishing a right – the right to impose a safeguard measure – that must be invoked in order for the safeguards disciplines to apply. Although the requirements vary, numerous other WTO provisions contemplate a Member exercising a right through invocation and contain structural features that are similar to Article XIX. For example:

- *GATT 1994 Article XXVIII* permits Members – when certain conditions are met – to modify or withdraw tariff concessions reflected in their Schedules of Concessions through negotiation and agreement with certain other Members. The structures of Article XXVIII and Article XIX are similar in that they both allow a Member to exercise a right after

[166] *See The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 806 (defining "emergency" as "1 A situation, esp. of danger or conflict, that arises unexpectedly and requires urgent action") (US-86).

invoking the provision to propose action.[167]. Also like Article XIX, the proposed modification or withdrawal under Article XXVIII triggers discussions between the invoking Member and certain other Members.[168]

- *GATT 1994 Article XXIV* states that, if, in the formation of a customs union or a free-trade area, a Member proposes to increase a duty rate above the bound rate, the renegotiation procedures in Article XXVIII shall apply.[169] Thus, a Member seeking to exercise its right under Article XXIV must follow the same procedures detailed above with respect to Article XXVIII and, as such, the parallels to Article XIX are equally applicable.

- *GATT 1994 Article XVIII* permits certain developing Members to renegotiate tariff concessions (Article XVIII:A) or to implement an otherwise inconsistent measure in order to promote the establishment of a particular domestic industry (Article XVIII:C). Subject to certain requirements, Article XVIII provides that qualifying developing Members seeking recourse to these provisions "**shall be free** to deviate temporarily from the provisions of the other Articles of this Agreement."[170] Both Sections A and C require the Member seeking modification to invoke these provisions by notifying Members,[171] and in certain

[167] *See* Article XXVIII:3(a) (authorizing a Member proposing to "modify or withdraw" a tariff concession to implement the proposed modification even if no agreement is reached between the importing Member and the affected Member); Article XIX:3(a) (allowing an importing Member proposing to take a safeguard measure to implement the proposed measure even if no agreement is reached between the importing Member and the affected Members).

[168] *See* GATT 1994 Art. XIX:2 (providing that the invoking Member "shall afford the [Members] and those [Members] having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action"); GATT 1994 Art. XXVIII:1 (providing for "negotiation and agreement" with a defined set of Members and "consultation" with other substantially interested Members).

[169] GATT 1994 Art. XXIV:6 (If, in the formation of a customs union or a free-trade area, a Member "...proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reduction brought about in the corresponding duty of the other constituents of the union."). *See also Understanding on the Interpretation of Article XXIV of the GATT 1994* (affirming that the procedure must be commenced before the proposed modification or withdrawal).

[170] GATT 1994 Art. XVII:4(a) (emphasis added).

[171] GATT 1994 Art. XVIII:7(a) (providing that the Member seeking modification under Section A "shall notify [Members]" of a proposed modification or withdrawal); GATT 1994, Article XVIII:14 (providing that a Member seeking modification under Section C "shall notify [Members] of the special difficulties which it meets …and shall indicate the specific measure affecting imports which it proposes to introduce in order to remedy these difficulties").

circumstances permit implementation of the proposed measure even absent agreement.[172] Affected Members may withdraw substantially equivalent concessions.[173]

- *GATT 1994 Article II:5* provides for consultations and negotiations for compensatory adjustment in the event that a domestic court ruling on classification does not accord the treatment required by a negotiated concession. Although renegotiation takes place *after* the change resulting from a domestic ruling, Article II:5 must still be invoked by the Member making the ruling, who "declares that such treatment cannot be accorded" because of the domestic ruling. Like Article XIX, Article II:5 contemplates negotiations with affected Members for compensatory adjustment.

- *GATT 1994 Article XXVII* permits withholding or withdrawal of a concession made during negotiations with respect to a government which has not become a Member or has ceased to be a Member of the GATT 1994. Like Article XIX, Article XXVII requires invocation by a Member through notice to and consultations with concerned Members upon request.[174]

- *GATS Article XXI* is the services equivalent of GATT 1994 Article XXVIII, permitting modification or withdrawal of a commitment in a Member's Schedule. GATS Article XXI affords a Member the right to modify or withdraw a commitment at any time in accordance with certain time frames and procedures.[175] The modifying Member invokes this provision by "notify[ing] its intent to modify or withdraw" prior to implementation[176] and entering into negotiations for compensation with affected Members upon request.[177]

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[172] Under Section A, even where negotiations do not result in agreement, the Member seeking modification "shall be free" to modify or withdraw concessions where there is a multilateral determination that the compensatory adjustment offered is adequate, or that the Member made every reasonable effort to offer adequate compensation. GATT 1994 Article XVIII:7(a) and (b). Section C also allows the possibility for the modifying Member to introduce the proposed measure where agreement is not reached after informing the Members. GATT 1994 Article XVIII:17.

[173] GATT 1994 Art. XVIII:7(b) and 21. Drafters expressly revised Article XVIII:A to correspond to Article XXVIII:4(d). *GATT Report of the Review Working Party II on Tariffs, Schedules and Customs Administration*, L/329, February 24, 1955, paras. 22-23.

[174] GATT 1994 Art. Article XXVII (stating that "Any [Member] shall at any time be free to withhold or to withdraw in whole or in part any concession…in respect of which such [Member] determines that it was initially negotiated with a government which has not become, or has ceased to be, a [Member]. A [Member] taking such action shall notify the [Members] and, upon request, consult with [Members] which may have a substantial interest in the product concerned.").

[175] GATS Art. XXI:1(a) ("A Member…may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article."). As in the goods context, services schedule modifications are subject to certification procedures. *See Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS) (Modification of Schedules)*, S/L/80, adopted October 29, 1999.

[176] GATS Art. XXI:1(b).

[177] GATS Art. XXI:2(a).

- *Agreement on Agriculture Article 5* sets out a safeguard mechanism for agricultural product. Members have the right to impose an additional duty temporarily, subject to certain requirements.[178] Although Article 5 differs from the safeguard mechanisms in Article XIX in other respects, Article 5 – like Article XIX – contemplates invocation through advance notice in writing and consultations with interested Members.[179]

- *Agreement on Textiles and Clothing Article 6* includes a transitional safeguard mechanism that reflects the same features of invocation through notice and consultations with affected Members. Indeed, the text refers explicitly to the Member "invoking the action."[180] As such, the key feature of invocation by a Member is evident in this context as well.

169. This context demonstrates that Article XIX is one of numerous provisions of the GATT 1994 and other covered agreements that require invocation as a condition precedent for taking action pursuant to certain provisions. Granting Members the right to take particular action when certain conditions are met – should the acting Member invoke its right to do so – is therefore an ordinary part of the WTO Agreement. Under such provisions, as in Article XIX, it is only when a Member has invoked its right to take action pursuant to such a provision that the relevant disciplines apply.

3. The Object and Purpose of the GATT 1994 Supports This Interpretation

170. The object and purpose of the GATT 1994, as set out in its Preamble, also support that invocation is a precondition for a Member's exercise of its right to take action under Article XIX. The GATT 1994 Preamble provides, among other things, that the GATT 1994 sets forth "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce".[181]

171. The ability to diverge from obligations under certain circumstances, including those set forth in Article XIX, is among the "reciprocal and mutually advantageous arrangements" to which Members agreed, and which permits Members to negotiate "substantial reductions" in tariffs. In fact, the United States explained this point in *US – Fur Felt Hats*, the first dispute under the GATT 1947 concerning Article XIX (discussed in more detail in Section IV.A.4 below). As the United States observed in that dispute, "Article XIX [was] inserted into the Agreement as a safety valve, because it was impossible to be sure that rates of duty agreed at one time might not have to be changed in unforeseen circumstances."[182] In this way, the Contracting

[178] *Agreement on Agriculture* Article 5(1).

[179] *Agreement on Agriculture* Article 5(7).

[180] *Agreement on Textiles and Clothing* Article 6(7) (The Agreement terminated January 1, 2005).

[181] GATT 1994, pmbl. (emphasis added).

[182] GATT Contracting Parties, Summary Record of the Fourteenth Meeting, GATT/CP.5/SR.14 (Nov. 30, 1950), at 2 (US-206).

Parties acknowledged that Article XIX "contributed to a larger measure of tariff reduction than would have been the case."[183]

172. Consistent with the language of its Preamble, the provisions of the GATT 1994 are part of a single undertaking in which it is contemplated that Members will make use of GATT 1994 provisions consistent with their text. As discussed above at Section IV.A, the text of Article XIX establishes that invocation is a precondition a Member's exercise of its right to take action under Article XIX. Accordingly, the object and purpose of the GATT 1994, as set forth in the agreement's Preamble, supports that invocation is a precondition to applying a safeguard.

173. In sum, the text of GATT 1994 Article XIX, in context and in the light of the agreement's object and purpose, establishes that invocation is a precondition to applying a safeguard.

4. An Adopted GATT 1947 Working Party Report Confirms This Interpretation

174. That invocation is a precondition for a Member's exercise of its right to take action under Article XIX and to the consequent application of safeguards rules to that action is also confirmed by the Working Party's report in *US – Fur Felt Hats*, a 1950 dispute between the United States and Czechoslovakia. There, the United States invoked Article XIX with respect to a proposal to withdraw a tariff concession concerning certain hats.[184] After notifying the CONTRACTING PARTIES, the United States entered into consultations with Czechoslovakia and other affected Contracting Parties.[185] The United States reached agreement with the affected Contracting Parties except Czechoslovakia.

175. Czechoslovakia then initiated a complaint, which was discussed by the CONTRACTING PARTIES and referred to a "specially appointed working party for detailed study."[186] In its complaint, Czechoslovakia argued that the United States "has not proven the conditions of Article XIX have been fulfilled" and suggested "that the United States Government revoke its intention" to apply a safeguard.[187]

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[183] GATT Contracting Parties, Summary Record of the Fourteenth Meeting, GATT/CP.5/SR.14 (Nov. 30, 1950), at 2 (emphasis added) (US-206).

[184] *See* Schedule XX – United States, Withdrawal of Item 1526(a) under the Provisions of Article XIX, GATT/CP/83 (Oct. 19, 1950) (noting that in accordance with the findings of the U.S. Tariff Commission – the predecessor agency to the U.S. International Trade Commission – and "pursuant to the provisions of Article XIX of the General Agreement, the Government of the United States finds it necessary to withdraw the concessions on" certain hats. The U.S. communication also provides that the proposed "action is being taken in accordance with the provisions of the last sentence of paragraph 2 of Article XIX" and that the U.S. "Government is prepared to afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it immediately in respect of the proposed action."), (US-207).

[185] *See US – Fur Felt Hats (GATT Panel)*, preface (US-208)

[186] *US – Fur Felt Hats (GATT Panel)*, preface (US-208).

[187] Memorandum by the Czechoslovak Delegation (Nov. 7, 1950), *US – Fur Felt Hats (GATT Panel)*, Appendix B, at 23-24 (US-208).

176. The Working Party's report set out the requirements of Article XIX, and stated that in "attempting to appraise whether the requirements of Article XIX had been fulfilled," it "examined separately each of the *conditions* which *qualify* the exercise of the right to suspend an obligation or to withdraw or modify a concession" under Article XIX.[188] The Working Party reasoned that "*three sets of conditions* have to be fulfilled" – including a requirement of notice – to meet the requirements of Article XIX.[189] As the Working Party stated:

> (a) There should be an abnormal development in the imports of the product in question in the sense that:
>
> > (i) the product in question must be imported in increased quantities;.
> >
> > (ii) the increased imports must be the result of unforeseen developments and of the effect of the tariff concession;
> >
> > (iii) the imports must enter in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products.
>
> (b) The suspension of on obligation or the withdrawal or modification of a concession must be limited to the extent and the time necessary to prevent or remedy the injury caused or threatened.
>
> (c) The contracting party taking action under Article XIX **must give notice** in writing to the CONTRACTING PARTIES **before taking action**. It must also give an opportunity to contracting parties substantially interested and to the Contracting Parties to consult with it. As a rule, consultation should take place before the action is taken, but, in critical circumstances, consultation may take place immediately after the measure is taken provisionally.[190]

177. The Working Party's reasoning on the requirements of Article XIX:2 is relevant in this dispute. In particular, the Working Party observed that the U.S. "notification was sent to the CONTRACTING PARTIES" before the U.S. took action and that while "the United States Government *invoked* the second procedure" of Article XIX:2, "by giving notice more than a

[188] *US – Fur Felt Hats (GATT Panel)*, para. 3 (emphasis added) (US-208).

[189] *US – Fur Felt Hats (GATT Panel)*, para 4 (emphasis added) (US-208).

[190] *US – Fur Felt Hats (GATT Panel)*, para 4 (emphasis added) (US-208).

month before" taking action the U.S. "enabled exporting countries to enter into consultation[s] before the duties were actually raised."[191]

178. Although Czechoslovakia did not agree with the conclusions of the Working Party's report, it was approved by the CONTRACTING PARTIES "as embodying their collective view" and, because of its value in relation to the interpretation of Article XIX, the CONTRACTING PARTIES published it.[192]

179. As the Working Party explained, the notification requirement of Article XIX is one of the "conditions" that qualifies the exercise "of the right to suspend an obligation or to withdraw or modify a concession" under Article XIX.[193] This interpretation by the Working Party of Article XIX confirms the U.S. understanding, based on the plain text, that invocation of Article XIX through notice is a precondition to applying a safeguard measure.

5. Supplementary Means of Interpretation, Including the Drafting History of Article XIX, Confirm This Interpretation

180. Although the meaning of Article XIX is clear from the text, the Panel may have recourse to supplementary means of interpretation to confirm this meaning.[194] Supplementary means of interpretation, including the drafting history of Article XIX of the GATT 1994, confirm that notice under Article XIX:2 is a fundamental, condition precedent to a Member's exercise of its right to take action under Article XIX and the application of safeguards disciplines.

181. In particular, the statements of drafters regarding the text that became Article XIX:2, first sentence, confirm the interpretation of Article XIX as requiring invocation as a condition precedent for a Member's exercise of its right to take action under Article XIX. As with Article XXI, the drafting history of Article XIX of the GATT 1994 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 provision:

> Article 29 (Emergency Action on Imports of Particular Products):
>
> 1. If, as a result of unforeseen developments and the effect of the obligations incurred under this Chapter, including the tariff concessions granted pursuant to Article 18, any product is being imported into the territory of any Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or similar products, the Member shall be free to withdraw the concession, or suspend the obligation, in respect of such product,

[191] *US – Fur Felt Hats (GATT Panel)*, para. 42 (US-208).

[192] *US – Fur Felt Hats (GATT Panel)*, preface (US-208).

[193] *US – Fur Felt Hats (GATT Panel)*, para. 3 (US-208).

[194] See Vienna Convention on the Law of Treaties, Article 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31.").

> in whole or in part, or to modify the concession to the extent and for such time as may be necessary to prevent such injury.
>
> 2. **Before** any Member shall take action **pursuant to** the provisions of paragraph 1 of this Article, it **shall give notice** in writing to the Organization as far in advance as may be practicable and shall afford the Organization, and other Members having a substantial interest as exporters of the product concerned, an opportunity to consult with it in respect of the proposed action. If agreement among the interested Members with respect to the proposed action is not reached, the Member which proposes to take action shall, nevertheless, be free to do so, and if such action is taken the other affected Members shall then be free, within sixty days after such action is taken, to suspend on sixty day's written notice to the Organization the application to the trade of the Member taking such action, of any of the obligations or concessions under this Chapter the suspension of which the Organization does not recommend against.[195]

182. As this text shows, the predecessor to Article XIX included an invocation requirement as originally drafted. This original draft Article XIX stated, among other things, that a Member "shall give notice in writing" before taking action under this provision. Although removal of this requirement was discussed as the ITO and GATT 1947 negotiations proceeded, the drafters ultimately decided to retain it.

183. When this draft was first discussed in November 1946, the United States – upon an invitation from the Chairman – outlined its view of the notification requirement as follows:

> The purpose of the Article, generally speaking, is to give some flexibility to the commitments undertaken in Chapter IV. Some provision of this kind seems necessary in order that countries will not find themselves in such a rigid position that they could not deal with situations of an emergency character. Therefore, the Article would provide for a modification of commitments to meet such temporary situation. In order to safeguard the right given and in order to prevent abuse of it, the Article would provide that **before** any action is taken under an exception, the member concerned would have to **notify** the organization and consult with them, and with other interested members.
>
> It provides, further, that, if no agreement were reached on the proposed action, any Member who was decisive could take compensatory action by withdrawing concessions from the Member that had **invoked** the clause.[196]

184. During the same meeting, the United Kingdom expressed concerns with the timing of the notification requirement and asserted:

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[195] Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33 (Oct. 31, 1946), Annexure 11, United States Draft Charter (US-31).

[196] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PV/7 (Nov. 1, 1946), at 3-4 (US-209).

> [W]e have doubts about the provision for **prior notice** of the emergency measures to be taken. It is precisely in the case of sudden influxes of imports, such as those which are envisaged by this Article, that **prior notice** and procedural delays would be most difficult to contemplate. Not only is almost immediate action likely to be needed in such cases, but any prior publicity with regard to the intended action would be likely to lead to forestalling and an accelerated rate of importation, and so would tend to defeat the object of the action. We do not, of course, oppose the requirement of notification, nor that of consultation, nor the arrangement for possible subsequent measures to deal with unjustified use of this procedure. But we think that it may fairly often be necessary for the notification to be simultaneous with, and **not prior**, to the taking of action under this Article.[197]

185. In response to the U.K.'s concerns, the United States asserted that while "the draft as it is now framed does provide for prior notice", it "does not stipulate that it should be very long."[198] The issue remained unresolved, and the drafters met a few days later to discuss this and other issues.[199] At the beginning of that meeting, India raised concerns with the requirements of both prior notice and prior consultation and suggested amending Article 29. In India's view, a safeguard action would have to be taken "quickly" to avoid "threatened injury to domestic interests". Thus, India suggested:

> would it not be better if we so re-wrote the section as to require the member concerned to **inform** the Organisation and to start this process of consultation **after** taking the action which is needed if the circumstances are so urgent as to make that course necessary?[200]

186. The Chairman noted that the point raised by India was outstanding from their previous meeting, and suggested that the drafters "see whether in certain circumstances only notice **after** a measure had been taken should be needed."[201] To address the comments from India and the Chairman, the United States observed that:

> The Article as drafted provides for the fact that **before** action is taken notice shall be given as far in advance as may be practicable. . . . . In essence, what the Article provides is that there ought to be advance notice and as long advance

[197] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PV/7 (Nov. 1, 1946), at 7—8 (emphasis added) (US-209).

[198] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PV/7 (Nov. 1, 1946), at 16 (emphasis added) (US-209).

[199] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/9 (Nov. 9, 1946) (US-210).

[200] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/9 (Nov. 9, 1946), at 5 (emphasis added) (US-210).

[201] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/9 (Nov. 9, 1946), at 5 (emphasis added) (US-210).

> notice as a country can give in all the circumstances. It seems to me it is a desirable principle to retain.[202]

187. In response, India observed that "it is not merely the prior notice that is involved here but also the consultation that members affect in respect of the proposed action".[203] Thus, India suggested that the procedure to invoke the safeguard provision "should be a little more elastic" and that in certain circumstances:

> the procedure should be that the members should be permitted to take action subject to consultation which may take place a little later, and the notice should be issued at once.[204]

188. To address the point raised by India, the Chairman suggested a compromise. Specifically, the Chairman suggested that the drafters agree to require **prior notice**, but suggested that to address "exceptional cases" the drafters "try to find a formula" that "gives the right in very exceptional cases" to "take immediate action" without prior consultation.[205] The United States agreed with the Chairman, noting that "the Chairman's suggestion that there might be provision made for quicker action in exceptional cases is sound."[206] After the drafters discussed the compromise, the Chairman wrapped up the discussion on Article 29 by observing that, if he saw the remarks of the drafters clearly, that there "**will be** prior consultation unless exceptional circumstances make it impracticable."[207] The drafters agreed with pausing the discussion on Article 29 until a new draft was presented by the rapporteur.[208]

189. On November 14, 1946, the drafters discussed a revised version of Article 29. At the beginning of the discussion on Article 29, the rapporteur observed with respect to the notice requirement that:

> It seemed to be **agreed** that prior or simultaneous **notice** should **in all cases be given**, but that with respect to consultation there should be some leeway in critical cases for the action to be taken first and the consultation should follow upon it

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[202] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/9 (Nov. 9, 1946), at 5 (emphasis added) (US-210).

[203] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/9 (Nov. 9, 1946), at 6 (emphasis added) (US-210).

[204] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/9 (Nov. 9, 1946), at 6 (emphasis added) (US-210).

[205] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/9 (Nov. 9, 1946), at 7 (emphasis added) (US-210).

[206] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/9 (Nov. 9, 1946), at 8 (emphasis added) (US-210).

[207] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/9 (Nov. 9, 1946), at 12 (emphasis added) (US-210).

[208] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/9 (Nov. 9, 1946), at 12 (emphasis added) (US-210).

> immediately. It is believed that the draft as it originally stood permitted short notice. In other words, under the original language of the draft it reads
>
> > Before any Member shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the Organisation as far in advance as may be practicable.
>
> It seems to me that would permit of short notice; it could a[l]most be simultaneous. Therefore, I did not think that any change was needed in that.[209]

190. Regarding prior consultation, the rapporteur noted that new text had been added to Article 29 that would allow action without prior consultation in exceptional circumstances.[210] After the rapporteur finished going over Article 29, the United Kingdom once again expressed concerns with the *prior notice* requirement of Article 29.[211] Specifically, the U.K. asserted that "it is difficult to insist that there must always be prior notice."[212] In the view of the U.K., for some countries it would "be extremely difficult to give prior notice" under certain conditions.[213] Thus, the U.K. suggested amending Article 29 so that "there might be an obligation on a country which acts *without giving notice* to agree to immediate consultation on request."[214] Further, if a country took action without giving notice, the U.K. suggested that:

> If countries ask for consultation, that country [*i.e.*, country taking action without providing prior notice] should be under an obligation to enter into consultation immediately. It might be worthwhile to insert a clause to this effect to the draft.[215]

191. After a discussion among the drafters on the U.K.'s suggestion, Canada suggested that it would be helpful for the drafters to hear from the United States since Article 29 was based on a safeguard provision used by the United States in U.S. trade agreements.[216] In response, the

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[209] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/11, (emphasis added) (Nov. 14, 1946), at 9 (US-210).

[210] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/11, (emphasis added) (Nov. 14, 1946), at 9 (US-211).

[211] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/11, (emphasis added) (Nov. 14, 1946), at 13 (US-211).

[212] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/11, (emphasis added) (Nov. 14, 1946), at 13 (US-211).

[213] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/11, (emphasis added) (Nov. 14, 1946), at 13 (US-211).

[214] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/11, (Nov. 14, 1946), at 13 (emphasis added) (US-211).

[215] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/11, (Nov. 14, 1946), at 13 (emphasis added) (211).

[216] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/11, (emphasis added) (Nov. 14, 1946), at 15-16 (US-211).

United States observed that the United States had "been including clauses similar to this in agreements for a long time" and that, in the United States, "they have almost never been **invoked**, but they have been there in case the emergency should arise, which gives some assurance to the people concerned."[217] The U.K.'s suggestion on striking the prior notice requirement of Article 29 was not supported by drafters, and ultimately the U.K. withdrew its amendment.[218]

192. On November 20, 1946, the drafters issued a report that included a revised Article 29 that retained the prior notice requirement.[219] This version of Article 29 was included in the London Report and it became Article 34 in the draft Charter of the ITO.[220] While the drafters made further revisions to Article 34 during the discussions in New York, Geneva, and Havana, the prior notice requirement was retained by the drafters and is reflected in Article XIX of the GATT 1994.

193. Accordingly, although not necessary in this dispute, supplemental means of interpretation – specifically the drafting history of Article XIX – supports the interpretation of Article XIX according to the customary rules of interpretation. The ordinary meaning of the terms, in context and in the light of the object and purpose of the GATT 1994, establishes that invocation through notice is a fundamental, condition precedent to a Member's exercise of its right to take action under Article XIX. As discussed below in Section IV.B, this conclusion is also supported by the Agreement on Safeguards.

B. The Agreement on Safeguards Confirms that Invocation Through Notice is a Condition Precedent for a Member's exercise of its right to take action under Article XIX and the Consequent Application of Safeguards Rules to that Action, and that the Ability to Take Action Pursuant to Article XIX Does Not Constrain Members' Ability to Act Pursuant to Other Provisions of the GATT 1994

194. The Agreement on Safeguards, which provides context for Article XIX of the GATT 1994, also supports that invocation of Article XIX through written notice is a condition precedent to a Member's exercise of its right to take action under Article XIX. As explained in Section IV.B.1, Article 11.1(c) supports this conclusion because a Member cannot seek, take, or maintain a measure "pursuant to" Article XIX without invoking that provision as set forth in Article XIX:2. In addition, contrary to the complainant's assertions, Article 11.1(c) of the Agreement on Safeguards, establishes that a Member may decide to seek, take, or maintain a

[217] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/11, (emphasis added) (Nov. 14, 1946), at 17 (US-211).

[218] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/11, (emphasis added) (November 14, 1946), at 16-28 (US-211).

[219] First Session of the Preparatory Committee of the International Conference on Trade and Employment, E/PC/T/C.II/57, Add.1, (November 20, 1946), at 1 (US-212).

[220] First Session of the Preparatory Committee of the International Conference on Trade and Employment, at 33 E/PC/T/33, at 33 (US-31).

measure pursuant to other provisions of the GATT 1994, such as Article XXI, and in such a case, the Agreement on Safeguards does not apply.

195. The requirement of invocation as a condition precedent to taking action under Article XIX is also supported by other provisions of the Agreement on Safeguards, as discussed in Section IV.B.2. Specifically, Article 1 and Article 11.1(a) support the requirement of invocation through notice by referring to Article XIX in its entirety, including the notice requirement set forth at Article XIX:2. Article 12 of the Agreement on Safeguards provides additional procedural requirements related to notification, but these requirements do not purport to limit the right of a Member to take safeguards action following "notice in writing" pursuant to Article XIX:2.

196. As described in Section IV.B.3, these conclusions are supported by the object and purpose of the Agreement on Safeguards, as set forth in its Preamble, to clarify and reinforce the obligations of Article XIX of the GATT 1994, including its notice requirement.

197. Although not necessary in this dispute, the Panel may have recourse to supplementary means of interpretation, including the drafting history of Articles 1 and 11 of the Agreement on Safeguards. As explained in Section IV.B.4, the drafting history of these provisions confirms that the invocation is a condition precedent to a Member's exercise of its right to take action under Article XIX, and a Member's ability to seek, take, or maintain safeguards measures does not constrain its ability to take such action pursuant to Article XXI.

1. Article 11.1(c) Supports That Invocation is a Condition Precedent for the a Member's exercise of its right to take action under Article XIX and Application of Safeguards Rules and that the Agreement on Safeguards Does Not Apply to a Measures Pursuant To Article XXI

198. Article 11.1(c) of the Agreement on Safeguards supports that invocation of Article XIX through written notice is a necessary precondition to a Member's exercise of its right to take action under Article XIX and the application of safeguards rules to that action. This provision states 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." Because a measure cannot be sought, taken or maintained "pursuant to" Article XIX:1 without the acting Member giving notice as set forth in Article XIX:2, Article 11.1(c) confirms that invocation is a condition precedent to the application of safeguards disciplines.

199. Furthermore, Article 11.1(c) establishes that a Member's ability to seek, take, or maintain safeguard measures does not constrain a Member's ability to take such action pursuant to other provisions of the GATT 1994, such as Article XXI. As Article 11.1(c) states the Agreement on Safeguards "does not apply" to such measures. Because the measures at issue in this dispute were sought, taken, and maintained pursuant to Article XXI, rather than Article XIX, this language excludes the application of the Agreement on Safeguards to the measures at issue here.

200. In attempting to argue that Article 11.1(c) does not preclude the application of the Agreement on Safeguards to the measures at issue, Norway offers conflicting interpretations of

the terms "sought, taken or maintained" in Article 11.1(c). Initially, Norway provides the following dictionary definitions of these terms:

- The meaning of "sought" ("to seek") includes: "to try to obtain", "to try to bring about or effect"; "to make it one's aim, to try or attempt *to* (do something)";

- The meaning of "taken" ("to take") includes: "to adopt or choose for a particular purpose or (with *as, for*) in a particular capacity; to have recourse to or avail oneself of (a means, method, opportunity, etc.)";

- The meaning of "maintained" ("to maintain") includes: "to carry on (an action at law); to have grounds for sustaining (an action)"; "to cause to continue in a specified state, relation, or position, or at a specified level or number".[221]

201. A few paragraphs later, however, Norway suggests an understanding of these terms that is limited to the temporal aspects of these terms only, contrary to the dictionary definitions it had just provided for those terms. As Norway states,

> [The measures at issue in this dispute] were not merely "sought" to be taken by the United States. Rather, in 2018, they were "taken" by the United States, and they have been "maintained" ever since. Thus, for purposes of applying Article 11.1(c) in this dispute, Norway considers that the appropriate verbs are "taken" and "maintained". In the responses addressing Article 11.1(c), Norway, therefore, focuses on the verbs "taken" and "maintained."[222]

202. Norway quotes the French and Spanish texts of Article 11.1(c), but it does not attempt to reconcile its proffered interpretation of the verbs "sought, taken or maintained" with the French and Spanish text.[223]

203. In addition, relying on its own incorrect construction of the U.S. measures at issue (as taken pursuant to both Article XIX and Article XXI[224]), Norway makes much of the words "other than" and the plural form of "provisions" in Article 11.1(c).[225] As the United States has explained, however, the measures at issue were taken pursuant to Article XXI, and not pursuant to Article XIX, as the United States has repeatedly made clear, including in communications to

[221] Norway's Response to the Panel's Question 20(a), para. 194 (footnotes omitted).

[222] Norway's Response to the Panel's Question 20(a), para. 198.

[223] Norway's Response to the Panel's Question 20(c), paras. 238-42.

[224] Norway's Response to the Panel's Question 20(d), para. 232 ("[O]n the US view, [Article 11.1(c)] excuses a sub category of safeguard measures from the safeguard disciplines, namely, those that are sought, taken, or maintained pursuant to Article XIX and some other GATT 1994 provision.").

[225] Norway's Response to the Panel's Question 20(b), paras. 199-210.

WTO committees and in connection with this dispute.[226] Thus, Norway's emphasis on the words "other than" and the plural form of "provisions" comes to nothing.

204. In addition, Norway is incorrect in its second construction of the terms "sought, taken or maintained." Contrary to Norway's argument, these terms are not simply temporal in nature, but rather these terms confirm that the Agreement on Safeguards does not constrain a Member's ability to take action – or to seek to take action, or to maintain action – pursuant to provisions of the GATT 1994 other than Article XIX, such as Article XXI.

205. Specifically the words "sought, taken or maintained" modify the word "measures" in Article 11.1(c). "Sought" is the past tense and past participle of the verb "seek," which can be defined as "[t]ry or attempt to do."[227] "Taken" is the past participle of the verb "take," which can be defined as "[h]ave an intended result; succeed, be effective, take effect."[228] "Maintained" is the past tense and past participle of the verb "maintain," which can be defined as "[c]ause to continue (a state of affairs, a condition, an activity, etc.)."[229] Definitions of the word "pursuant" – used as an adverb in Article 11.1(c) – include "[w]ith to: in consequence of, in accordance with."[230]

206. With these definitions in mind, the ordinary meaning of the terms in Article 11.1(c) can be understood as "measures [that a Member has] tried or attempted to do, succeeded in doing, or caused to continue in accordance with provisions of the GATT 1994 other than Article XIX." The ordinary meaning of these terms establishes that Article 11.1(c) is triggered – and the Agreement on Safeguards "does not apply" – when a Member acts (by seeking, taking or maintaining a measure) pursuant to a provision of the GATT 1994 other than Article XIX. Put differently, when a Member tries or attempts to take, succeeds in taking, or continues to take an action pursuant to Article XXI, as the United States has done with respect to the measures at issue in this dispute, the Agreement on Safeguards does not constrain a Member's ability to seek, take, or maintain that measure.

207. The French and Spanish texts of the Agreement on Safeguards support this understanding of Article 11.1(c). In French, the relevant text of Article 11.1(c) reads "Le présent accord ne s'applique pas aux mesures qu'un Membre cherchera à prendre, prendra ou maintiendra en vertu

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[226] *See* U.S. Response to the Panel's Question 5(b)-(d) (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)).

[227] The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2758 (US-86).

[228] The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 3206 (US-86).

[229] The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 1669 (US-86).

[230] The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2422 (US-86).

de dispositions du GATT de 1994 autres que l'article XIX." The verb "chercher" can be translated as "to try", while the verb "prendre" means "to take," and the verb "maintenir" can be translated as "to maintain [*situation, équilibre, privilege*]."[231] The phrase "en vertu de" can be translated as "by virtue of, pursuant to [*article, loi, ordonnance*]."[232]

208. In the French text, the first verb in the series ("cherchera à prendre") is explicitly an attempt to carry out the second verb in the series ("prendra"). Thus, consistent with the English text, the ordinary meaning of the French text of Article 11.1(c) provides that the Agreement on Safeguards "does not apply" when a Member *attempts* or *tries* to *take* a measure pursuant to a provision of the GATT 1994 other than Article XIX, or when the Member is successful in taking such a measure or causes such a measure to continue. In that situation – when a Member's action is "pursuant to" a provision of the GATT 1994 other than Article XIX – the Agreement on Safeguards does not constrain a Member's ability to act.

209. The Spanish text also confirms this point. In Spanish, the relevant text of Article 11.1(c) reads, "El presente Acuerdo no es aplicable a las medidas que un Miembro trate de adoptar, adopte o mantenga de conformidad con otras disposiciones del GATT de 1994, aparte del artículo XIX." The verb "trate" comes from "tratar", which translates as "to try,"[233] and the verb "adoptar" can be translated as "(*actitud/costumbre*) to adopt; <*decision*> to take."[234] The verb "mantener" can be translated as "(conserver, preservar); to keep."[235] The phrase "de conformidad con" can be translated as "in accordance with (frml)"[236]

210. In the Spanish text, as in the French, the first verb in the series ("trate de adopter") is explicitly an attempt to carry out the second verb in the series ("adopte"). This text makes clear that Article 11.1(c) is triggered when a Member *attempts* to *take* a measure pursuant to a provision of the GATT 1994 other than Article XIX, or when the Member is successful in taking such a measure or causes such a measure to continue. Like the English and French texts, when a Member's action is "pursuant to" a provision of the GATT 1994 other than Article XIX, the Agreement on Safeguards does not apply, and those rules would not constrain a Member's ability to act.

2. Other Provisions of the Agreement on Safeguards Also Support that Notice is a Condition Precedent for Action Under Article XIX

211. In addition to Article 11.1(c), other provisions of the Agreement on Safeguards also support that invocation is a condition precedent for action under Article XIX. Both Article 1 and Article 11.1(a) refer to Article XIX in its entirety in describing, respectively, the scope of

[231] The *Oxford French Dictionary*, 4th edn, (Oxford University Press, 2007), at 148, 507, & 666-67 (emphasis added) (US-88).

[232] The *Oxford French Dictionary*, 4th edn, (Oxford University Press, 2007), at 890 (emphasis added) (US-88).

[233] *The Oxford Spanish Dictionary*, 1st edn, (Oxford University Press, 1994), at 757 (US-89).

[234] *The Oxford Spanish Dictionary*, 1st edn, (Oxford University Press, 1994), at 18 (US-89).

[235] *The Oxford Spanish Dictionary*, 1st edn, (Oxford University Press, 1994), at 479-80 (US-89).

[236] *The Oxford Spanish Dictionary*, 1st edn, (Oxford University Press, 1994), at 183 (US-89).

application for the rules established in the Agreement on Safeguards and when a Member may take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994. By referring to Article XIX in its entirety – including the requirement of invocation through notice set forth at Article XIX:2 – Article 1 and Article 11.1(a) of the Agreement on Safeguards support that invocation through written notice is a condition precedent to a Member's exercise of its right to take action under Article XIX and the application of safeguards rules to that action. Article 12 of the Agreement on Safeguards sets forth procedural requirements to expand the *scope* of information a Member provides to other Members regarding its invocation of Article XIX and proposed action. Importantly, however, invocation through notice permits the exercise of a Member's right under Article XIX, and Article 12 does not purport to alter this right.

212. In its interpretation of these provisions, Norway relies on its own incorrect construction of Article XIX and the Appellate Body's report in *Indonesia – Iron or Steel*. For example, Norway states that "Article 1 defines 'safeguard measures' as those 'provided for' in Article XIX" – but then proceeds to quote only subparagraph 1(a) of Article XIX.[237] Norway also indicates that it regards the "objective features" of a safeguard to be those set forth by the Appellate Body in *Indonesia – Iron or Steel*,[238] and opines that "[i]f a Member adopts a measure with the objective features of a safeguard – i.e., under Article 1 of the *Safeguards Agreement*, it is a measure "provided for" in Article XIX – the safeguard disciplines apply."[239] Norway's arguments regarding Article 1 and Article 11.1(a) fail for the same reasons set forth in Section IV.A, and are not supported by the text of these provisions.

213. As Article 1 states, "[t]his Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994." As set forth at Section IV.A, an integral feature of the right set out in Article XIX is the requirement of invocation as a precondition to taking action pursuant to that provision. By referring to Article XIX in its entirety in describing what should be "understood to mean" the "safeguard measures" for which the Agreement on Safeguards "establishes rules", Article 1 incorporates the invocation requirement set forth in Article XIX.

214. Article 11.1(a) also refers to Article XIX in its entirety, and states, "[a] Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement." By referring to Article XIX in its entirety – rather than referring to certain characteristics of the measure, or referring to only Article XIX:1(a) – Article 11.1(a) supports that invocation through written notice is a condition precedent to the application of safeguards disciplines.

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[237] Norway's Response to the Panel's Question 5(f), para. 64.

[238] Norway's Response to the Panel's Question 77(b), para. 614 ("As a consequence, if a measure has the objective features ('constituent elements') of a safeguard measure, the obligations in Article XIX and the *Safeguards Agreement* apply.").

[239] Norway's Response to the Panel's Question 74(b), para. 586.

215. Article 12 further supports this conclusion by identifying certain notification requirements that apply at different temporal stages of a safeguard investigation. Article 12.1, for example requires a Member to "immediately" notify the Committee on Safeguards upon (1) initiating an investigatory process relating to serious injury or threat, (2) making a finding of serious injury or threat caused by increased imports, and (3) taking a decision to apply or extend a safeguard measure. Article 12 sets procedural requirements to expand the *scope* of information a Member provides to other Members regarding its invocation of Article XIX and proposed action. Importantly, however, invocation through notice permits the exercise of a Member's right under Article XIX, and Article 12 does not purport to alter this right.

3. The Object And Purpose Of The Agreement On Safeguards Supports This Interpretation

216. In its discussion of Article 11.1(c), Norway argues the requirement of invocation as a condition precedent to application of the safeguards disciplines would be contrary to the object and purpose of the GATT 1994 and the *Safeguards Agreement* because such a result "would circumvent the WTO disciplines that apply to safeguard measures."[240] Nowhere in this discussion does Norway actually state what it believes to be the object and purpose of the GATT 1994 or the Agreement on Safeguards, and what parts of that object and purpose it believes are undermined by requiring invocation as a condition precedent for a Member's exercise of its right to take action under Article XIX and the application of safeguards rules to that action. As the United States has explained above at Section IV.A.3, that invocation is a condition precedent to action is supported by the object and purpose of the GATT 1994. This is also consistent with the object and purpose of the Agreement on Safeguards.

217. The object and purpose of the Agreement on Safeguards, as set out in its Preamble, also supports that invocation is a precondition to a Member's exercise of its right to take action under Article XIX. As the Preamble states, the drafters had "in mind the overall objective of the Members to improve and strengthen the international trading system based on GATT 1994[.]" In particular, the drafters recognized "the need to *clarify and reinforce* the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control" (emphasis added).

218. Consistent with this language, the Agreement on Safeguards clarified and reinforced the disciplines of the GATT 1994, specifically those of Article XIX. Among the aspects of Article XIX that was so clarified and reinforced is the precondition in Article XIX that invocation is necessary such that a Member "shall be free" to exercise its rights and apply a measure that departs from its obligations and commitments.

219. Furthermore, "improv[ing] and strengthen[ing] the international trading system based on GATT 1994" requires giving effect to *all* provisions of the GATT 1994, including both obligations and exceptions. With this reference to the trading system as a whole, the object and purpose of the Agreement on Safeguards – as expressed in its preamble – confirms that a

[240] Norway's Response to the Panel's Question 20(b), para. 216.

Member's ability to seek, take, or maintain safeguard measures does not constrain a Member's ability to take such action pursuant to other provisions of the GATT 1994, such as Article XXI.

4. The Drafting History of the Agreement On Safeguards Confirms That Invocation Through Notice is a Precondition to a Member's exercise of its right to take action under Article XIX and that the Agreement on Safeguards Does Not Constrain a Member's Ability to Act Pursuant to Article XXI(b)

220. The drafting history of the Agreement on Safeguards also confirms that invocation is a condition precedent to a Member's exercise of its right to take action under Article XIX and the consequent application of safeguards rules to that action. The importance of invocation was highlighted during Tokyo Round discussions, and can be seen in the continued development of the text that became Article 1 and Article 11 of the Agreement on Safeguards after the Uruguay Round.

221. In its response to the Panel's Question 20, Norway discusses part of the negotiating history of the Agreement on Safeguards, and makes much of the fact that the December 1991 version of Article 11.1(c) referred to "other provisions" while the final text of the Agreement on Safeguards refers to "provisions . . . other than Article XIX."[241] Viewed in context, however, the negotiating history of Article 11.1(c) makes clear that – contrary to Norway's assertions – this provision does not constrain Members' ability to take action pursuant to other provisions of the GATT 1994, such as Article XXI.

222. During the Tokyo Round negotiations, contracting parties perceived a need to clarify and strengthen the provisions of Article XIX.[242] In particular, certain contracting parties "affected by Article XIX measures wanted its provisions to be clarified and re-inforced" and "stressed the need for *more precise criteria for invocation of the safeguard clause*".[243] The Tokyo Declaration, adopted in September 1973, stated that negotiations should examine "the adequacy of the multilateral safeguard system, considering particularly the modalities of application of Article XIX, with a view to furthering trade liberalization and preserving its results."[244]

223. Although negotiations reached an impasse at the end of the Tokyo Round in April 1979 and no new text was agreed to, Members continued discussing these issues in the Uruguay Round negotiations. In particular, in preparing the text that became Article 1 and Article 11.1 of

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[241] Norway's Response to the Panel's Question 20, paras. 235-36.

[242] *Work Already Undertaken in the GATT on Safeguards*, MTN.GNG/NG9/W/1, (Apr. 7, 1987), page 4, para. 14 ("During the preparatory stage before the Ministerial meeting in Tokyo, the question of the adequacy or otherwise of the existing multilateral safeguard system acquired increased importance as an issue for the negotiations.") (US-213).

[243] *Work Already Undertaken in the GATT on Safeguards*, MTN.GNG/NG9/W/1, (Apr. 7, 1987), para. 14 (emphasis added) (US-213)

[244] *Work Already Undertaken in the GATT on Safeguards*, MTN.GNG/NG9/W/1, (Apr. 7, 1987), para. 15 (US-213); *see also* Declaration of Ministers Approved at Tokyo on 14 September 1973, reprinted in GATT, BISD 20th Supp. at 19, 21 (1974) (US-214).

the Agreement on Safeguards, Uruguay Round drafters abandoned their early attempts to include a definition for what would constitute safeguard measures, and instead included only a reference to the provisions of Article XIX. This decision by the Uruguay Round drafters confirms that it is the terms of Article XIX – including its invocation requirement – that define what constitutes safeguard measures under the Agreement on Safeguards and under Article XIX.

224. Furthermore, Uruguay Round drafters also abandoned their early proposals that could have been seen as limiting Members' ability to take action pursuant to provisions of the GATT 1994 other than Article XIX. This decision by drafters confirms that nothing in the Agreement on Safeguards constrains a Member's ability to take action pursuant to Article XXI.

a. Negotiators Abandoned Draft Text That Defined Safeguard Measures Based Characteristics, Rather Than By Reference To Article XIX

225. In early Uruguay Round drafts of the Agreement on Safeguards, the "General Provisions" section included language that would have defined "safeguards" based on certain characteristics that those measures might exhibit, rather than by a general reference to Article XIX. For example, the first draft of the Agreement on Safeguards, produced in June 1989 by the Negotiating Group on Safeguards provided in relevant part:

> GENERAL PROVISIONS
> 1. *This agreement covers all safeguard measures designed to give protection to domestic industries in the circumstances specified below.*
>
> 2. *Safeguards 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*, as provided for in Section II below.[245]

226. This June 1989 draft therefore would have defined safeguard measures at paragraph 1 as comprising "all safeguard measures designed to give protection to domestic industries in the circumstances specified below." Paragraph 2 would then have gone on to identify the circumstances in which such measures could be taken, the characteristics they would entail, and the purpose for which they would have been taken.[246] Without an express reference to Article XIX, this text could be understood to refer to measures other than those taken pursuant to Article XIX. In other words, under these draft provisions, the Agreement on Safeguards could have been construed to apply to measures for which a Member had *not* invoked its right to take

[245] Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25 (June 27, 1989), paras. 1 & 2 (US-215).

[246] Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25 (June 27, 1989), para. 2 (US-215).

action under Article XIX – so long as the measure in question otherwise reflected the identified characteristics.

227. Although the January 1990 and July 1990 drafts of the Agreement on Safeguards contained the same provisions as the July 1989 draft (defining safeguards based on characteristics of the measure, rather than based on a reference to Article XIX),[247] negotiators abandoned this approach by October 1990. The October 1990 draft agreement stated in relevant part:

> GENERAL
>
> 1. This agreement establishes rules for the application of safeguard measures *which shall be understood to mean those measures provided for in Article XIX of the General Agreement.*
>
> CONDITIONS
>
> 2. A contracting party may apply a safeguard measure to a product only if the importing contracting party has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.[248]

228. As this text shows, in the October 1990 draft of the Agreement on Safeguards, the "general" provision at paragraph 1 was revised to define safeguard measures by reference to Article XIX. These two provisions of the Agreement on Safeguard were retained in the further

[247] As the January 1990 text stated, "Safeguard measures consist of import relief measures that entail the suspension, in whole or in part, of obligations, or the withdrawal or modification of concessions under the General Agreement, adopted to prevent or remedy certain emergency situations. . .". Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25/Rev.1 (Jan. 15, 1990), para. 2 (US-216). As the July 1990 draft stated, "[f]or purposes of this Agreement, a safeguard measure shall be understood to mean a border measure entailing the suspension, in whole or in part, of obligations or the withdrawal or modification of concessions necessary under the conditions and procedures provided for below, to prevent or remedy serious injury to a domestic industry and to facilitate adjustment. Any trade-restrictive border measure taken in violation of the said conditions and procedures shall not be deemed to be a legitimate safeguard measure." Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25/Rev.2 (July 13, 1990), para. 1 (US-217).

[248] Negotiating Group on Safeguards, Additional United States' Proposals on Safeguards, MTN.GNG.NG9/W/31 (Oct. 31, 1990), at 2 (emphasis added) (US-218); Agreement on Safeguards, art. 1.

drafts of the Agreement on Safeguards of December 1990,[249] June 1991,[250] and December 1991,[251] and became the final text of Article 1 of the Agreement on Safeguards.

229. Negotiators' decision to define safeguards measures as those measures "provided for in Article XIX" – as opposed to defining safeguards based on the characteristics of such measures, as the June 1989 and January 1990 drafts had done – indicates that the drafters intended for the provisions of Article XIX to be determinative as to whether a particular measure was a safeguard measure for purposes of the Agreement on Safeguards. Because the measures "provided for" in Article XIX are measures for which a Member proposing to take action has provided notice in writing as required in Article XIX:2, this decision by the drafters of the Agreement on Safeguards confirms that invocation through notice is a fundamental, condition precedent for a measure to be a "safeguard measure" subject to the safeguards disciplines contained in that Agreement.

b. Negotiators Abandoned Draft Text That Purported To Limit Members' Ability To Take Action Pursuant to Provisions Of The GATT 1994 Other than Article XIX

230. The negotiating history of the Agreement on Safeguards also confirms that nothing in the Agreement on Safeguards affects a Member's ability to take action under Article XXI or another provision of the GATT 1994 other than Article XIX.

231. As discussed above at Section IV.B.4.a., the June 1989 draft of the Agreement on Safeguards defined safeguards measures based on certain characteristics they might exhibit, rather than through reference to Article XIX. Regarding a Member's ability to invoke the Article XIX, the June 1989 draft would have limited this right to situations in which certain other provisions of the GATT 1994 were not available:

> CONDITIONS
>
> 4. A contracting party [or a customs union] may apply safeguard measures to a product being imported into its territory, *only in a situation in which other GATT provisions do not provide specific remedies (e.g. Articles VI, XVI or XXVIII)*, and on the conditions that:
>
> > (a) there has been an unforeseen, sharp and substantial increase in the quantity of such product being imported;

[249] Trade Negotiations Committee, Draft Final Act Embodying The Results of the Uruguay Round of Multilateral Trade Negotiations, Revision, MTN.TNC/W/35/Rev.1 (Dec. 3, 1990), at 184 (US-189).

[250] Negotiating Group on Rule Making and Trade-Related Investment Measures, Safeguards, Note by the Secretariat MTN.GNG/RM/W/3 (June 6, 1991), at 4 (US-219)

[251] Trade Negotiations Committee, Draft Final Act Embodying The Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (Dec. 20, 1991), at M.1 (US-190).

> (b) the competent national authorities of the importing contracting party have established that such increase is causing serious injury to domestic producers of like or directly competitive products; and
>
> (c) the measures are applied to products from all sources.[252]

232. The January 1990 draft of the Agreement on Safeguards broadened this constraint by omitting the reference to Articles VI, XVI or XXVIII; accordingly, safeguard action would only have been permissible if *no other* provision of GATT 1994 were available. As the January 1990 draft text stated:

> 4. A contracting party [or a customs union] may apply safeguard measures to a product being imported into its territory, *only in a situation in which other GATT provisions do not provide specific remedies*, and on the conditions that… [253]

233. By July 1990, however, negotiators of the Agreement on Safeguards had abandoned this approach. While the July 1990 draft still defined safeguards based on their characteristics, it now made clear that this definition would not prejudice a Member's ability to take action pursuant to provisions of the GATT 1994 other than Article XIX:

> 2. The provisions of paragraph 1 [defining a safeguard measure] above *do not prejudice the rights and obligations of contracting parties regarding trade-restrictive measures taken in conformity with specific provisions of the General Agreement other than Article XIX, protocols, and agreements and arrangements negotiated under the auspices of GATT.*[254]

234. Although the phrasing and placement of this provision changed as the negotiations went along, negotiators' underlying intent to prevent the terms of the Agreement on Safeguards from prejudicing Members' rights under other GATT provisions continued to be reflected in the text.

235. The October 1990 draft Agreement on Safeguards, the text regarding the relationship between safeguard measures and other possible bases for action under the GATT 1994 was rephrased and moved to paragraph 24, which stated:

> 24. *No trade-restrictive measure shall be sought or taken by a contracting party unless* it conforms with the provisions of Article XIX as interpreted by the provisions of this agreement, *or is consistent with other provisions of the*

[252] Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25 (June 27, 1989), para. 4 (US-215).

[253] Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25 (June 27, 1989), para. 4 (US-215).

[254] Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25/Rev.2 (July 13, 1990), para. 2 (emphasis added) (US-217).

> *General Agreement, or protocols and agreements or arrangements concluded within the framework of the General Agreement.*[255]

236. With this text, the October 1990 draft continues to make clear – like the July 1990 draft – that the availability of Article XIX as a release from obligations does not constrain a Member's ability to take action pursuant to other provisions of the GATT 1994. So much is clear based on the use of the word "*or*" in the draft paragraph 24 quoted above, which confirms that that Members could seek or take trade-restrictive measures that were *either* in conformity with Article XIX *or* consistent with other provisions of the General Agreement (including Article XXI).

237. In the December 1991 draft Agreement on Safeguards, this provision was moved to paragraph 22, rephrased, and divided into parts, to read as follows:

> 22. (a) A contracting party shall not take or seek any emergency action on imports of particular products as set forth in Article XIX unless such action conforms with the provisions of Article XIX of the General Agreement applied in accordance with this agreement.
>
> . . . .
>
> (c) Measures sought, taken or maintained by a contracting party pursuant to other provisions of the General Agreement, or protocols and agreements or arrangements concluded within the framework of the General Agreement are not included in the scope of this agreement.[256]

238. Paragraph 22(a) mirrors Article 11.1(a) of the Agreement on Safeguards, and confirms that "emergency action on imports of particular products as set forth in Article XIX" – including the invocation requirement in Article XIX – must conform with the provisions of both Article XIX and the Agreement on Safeguards.

239. Paragraph 22(c) is similar to Article 11.1(c), particularly its reference to measures "sought, taken or maintained . . . pursuant to" other provisions of the General Agreement. In the final text of the Agreement on Safeguards, paragraph 22(c) of this draft was again rephrased to emphasize this point. Specifically, the January 1991 draft language stating that measures sought, taken, or maintained pursuant to other provisions of the GATT 1994 "are not included in the scope of" the Agreement on Safeguards was replaced with a more definite statement that the Agreement on Safeguards "does not apply" to such measures.[257]

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[255] Negotiating Group on Safeguards, Draft Text of an Agreement, MTN.GNG/NG9/W/25/Rev.3 (Oct. 31, 1990), at (emphases added) (US-220).

[256] Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (Dec. 1991), at M.6 (US-190).

[257] As the final text of Article 11.1(c) provides in relevant part, "This Agreement does not apply to measure sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX." Agreement on Safeguards, art. 11.1(c).

240. By stating that the Agreement "does not apply" to such measures, this final text makes even clearer that a Member's ability to seek, take, or maintain safeguard measures does not constrain a Member's ability to take such action pursuant to other provisions of the GATT 1994, such as Article XXI. And that where a Member has sought, taken or maintained action pursuant to an "*other* provision of the GATT 1994," as the United States has explained, the Agreement on Safeguards "does not apply."

V. The Panel Should Begin Its Analysis By Addressing the United States' Invocation of Article XXI

241. The DSU does not specify the order of analysis that a panel must adopt, and instead leaves this matter up to the Panel's determination. Therefore, the Panel may consider the issues presented in any order that it sees fit. Whatever the Panel's *internal* ordering of its analysis, as the United States has explained in Section III, in light of the U.S. invocation of Article XXI(b) and the self-judging nature of that provision, the sole *finding* that the Panel may make in its report – consistent with its terms of reference and the DSU – is to note its understanding of Article XXI and that the United States has invoked Article XXI. No additional findings concerning the claims raised by the complaining Member in its submissions would be consistent with the DSU, in light of the text of Article XXI(b). Accordingly, the Panel should begin by addressing the United States' invocation of GATT 1994 Article XXI(b).

242. Norway asserts that "[a]s a general principle, panels are free to order their analysis as they see fit",[258] but later charges that "[t]he Panel must begin by assessing whether the obligations in the *Safeguards Agreement* and the GATT 1994 are violated, and only then assess whether any of these violations is justified under an Article XXI defence."[259] According to Norway "if there is no violation, the proposed defence has no operative role: there is no violation to justify in the first place."[260] In support of its argument, Norway points to the title of Article XXI, which includes the word "exceptions," which in Norway's view demonstrates that Article XXI "establish[es] a defence that a respondent may assert, if a complainant establishes that one of its measures is incompatible with obligations found in other parts of the GATT 1994."[261]

243. Norway also cites its own erroneous characterization of the U.S. measures at issue in this dispute – as having been taken pursuant to both Article XIX and Article XXI – to support its argument that Article 11.1(c) does not preclude the application of the Agreement on Safeguards to the U.S. measures. As the United States explained more fully in Part IV and in its response to the Panel's Questions 5(b)-(d), the United States has stated numerous times, including to WTO committees, that the U.S. measures at issue are national security measures that were sought and

[258] Norway's Response to the Panel's Question 21, para. 243.

[259] Norway's Response to the Panel's Question 22, para. 249.

[260] Norway's Response to the Panel's Question 22, para. 250.

[261] Norway's Response to the Panel's Question 33, para. 302-303.

taken pursuant to Article XXI.[262] Norway's attempt to unilaterally recharacterize these measures as safeguards is unavailing.

244. It is not correct to argue that the Panel must first determine whether the measures challenged breach the GATT 1994 or the Agreement on Safeguards before assessing the U.S. invocation of Article XXI. This is because Article XXI is a defense to claims under both the Agreement on Safeguards and the GATT 1994, and the United States has invoked Article XXI as to *all* aspects of *all* the measures challenged. Thus, if the Panel determines that Article XXI(b) is self-judging, consistent with the text, or that Article XXI in any event applies under another interpretation, there would be no need to review any of the complainant's claims.

245. Nor does characterizing Article XXI as an "affirmative defense" or an "exception" require the Panel to begin its analysis with the complainant's claims. The DSU does not use these terms, and instead calls on the Panel to interpret Article XXI in accordance with customary rules of interpretation. As interpreted according to these customary rules, Article XXI is a self-judging exception to a Member's obligations, both under the GATT 1994 and the Agreement on Safeguards. Once the United States invokes Article XXI(b), the sole finding that the Panel may make – consistent with its terms of reference and the DSU – is to note the U.S. invocation of Article XXI. Any characterization of Article XXI as an affirmative defense or other kind of exception cannot change the ordinary meaning of Article XXI, such that the invoking party must make a legal or evidentiary showing not required by the text.

246. Even where it is claimed that Article XXI is not a defense to claims under the Agreement on Safeguards – which the United States disagrees with – addressing Article XXI first also leads to the conclusion under Article 11.1(c) of the Agreement on Safeguards that the Agreement on Safeguards is not applicable to the challenged measures. This is because – as explained further in Part IV.B. and in the U.S. Response to the Panel's Question 20 – Article 11.1(c) of the Agreement on Safeguards makes clear that that agreement "does not apply" to a measure sought, taken, or maintained pursuant to Article XXI of GATT 1994, such as the measures at issue in this dispute.

247. In sum, as the United States has explained, under the terms of reference set by the DSB for the Panel, the Panel is to examine the matter and to make such findings as will assist the DSB in making recommendations to bring a WTO-inconsistent measure into conformity with the covered agreements. If the Panel objectively examines Article XXI and agrees this provision is self-judging, there is no finding in relation to any claim by the complainant that would assist the DSB in making a recommendation. That is, whatever the arguments brought forward in relation to a claim, the Panel would find that Article XXI serves as an exception to that claim. There is no basis under the Panel's terms of reference to make a findings on a claim that could not lead to

[262] See U.S. Response to the Panel's Question 5(b)-(d) (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)).

a recommendation. For purposes of its report, therefore, the Panel should start its analysis with Article XXI.

VI. Conclusion

248. For the foregoing reasons, 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.

Annex I: Comparison of the English, French and Spanish Texts of Article XXI(b) of the GATT 1994

	English	French	Spanish
GATT 1994 Art. XXI(b)	Nothing in this Agreement shall be construed . . . (b) to prevent any contracting party from taking any 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; or	Aucune disposition du présent Accord ne sera interprétée . . . b) ou comme empêchant une partie contractante de prendre toutes mesures qu'elle estimera nécessaires à la protection des intérêts essentiels de sa sécurité: (i) se rapportant aux matières fissiles ou aux matières qui servent à leur fabrication; ii) se rapportant au trafic d'armes, de munitions et de matériel de guerre et à tout commerce d'autres articles et matériel destinés directement ou indirectement à assurer l'approvision-nement des forces armées; iii) appliquées en temps de guerre ou en cas de grave tension internationale;	No deberá interpretarse ninguna disposición del presente Acuerdo en el sentido de que: . . . b) impida a una parte contratante la adopción de todas las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad, relativas: i) a las materias fisionables o a aquellas que sirvan para su fabricación; ii) al tráfico de armas, municiones y material de guerra, y a todo comercio de otros artículos y material destinados directa o indirectamente a asegurar el abastecimiento de las fuerzas armadas; iii) a las aplicadas en tiempos de guerra o en caso de grave tensión internacional;

Annex 2: Comparison of the Spanish text of the Security Exception in the GATT 1994, GATS and TRIPS

	GATT 1994, Art. XXI	**GATS, Art. XIV*bis***	**TRIPS Agreement, Art. 73**
EN	Nothing in this Agreement shall be construed (b) to prevent any contracting party from taking any 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; or	Nothing in this Agreement shall be construed: (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests: (i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment; (ii) relating to fissionable and fusionable materials or the materials from which they are derived; (iii) taken in time of war or other emergency in international relations; or	Nothing in this Agreement shall be construed: (b) to prevent a Member from taking any 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; or
FR	Aucune disposition du présent Accord ne sera interprétée . . . b) ou comme empêchant une partie contractante de prendre toutes mesures qu'elle estimera nécessaires à la protection des intérêts essentiels de sa sécurité: i) se rapportant aux matières fissiles ou aux matières qui servent à leur fabrication; ii) se rapportant au trafic d'armes, de munitions et de matériel de guerre et à tout commerce d'autres articles et matériel destinés directement ou indirectement à assurer l'approvisionnement des forces armées; iii) appliquées en temps de guerre ou en cas de grave tension internationale;	Aucune disposition du présent accord ne sera interprétée: … b) ou comme empêchant un Membre de prendre toutes mesures qu'il estimera nécessaires à la protection des intérêts essentiels de sa sécurité: i) se rapportant à la fourniture de services destinés directement ou indirectement à assurer l'approvisionnement des forces armées; ii) se rapportant aux matières fissiles et fusionables ou aux matières qui servent à leur fabrication; iii) appliquées en temps de guerre ou en cas de grave tension internationale;	Aucune disposition du présent accord ne sera interprétée: … b) ou comme empêchant un Membre de prendre toutes mesures qu'il estimera nécessaires à la protection des intérêts essentiels de sa sécurité: i) se rapportant aux matières fissiles ou aux matières qui servent à leur fabrication; ii) se rapportant au trafic d'armes, de munitions et de matériel de guerre et à tout commerce d'autres articles et matériel destinés directement ou indirectement à assurer l'approvisionnement des forces armées; iii) appliquées en temps de guerre ou en cas de grave tension internationale;
SP	No deberá interpretarse ninguna disposición del presente Acuerdo en el sentido de que: . . . *b)* impida a una parte contratante la adopción de todas las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad, relativas: i) a las materias fisionables o a aquellas que sirvan para su fabricación; ii) al tráfico de armas, municiones y material de guerra, y a todo comercio de otros artículos y material destinados directa o indirectamente a asegurar el abastecimiento de las fuerzas armadas; iii) a las aplicadas en tiempos de guerra o en caso de grave tensión internacional;	Ninguna disposición del presente Acuerdo se interpretará en el sentido de que: . . . b) impida a un Miembro la adopción de las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad: i) relativas al suministro de servicios destinados directa o indirectamente a asegurar el abastecimiento de las fuerzas armadas; ii) relativas a las materias fisionables o fusionables o a aquellas que sirvan para su fabricación; iii) aplicadas en tiempos de guerra o en caso de grave tensión internacional; o	Ninguna disposición del presente Acuerdo se interpretará en el sentido de que: . . . b) impida a un Miembro la adopción de las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad: i) relativas a las materias fisionables o a aquellas que sirvan para su fabricación; ii) relativas al tráfico de armas, municiones y material de guerra, y a todo comercio de otros artículos y material destinados directa o indirectamente a asegurar el abastecimiento de las fuerzas armadas; iii) aplicadas en tiempos de guerra o en caso de grave tensión internacional;