As delivered

IN THE WORLD TRADE ORGANIZATION

United States – Certain Measures on Steel and Aluminium Products (WT/DS544/547/548/554/556/564)

Third Party Oral Statement

by

Norway

at the Third Party Sessions of the Panels

18 NOVEMBER 2019

TABLE OF CONTENTS

Page

TABLE OF CASES ..... **ii**

LIST OF ABBREVIATIONS ..... **iii**

I. Introduction **1**

II. The Panel Must Make an Objective Assessment of the Claims and Defences Pursuant to Article 11 of the DSU **1**

III. Article XXI(b) is not "self-judging" **1**

A. The subparagraphs of Article XXI(b) are not qualified by "which it considers" **1**

B. The *chapeau* is not "self-judging" by virtue of the terms "which it considers" **2**

TABLE OF CASES

Short Title	Full Case Title and Citation
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea,* WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865

LIST OF ABBREVIATIONS

Abbreviation	Description
DSU	Understanding on Rules and procedures governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
US	United States

I. INTRODUCTION

Mr. Chair, Members of the Panel,

1. Norway would like to thank the Panel for the opportunity to make a short statement at this meeting. In the following, we focus on one of the core disagreements between the parties: the panel's standard of review under Article XXI(b) of the GATT 1994.

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

2. The United States agrees that the Panel has jurisdiction over this matter.[1] The United States also agrees that the Panel must make an "objective assessment" under Article 11 of the DSU.[2] However, the United States takes the radical position that, because it has invoked Article XXI(b) of the GATT 1994, the Panel cannot make any substantive findings. In other words, while the Panel has jurisdiction, its review is empty of any substantive content.

3. In any given dispute, the standard of review under Article 11 "must be understood in light of the specific obligations of the relevant agreements that are at issue in the case".[3] In the next section of its statement, Norway explains that, to give effect to the chosen terms of Article XXI(b), and to the obligation to make an "objective assessment", the Panel must reject the US position that the appropriate standard of review under Article XXI(b) is total deference to the respondent.

III. ARTICLE XXI(B) IS NOT "SELF-JUDGING"

4. The US position that Article XXI(b) is self-judging rests on two incorrect interpretive premises: *first*, the phrase "which it considers" applies to the subparagraphs of Article XXI(b); and *second* the phrase renders any other terms to which it attaches "self-judging".

A. The subparagraphs of Article XXI(b) are not qualified by "which it considers"

5. The US first interpretive error is to misunderstand the relationship between the *chapeau* and the subparagraphs. The United States argues that subparagraphs (i) and (ii) qualify the term "essential security interests" in the *chapeau*, and not the word "action".[4] On this basis, the United States (incorrectly) argues that each subparagraph must be understood

[1] The United States' first written submission, para. 181.
[2] The United States' opening statement at the first substantive meeting, para. 63.
[3] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 92; Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184.
[4] The United States' first written submission, paras. 29-33.

as simply endings to a sentence that begins with "which it considers". The United States thereby injects the verb "consider" from the *chapeau* into the subparagraphs. As a result, for the United States, the fulfilment of the legal conditions in the subparagraphs depends entirely on a respondent's subjective "consideration". The United States is wrong.

6. Properly interpreted, each of the three subparagraphs qualifies the word "action", and not the words "essential security interests". This follows from the text, context, object and purpose, and negotiating history of Article XXI(b). In particular, the US view is irreconcilable with the Spanish version of the text, in which the term "***relativas***" (relating) can only qualify the word "***medidas***" ("action"); and, the *chapeau* / subparagraphs are broken by a comma.

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

(1) the "action" must "relate to" the specific circumstances set forth in subparagraph (i) or (ii), or be "taken in time of war or other emergency in international relations", under subparagraph (iii); and,

(2) it must be "action" that the Member "considers necessary" for the protection of its essential security interests.

8. As a first step, therefore, a panel must make an objective assessment of whether the Member has demonstrated that the "action" meets the circumstances / situation in at least one of the subparagraphs. Textually, the phrase "which it considers" is not part of this step. Therefore, a Member's demonstration that it fulfils the conditions in the subparagraphs is not subject to a more forgiving standard of review flowing from the verb "consider" in the *chapeau*.

9. The United States has not identified a subparagraph of Article XXI(b), let alone substantiated that its actions meet the terms of any of the subparagraphs. The United States therefore fails to make a *prima facie* case, and the Panel's analysis may stop at the first step.

B. The *chapeau* is not "self-judging" by virtue of the terms "which it considers"

10. The US second interpretive error relates to the second step of the Panel's analysis: is the measure "action" which the Member "considers necessary" for the protection of its essential security interests? The United States is wrong that the legal effect of the terms

"which it considers" is that, in assessing this question, a panel must afford total deference to the respondent.

11. Norway agrees that the phrase "which it considers" means a panel should afford the respondent a degree of deference. However, a standard of "total deference", with no scrutiny whatsoever of a Member's action, fails to give effect to the chosen treaty terms, and the requirement of "objectivity" under Article 11 of the DSU.

12. The verb "consider" has a specific meaning: to "look attentively"; and, in transitive form, "to contemplate mentally, fix the mind upon".[5] Thus, the verb "considers" in the *chapeau* of Article XXI(b) establishes an obligation for a Member to undertake an attentive examination that the legal conditions in the *chapeau* are met.

13. Indeed, the surrounding words "necessary", "for the protection of", and "essential" each have their own specific meaning, and establish legal conditions that constrain the types of action that a respondent may take. The treaty interpreter cannot interpret two words in the *chapeau* in a way that deprives the surrounding context of meaning.

14. By way of contrast, the drafters could have chosen a different verb than "considers", and different surrounding words. For example, Article XXI(b) could have permitted a Member to take any action which it "**declares** necessary for the protection of its essential security interests"; or, which it "considers, **in its judgment, fruitful to its security interests**". The more open-ended language in each example would connote a far greater degree of discretion than the language the drafters actually chose.

15. The US interpretation of the *chapeau* as "self-judging" therefore reduces the *chapeau's* disciplines to inutility, and overrides Article 11 of the DSU. If the Panel accepts that Article XXI(b) is "self-judging", a Member could justify any action under the *chapeau*, however spurious its national security justification, thereby circumventing its GATT 1994 obligations, and defeating the object and purpose of the GATT 1994.

Thank you.

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[5] Oxford English Dictionary definition of "consider", available at: https://www.oed.com/view/Entry/39593?redirectedFrom=consider#contentWrapper, last accessed 4 November 2019, **(Exhibit NOR-85)**.