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

REPORT OF THE PANEL

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<i>Argentina – Import Measures</i>	Panel Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/R and Add.1 / WT/DS444/R and Add.1 / WT/DS445/R and Add.1, adopted 26 January 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R / WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, DSR 2015:II, p. 783
<i>Argentina – Import Measures</i>	Appellate Body Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R , adopted 26 January 2015, DSR 2015:II, p. 579
<i>Argentina – Textiles and Apparel</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, p. 1003
<i>Australia – Tobacco Plain Packaging</i>	Panel Reports, <i>Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging</i> , WT/DS435/R , Add.1 and Suppl.1 (<i>Honduras</i>) / WT/DS441/R , Add.1 and Suppl.1 (<i>Dominican Republic</i>) / WT/DS458/R , Add.1 and Suppl.1 (<i>Cuba</i>) / WT/DS467/R , Add.1 and Suppl.1 (<i>Indonesia</i>), WT/DS458/R and WT/DS467/R adopted 27 August 2018, DSR 2018:VIII, p. 3925, and WT/DS435/R and WT/DS441/R adopted 29 June 2020, as upheld by Appellate Body Reports WT/DS435/AB/R / WT/DS441/AB/R, DSR 2018:VIII, p. 3925
<i>Australia – Tobacco Plain Packaging</i>	Appellate Body Reports, <i>Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging</i> , WT/DS435/AB/R and Add.1 (<i>Honduras</i>) / WT/DS441/AB/R and Add.1 (<i>Dominican Republic</i>), adopted 29 June 2020
<i>Brazil – Desiccated Coconut</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R , adopted 20 March 1997, DSR 1997:I, p. 167
<i>Canada – Autos</i>	Panel Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/R , WT/DS142/R , adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, p. 3043
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R , WT/DS142/AB/R , adopted 19 June 2000, DSR 2000:VI, p. 2985
<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R , adopted 30 July 1997, DSR 1997:I, p. 449
<i>Canada – Renewable Energy / Canada – Feed-in Tariff Program</i>	Appellate Body Reports, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program</i> , WT/DS412/AB/R / WT/DS426/AB/R , adopted 24 May 2013, DSR 2013:I, p. 7
<i>Canada – Wheat Exports and Grain Imports</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R , adopted 27 September 2004, DSR 2004:VI, p. 2739
<i>Chile – Price Band System</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/R , adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R, DSR 2002:VIII, p. 3127
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<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW , adopted 22 May 2007, DSR 2007:II, p. 513
<i>China – Auto Parts</i>	Appellate Body Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R , adopted 12 January 2009, DSR 2009:I, p. 3
<i>China – Rare Earths</i>	Panel Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/R and Add.1 / WT/DS432/R and Add.1 / WT/DS433/R and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, DSR 2014:IV, p. 1127
<i>China – Raw Materials</i>	Panel Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/R , Add.1 and Corr.1 / WT/DS395/R , Add.1 and Corr.1 / WT/DS398/R , Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, DSR 2012:VII, p. 3501
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535

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Colombia – Textiles	Appellate Body Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131
Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)	Panel Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear – Recourse to Article 21.5 of the DSU by Colombia / Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear – Recourse to Article 21.5 of the DSU by Panama</i> , WT/DS461/RW and Add.1, circulated to WTO Members 5 October 2018
Dominican Republic – Import and Sale of Cigarettes	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R , adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R , DSR 2005:XV, p. 7425
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EC and certain member States – Large Civil Aircraft	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R , adopted 1 June 2011, DSR 2011:I, p. 7
EC – Bananas III	Panel Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/R/ECU (Ecuador) / WT/DS27/R/GTM , WT/DS27/R/HND (Guatemala and Honduras) / WT/DS27/R/MEX (Mexico) / WT/DS27/R/USA (US), adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R , DSR 1997:II, p. 695 to DSR 1997:III, p. 1085
EC – Bananas III	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R , adopted 25 September 1997, DSR 1997:II, p. 591
EC – Bananas III (Article 21.5 – Ecuador II)	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/RW2/ECU , adopted 11 December 2008, as modified by Appellate Body Report WT/DS27/AB/RW2/ECU , DSR 2008:XVIII, p. 7329
EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)	Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/AB/RW2/ECU , adopted 11 December 2008, and <i>Corr.1 / European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS27/AB/RW/USA and <i>Corr.1</i> , adopted 22 December 2008, DSR 2008:XVIII, p. 7165
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW , adopted 24 April 2003, DSR 2003:III, p. 965
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EC – Computer Equipment	Appellate Body Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , WT/DS62/AB/R , WT/DS67/AB/R , WT/DS68/AB/R , adopted 22 June 1998, DSR 1998:V, p. 1851
EC – Export Subsidies on Sugar (Australia)	Panel Report, <i>European Communities – Export Subsidies on Sugar, Complaint by Australia</i> , WT/DS265/R , adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R , WT/DS266/AB/R , WT/DS283/AB/R , DSR 2005:XIII, p. 6499
EC – Fasteners (China) (Article 21.5 – China)	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China</i> , WT/DS397/AB/RW and Add.1, adopted 12 February 2016, DSR 2016:I, p. 7
EC – Hormones	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R , WT/DS48/AB/R , adopted 13 February 1998, DSR 1998:I, p. 135
EC – IT Products	Panel Reports, <i>European Communities and its member States – Tariff Treatment of Certain Information Technology Products</i> , WT/DS375/R / WT/DS376/R / WT/DS377/R , adopted 21 September 2010, DSR 2010:III, p. 933
EC – Poultry	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R , adopted 23 July 1998, DSR 1998:V, p. 2031
EC – Seal Products	Panel Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/R and Add.1 / WT/DS401/R and

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EC – Seal Products	Add.1, adopted 18 June 2014, as modified by Appellate Body Reports WT/DS400/AB/R / WT/DS401/AB/R, DSR 2014:II, p. 365
EEC – Import Restrictions	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R , adopted 18 June 2014, DSR 2014:I, p. 7
India – Additional Import Duties	GATT Panel Report, <i>EEC – Quantitative Restrictions Against Imports of Certain Products from Hong Kong, L/5511</i> , adopted 12 July 1983, BISD 30S/129
India – Patents (US)	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R , adopted 16 January 1998, DSR 1998:I, p. 9
India – Quantitative Restrictions	Panel Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/R , adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R, DSR 1999:V, p. 1799
India – Solar Cells	Panel Report, <i>India – Certain Measures Relating to Solar Cells and Solar Modules</i> , WT/DS456/R and Add.1, adopted 14 October 2016, as modified by Appellate Body Report WT/DS456/AB/R, DSR 2016:IV, p. 1941
Indonesia – Autos	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R , WT/DS55/R , WT/DS59/R , WT/DS64/R , Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, p. 2201
Indonesia – Iron or Steel Products	Panel Report, <i>Indonesia – Safeguard on Certain Iron or Steel Products</i> , WT/DS490/R , WT/DS496/R , and Add.1, adopted 27 August 2018, as modified by Appellate Body Report WT/DS490/AB/R, WT/DS496/AB/R, DSR 2018:VII, p. 3707
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Japan – Alcoholic Beverages II	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R , WT/DS10/AB/R , WT/DS11/AB/R , adopted 1 November 1996, DSR 1996:I, p. 97
Peru – Agricultural Products	Panel Report, <i>Peru – Additional Duty on Imports of Certain Agricultural Products</i> , WT/DS457/R and Add.1, adopted 31 July 2015, as modified by Appellate Body Report WT/DS457/AB/R, DSR 2015:VII, p. 3567
Peru – Agricultural Products	Appellate Body Report, <i>Peru – Additional Duty on Imports of Certain Agricultural Products</i> , WT/DS457/AB/R and Add.1, adopted 31 July 2015, DSR 2015:VI, p. 3403
Russia – Pigs (EU)	Panel Report, <i>Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union</i> , WT/DS475/R and Add.1, adopted 21 March 2017, as modified by Appellate Body Report WT/DS475/AB/R, DSR 2017:II, p. 361
Russia – Railway Equipment	Panel Report, <i>Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof</i> , WT/DS499/R and Add.1, adopted 5 March 2020, as modified by Appellate Body Report WT/DS499/AB/R
Russia – Tariff Treatment	Panel Report, <i>Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products</i> , WT/DS485/R , Add.1, Corr.1, and Corr.2, adopted 26 September 2016, DSR 2016:IV, p. 1547
Russia – Traffic in Transit	Panel Report, <i>Russia – Measures Concerning Traffic in Transit</i> , WT/DS512/R and Add.1, adopted 26 April 2019, DSR 2019:VIII, p. 4301
Saudi Arabia – IPRs	Panel Report, <i>Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights</i> , WT/DS567/R and Add.1, circulated to Members on 16 June 2020, dispute terminated while appeal pending
Thailand – Cigarettes (Philippines)	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R , adopted 15 July 2011, DSR 2011:IV, p. 2203
Ukraine – Ammonium Nitrate	Appellate Body Report, <i>Ukraine – Anti-Dumping Measures on Ammonium Nitrate</i> , WT/DS493/AB/R and Add.1, adopted 30 September 2019, DSR 2019:X, p. 5227
US – 1916 Act	Appellate Body Report, <i>United States – Anti-Dumping Act of 1916</i> , WT/DS136/AB/R , WT/DS162/AB/R , adopted 26 September 2000, DSR 2000:X, p. 4793
US – Carbon Steel	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – COOL	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R / WT/DS386/AB/R , adopted 23 July 2012, DSR 2012:V, p. 2449
US – COOL (Article 21.5 – Canada and Mexico)	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and</i>

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	<i>Mexico</i> , WT/DS384/AB/RW / WT/DS386/AB/RW , adopted 29 May 2015, DSR 2015:IV, p. 1725
<i>US – Customs Bond Directive</i>	Panel Report, <i>United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , WT/DS345/R , adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R / WT/DS345/AB/R , DSR 2008:VIII, p. 2925
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R , adopted 20 May 1996, DSR 1996:I, p. 3
<i>US – Line Pipe</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R , adopted 8 March 2002, DSR 2002:IV, p. 1403
<i>US – Offset Act (Byrd Amendment)</i>	Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R , WT/DS234/AB/R , adopted 27 January 2003, DSR 2003:I, p. 375
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R , adopted 25 October 2010, DSR 2010:V, p. 1909
<i>US – Section 301 Trade Act</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R , adopted 27 January 2000, DSR 2000:II, p. 815
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R , adopted 6 November 1998, DSR 1998:VII, p. 2755
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R , adopted 17 February 2004, DSR 2004:II, p. 571
<i>US – Stainless Steel (Mexico)</i>	Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/AB/R , adopted 20 May 2008, DSR 2008:II, p. 513
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R , WT/DS249/AB/R , WT/DS251/AB/R , WT/DS252/AB/R , WT/DS253/AB/R , WT/DS254/AB/R , WT/DS258/AB/R , WT/DS259/AB/R , adopted 10 December 2003, DSR 2003:VII, p. 3117
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R , adopted 21 March 2005, DSR 2005:I, p. 3

EXHIBITS REFERRED TO IN THIS REPORT

Panel Exhibit	Short title (if applicable)	Title
NOR-1 and USA-7	Steel Report	US Department of Commerce, Bureau of Industry and Security, Office of Technology Evaluation, <i>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</i> (11 January 2018)
NOR-2 and USA-8	Aluminium Report	US Department of Commerce, Bureau of Industry and Security, Office of Technology Evaluation, <i>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</i> (17 January 2018)
NOR-3 and USA-10	Presidential Proclamation 9704	Proclamation 9704 of 8 March 2018, Adjusting Imports of Aluminum Into the United States, United States Federal Register, Vol. 83, No. 51 (15 March 2018), p. 11619
NOR-4 and USA-9	Presidential Proclamation 9705	Proclamation 9705 of 8 March 2018, Adjusting Imports of Steel Into the United States, United States Federal Register, Vol. 83, No. 51 (15 March 2018), p. 11625
NOR-6 and USA-12	Presidential Proclamation 9710	Proclamation 9710 of 22 March 2018, Adjusting Imports of Aluminum Into the United States, United States Federal Register, Vol. 83, No. 60 (28 March 2018), p. 13355
NOR-7 and USA-11	Presidential Proclamation 9711	Proclamation 9711 of 22 March 2018, Adjusting Imports of Steel Into the United States, United States Federal Register, Vol. 83, No. 60 (28 March 2018), p. 13361
NOR-8 and USA-13	Presidential Proclamation 9740	Proclamation 9740 of 30 April 2018, Adjusting Imports of Steel Into the United States, United States Federal Register, Vol. 83, No. 88 (7 May 2018), p. 20683
NOR-9 and USA-16	Presidential Proclamation 9758	Proclamation 9758 of 31 May 2018, Adjusting Imports of Aluminum Into the United States, United States Federal Register, Vol. 83, No. 108 (5 June 2018), p. 25849
NOR-10 and USA-15	Presidential Proclamation 9759	Proclamation 9759 of 31 May 2018, Adjusting Imports of Steel Into the United States, United States Federal Register, Vol. 83, No. 108 (5 June 2018), p. 25857
NOR-11 and USA-14	Presidential Proclamation 9739	Proclamation 9739 of 30 April 2018, Adjusting Imports of Aluminum Into the United States, United States Federal Register, Vol. 83, No. 88 (7 May 2018), p. 20677
NOR-12 and USA-1	Section 232	Trade Expansion Act, Public Law No. 87-794, 76 Stat. 877 (1962), United States Code, Title II, Section 232
NOR-20 and USA-21	September Interim Final Rule	Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum, Interim Final Rule, United States Federal Register, Vol. 83, No. 176 (11 September 2018), p. 46026
NOR-21 and USA-19	Presidential Proclamation 9776	Proclamation 9776 of 29 August 2018, Adjusting Imports of Aluminum Into the United States, United States Federal Register, Vol. 83, No. 171 (4 September 2018), p. 45019
NOR-22 and USA-18	Presidential Proclamation 9777	Proclamation 9777 of 29 August 2018, Adjusting Imports of Steel Into the United States, United States Federal Register, Vol. 83, No. 171 (4 September 2018), p. 45025
NOR-23 (excerpt) and USA-84 (full version)		Statements dated 29 October 2018, 21 November 2018, and 4 December 2018 of the United States, WTO Dispute Settlement Body
NOR-76 and USA-20	March Interim Final Rule	Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum Into the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum, Interim Final Rule, United States Federal Register, Vol. 83, No. 53 (19 March 2018), p. 12106
NOR-5	Presidential Proclamation 9772	Proclamation 9772 of 10 August 2018, Adjusting Imports of Steel Into the United States, United States Federal Register, Vol. 83, No. 158 (15 August 2018), p. 40429
NOR-15		Harmonized Tariff Schedule of the United States (2019) Revision 2, Chapter 99
NOR-69		United States Bound Tariffs
NOR-125		Oxford English Dictionary, definition of "emergency", https://www.oed.com/view/Entry/61130?redirectedFrom=emergency&print (accessed 4 February 2020)
USA-2	Section 232 regulations	United States Code of Federal Regulations, Title 15, Part 705
USA-22		<i>The New Shorter Oxford English Dictionary</i> , 4 th edn, L. Brown (ed.) (Clarendon Press, 1993)

Panel Exhibit	Short title (if applicable)	Title
USA-23		Draft Articles on the Law of Treaties with commentaries, Yearbook of the International Law Commission, 1966, Vol. II
USA-72		G20, <i>Global Forum on Steel Excess Capacity Report</i> (30 November 2017)
USA-80		Council for Trade in Goods, Minutes of the Meeting held on 10 November 2017, G/C/M/130
USA-81		Council for Trade in Goods, Minutes of the Meeting held on 23 and 26 March 2018, G/C/M/131
USA-82		Committee on Safeguards, Communication from the United States, G/SG/168
USA-83		Statement dated 8 May 2018 of the Deputy US Trade Representative and US Permanent Representative to the WTO, WTO General Council
USA-85		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
USA-86		<i>The New Shorter Oxford English Dictionary</i> , 4 th edn, L. Brown (ed.) (Clarendon Press, 1993)
USA-93		S. Greenbaum, <i>English Grammar</i> (Oxford University Press, 1996)
USA-94		R. Flesch and A.H. Lass, <i>The Classic Guide to Better Writing</i> (HarperPerennial, 1996)
USA-95		<i>Merriam-Webster's Guide to Punctuation and Style</i> (Merriam-Webster, Incorporated, 1995)
USA-96		S. Benedict (ed.), <i>Harper's English Grammar</i> (Harper & Row, 1966)
USA-222		<i>The New Shorter Oxford English Dictionary</i> , 4 th edn, L. Brown (ed.) (Clarendon Press, 1993)
USA-226		W. Strunk Jr. and E.B. White, <i>The Elements of Style</i> , 4 th edn (Allyn and Bacon, 1999)
USA-240		Remarks dated 18 April 2016 of C. Malmström, "Way ahead for the global steel industry", OECD High-Level Symposium on Steel
USA-246		Statement of the Chair of the OECD Ministerial Council Meeting (2018)
USA-247		Charlevoix G7 Summit Communiqué (9 June 2018)

1 INTRODUCTION

1.1. This dispute concerns additional duties and related measures imposed by the United States on steel and aluminium products under Section 232 of the Trade Expansion Act of 1962, as amended. Norway challenges the consistency of these measures with the United States' obligations under the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Safeguards.

1.1 Complaint by Norway

1.2. On 12 June 2018, Norway requested consultations with the United States pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the GATT 1994, and Article 14 of the Agreement on Safeguards with respect to the measures and claims set out below.¹

1.3. Consultations were held on 19 July 2018 between Norway and the United States. These consultations failed to resolve the dispute.²

1.2 Panel establishment and composition

1.4. On 18 October 2018, Norway requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII:2 of the GATT 1994, and Article 14 of the Agreement on Safeguards with standard terms of reference.³ At its meeting on 21 November 2018, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Norway in document WT/DS552/10, in accordance with Article 6 of the DSU.⁴

1.5. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Norway in document WT/DS552/10 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.⁵

1.6. On 7 January 2019, Norway requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 25 January 2019, the Director-General accordingly composed the Panel as follows:

Chairperson: Mr Elbio Rosselli

Members: Mr Esteban B. Conejos, Jr
Mr Rodrigo Valenzuela

1.7. The Kingdom of Bahrain; Brazil; Canada; China; Colombia; Egypt; the European Union; Guatemala; Hong Kong, China; Iceland; India; Indonesia; Japan; Kazakhstan; Malaysia; Mexico; New Zealand; Qatar; the Russian Federation; the Kingdom of Saudi Arabia; Singapore; South Africa; Switzerland; Chinese Taipei; Thailand; Türkiye⁶; Ukraine; the United Arab Emirates⁷; and the Bolivarian Republic of Venezuela notified their interest in participating in the Panel proceedings as third parties.

¹ See Request for consultations by Norway, WT/DS552/1.

² See Request for the establishment of a panel by Norway, WT/DS552/10 (Norway's panel request).

³ See Norway's panel request.

⁴ See Minutes of the DSB meeting held on 21 November 2018, WT/DSB/M/421, para. 10.4.

⁵ See Note by the Secretariat, Constitution of the Panel established at the request of Norway, WT/DS552/11.

⁶ Member formerly known as Turkey.

⁷ On 19 July 2019, the United Arab Emirates notified the DSB and the Panel of its interest in participating as a third party. (See WT/DS552/11/Rev.1).

1.3 Panel proceedings

1.3.1 General

1.8. The Panel held an organizational meeting with the parties on 15 March 2019.

1.9. After consultation with the parties, the Panel adopted its Working Procedures⁸ and Timetable⁹ on 5 April 2019.

1.10. The Panel held a first substantive meeting with the parties on 6-7 November 2019.¹⁰ A session with the third parties took place on 18 November 2019. The Panel held a second substantive meeting with the parties on 14 and 28 January 2021. On 15 July 2021, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 29 June 2022. The Panel issued its Final Report to the parties on 16 November 2022.

1.3.2 Request for the substantive meetings of the Panel to be open to the public

1.11. On 5 March 2019, the Panel received a communication from the United States inquiring whether Norway was willing to open the substantive meetings in the dispute to public observation and make its submissions to the Panel available to the public.¹¹ In the Panel's organizational meeting with the parties, Norway expressed its willingness to make the opening statements available for public viewing.¹²

1.12. The Panel transmitted its Working Procedures to the parties on 5 April 2019, which provided that the Panel "may open its meetings with the parties to the public, subject to appropriate procedures to be adopted by the Panel after consulting the parties".¹³ On 28 May 2019, the Panel circulated draft additional working procedures on open meetings to the parties for comments. Based on the comments received from the parties on 14 June 2019 and 21 June 2019, the Panel adopted

⁸ The Panel's Working Procedures were revised on 19 July 2019 and 20 February 2020. See the Panel's Working Procedures, adopted on 5 April 2019, as revised on 19 July 2019 and 20 February 2020, in Annex A-1.

⁹ The Timetable for the Panel proceedings was revised on 19 July 2019, 13 December 2019, and 20 February 2020. The Panel subsequently communicated with the parties directly regarding additional dates and deadlines in the Panel proceedings.

¹⁰ On 14 October 2019, the Panel informed the parties that the Chairperson of the Panel would not be able to travel to Geneva for the first substantive meeting due to an accident. In response to the Panel's invitation to provide views on the conduct of the meeting, the United States expressed concern that participation by videoconference could make the meeting less effective and queried whether the Chairperson would be able to participate in person with a modest delay in the timetable. After consulting the parties, the Panel decided on 22 October 2019 to proceed with the participation of the Chairperson through videoconferencing. In its decision, the Panel noted that the prompt settlement of disputes is a key principle under Article 3 of the DSU and, under Article 12.2 of the DSU, panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process. The Panel also informed the parties that several actions had been taken in order to guarantee an optimal quality of communication, including setting up multiple channels of communication between Geneva and Montevideo to maintain connectivity.

¹¹ United States' communication dated 5 March 2019.

¹² During the Panel's organizational meeting with the parties, the United States alternatively requested the Panel to partially open its substantive meetings to the public given the complainants' views in the other disputes in which the same three persons were appointed as panelists (See section 1.3.4 below). The United States argued in that context that providing for a partially open hearing would serve to facilitate the United States' right under Article 18.2 of the DSU to disclose statements of its own position. In its communication to the parties dated 5 April 2019, the Panel observed that nothing in the DSU provides that a party's right to disclose statements of its own positions to the public must be exercised through the holding of fully or partly open hearings. The Panel noted that there are other ways in which Members can make statements of their own position public and that by declining a party's request to hold partially open hearings, the Panel would not be depriving a Member of its rights under Article 18.2 or under any other provisions of the DSU. Having considered the disagreement between the parties on the United States' proposal, as well as the parties' views on the scope of the obligation to protect confidential information in the context of a partially open hearing, the Panel exercised its discretion under Article 12.1 of the DSU to deny the United States' request for partially open meetings.

¹³ Working Procedures of the Panel, para. 10.

the Additional Working Procedures on open meetings on 19 July 2019, applicable to the first substantive meeting of the Panel with the parties.¹⁴

1.3.3 Request for enhanced third-party rights

1.13. On 7 June 2019, the Panel received a communication from Türkiye requesting enhanced third-party rights (a) to receive copies of all the parties' written submissions, oral statements, rebuttals and answers to questions from the Panel and each other, through all stages of the proceedings; (b) to be present for the entirety of all substantive meetings of the Panel with the parties; and (c) to review the draft summary of their own arguments in the descriptive part of the Panel Report.¹⁵ On 17 June 2019 and 26 June 2019, the Panel invited the parties to comment on this request as well as other similar requests received from China¹⁶; the European Union¹⁷; Switzerland¹⁸; the Russian Federation¹⁹; and Hong Kong, China.²⁰ In response, the United States opposed the requests for enhanced rights to third parties²¹, whereas Norway supported the requests.²²

1.14. Having consulted the parties on this matter and considering their due process interests, the Panel informed the parties and third parties on 19 July 2019 that it had decided to grant certain enhanced third-party rights to all third parties. The Panel implemented this decision in paragraph 30(e) of the Revised Working Procedures of 19 July 2019, granting third parties access to the parties' submissions up to and including their responses to the questions posed by the Panel following the first substantive meeting, as well as final versions of the oral statements made by the parties during the first substantive meeting. The Panel stated that it would address the requests for enhanced third-party rights in respect of further stages of the proceedings in due course.

1.15. After consultation with the parties, the Panel also granted enhanced third-party rights in respect of further stages of the proceedings. On 20 February 2020, the Panel amended its Working Procedures to provide third parties access to the parties' second written submissions, final versions of oral statements made by the parties during the second substantive meeting, their responses to the Panel's questions after the second substantive meeting, and comments on those responses.

1.16. In the interest of advancing the proceedings during the disruptions associated with the COVID-19 pandemic²³ and pursuant to paragraph 9 of the Panel's Working Procedures, the Panel sent additional questions to the parties on 26 August 2020. Based on consultations with the parties, the Panel decided on 8 September 2020 and 21 September 2020 that the parties' responses to the Panel's additional questions and comments on those responses should be made available to third parties.

1.17. Due to the impact of the COVID-19 pandemic on the second substantive meeting²⁴, the Panel decided, on 10 November 2020, to modify its decision of 20 February 2020 so that third parties would not receive further access to any statements, submissions, or exchanges from the parties, including statements made by the parties during the second substantive meeting, their responses to the Panel's questions after the second substantive meeting, or comments on those responses.

¹⁴ See the Panel's Additional Working Procedures on Open Meeting, adopted on 19 July 2019, in Annex A-2.

¹⁵ Türkiye's communication dated 7 June 2019, para. 11.

¹⁶ China's communication dated 7 June 2019, para. 2.

¹⁷ European Union's communication dated 7 June 2019, para. 11.

¹⁸ Switzerland's communication dated 11 June 2019, para. 3.

¹⁹ The Russian Federation's communication dated 14 June 2019, p. 3.

²⁰ Hong Kong, China's communication dated 25 June 2019, p. 1.

²¹ United States' communications dated 24 June 2019, para. 2; United States' communication dated 1 July 2019, para. 2.

²² Norway's communication dated 24 June 2019; Norway's communication dated 1 July 2019, para. 8.

²³ See section 1.3.5.2 below.

²⁴ See section 1.3.5.4 below.

1.3.4 Relationship with the other disputes where the same three persons act as panelists

1.18. At the organizational meeting and at various points in the proceedings, the parties provided views regarding the relationship between this dispute and the other cases where the same three persons act as panelists.²⁵

1.19. Norway considered that these complaints relate to the same matter and Article 9.3 of the DSU was therefore applicable, noting that this was recognized in the Director-General's decision to appoint the same panelists to serve on all these panels. Accordingly, Norway argued that these proceedings required harmonized timetables and consolidated hearings, which could significantly reduce the risk of unnecessary repetition and achieve important efficiencies.²⁶ For Norway, the notion of a "harmonized" timetable in Article 9.3 of the DSU implies "harmonized", or consolidated, substantive meetings.²⁷ Norway argued that, in previous practice, single panels were established under Article 9.1 of the DSU despite the absence of a complete overlap of the claims raised and that "[t]his logic applies *a fortiori* under Article 9.3 of the DSU."²⁸

1.20. The United States considered that a single panel had not been established in these disputes pursuant to Article 9.1 of the DSU, but rather, nine²⁹ separate panels were established by the DSB to consider distinct matters. For the United States, the matters are distinct because the claims and measures identified by each complainant are different from the other complainants. For this reason, the United States submitted that Article 9.3 of the DSU is not applicable and, even if it were, it would only be relevant to the composition of the various panels and the timetables.³⁰ In the context of Article 9.3 of the DSU, the United States argued that to "harmonize" the timetables in these proceedings would mean to make them consistent or compatible and that harmonization does not suggest, much less require, that the Panel collapse the proceedings into a single, identical process. For the United States, the disparate sets of claims and measures identified by the complainants are important to considerations of both efficiency and procedural fairness.³¹

1.21. The Panel notes that, at its meeting on 21 November 2018, the DSB established a panel pursuant to the request of Norway in document WT/DS552/10, in accordance with Article 6 of the DSU.³² While the same three persons that act as panelists in this dispute were also appointed as panelists in other related cases³³, these proceedings are not substantively identical in all respects, for instance, in terms of the precise measures and claims at issue. The Panel was also mindful of the logistical complexities of coordinating multiple formally distinct disputes and, before adopting its Timetable and Working Procedures, consulted the parties on multiple possible alternatives for the conduct and configuration of the proceedings.³⁴

²⁵ The other disputes where the same three persons are acting as panelists include DS544 (China), DS547 (India), DS554 (the Russian Federation), DS556 (Switzerland), and DS564 (Türkiye). Mutually agreed solutions were notified in DS550 (Canada) and DS551 (Mexico), where the same three persons were appointed as panelists. See *United States – Certain Measures on Steel and Aluminium Products (Canada)*, Notification of a Mutually Agreed Solution, WT/DS550/13, 27 May 2019 and *United States – Certain Measures on Steel and Aluminium Products (Mexico)*, Notification of a Mutually Agreed Solution, WT/DS551/13, 3 June 2019. On 17 January 2022, the United States and the European Union jointly notified the DSB that they were terminating the dispute in DS548 (European Union), where the same three persons were appointed as panelists. (WT/DS548/20). On 20 January 2022, that panel notified the DSB that it was in receipt of a communication from the European Union notifying the withdrawal of its complaint, and accordingly, had ceased all work in those proceedings. (WT/DS548/21).

²⁶ Norway's communication dated 22 February 2019.

²⁷ Norway's communication dated 1 March 2019.

²⁸ Norway's communication dated 1 March 2019.

²⁹ The Panel recalls that the disputes in DS548 (European Union), DS550 (Canada) and DS551 (Mexico) were active at the time of the Panel's organizational meeting and related consultations with the parties.

³⁰ United States' communication dated 22 February 2019.

³¹ United States' communication dated 1 March 2019.

³² Note by the Secretariat, Constitution of the Panel established at the request of Norway, WT/DS552/11.

³³ DS544 (China), DS547 (India), DS554 (the Russian Federation), DS556 (Switzerland), and DS564 (Türkiye).

³⁴ Panel communication to the parties dated 7 March 2019. During the Panel's organizational meeting and related consultations with the parties, the Panel specifically sought the parties' views on the optimal scheduling and configuration of the substantive meetings in the disputes where the same three persons were appointed as panelists, particularly addressing three possible configurations for the substantive meetings: (a)

1.22. The Panel, nonetheless, made arrangements at each stage of the proceedings to maintain harmonized timetables to the greatest extent possible in both the deadlines for written submissions and the dates for meetings across all disputes in which the same three persons act as panelists. In doing so, the Panel endeavoured to balance the efficient conduct of proceedings with the due process rights of the parties, taking into account the agreement of the parties, or lack thereof, on the different proposals on how to organize the proceedings. As elaborated in the next section, the harmonization of timetables was, in some instances, affected by the divergent views of the complainants across the different disputes.³⁵

1.3.5 Impact of the COVID-19 pandemic on the Panel proceedings

1.3.5.1 Filing of written submissions

1.23. On 17 March 2020, in response to the COVID-19 outbreak, the Panel suspended the requirement to deliver paper copies of a document or submission to the other parties or the DS Registry until further notice. The Panel decided that receipt of the electronic version would be deemed to be full service for the purposes of the Working Procedures. After briefly reverting to service of hard copies of documents on 22 July 2020, the Panel informed the parties that as of 28 October 2020, e-filing would be deemed full service again until further notice.³⁶

1.3.5.2 Scheduling of the second substantive meeting of the Panel with the parties

1.24. According to the revised Timetable adopted on 20 February 2020 after consultation with the parties³⁷, the Panel's second meeting with the parties was scheduled for 7-8 July 2020.

1.25. On 27 May 2020, the Panel invited the parties to provide information on the travel restrictions that might impact the overall likelihood of holding the second meeting in person in July 2020. In addition, the Panel consulted the parties on possible alternative arrangements to meetings in person, including (a) holding the second substantive meeting through virtual participation in July 2020; (b) postponement of the meeting to a later date with a possibility for an exchange of written questions and responses in the interim; (c) adoption of written procedures as a substitute for the second substantive meeting; or (d) any other possible arrangement, should it not be possible to hold the meeting in person in July 2020. The Panel further requested comments on the possibility of holding meetings open to the public given *inter alia* the restrictions on social gatherings in force in Switzerland.

1.26. In response to the Panel's communication, both parties indicated their inability to travel to Geneva for the second substantive meeting in July 2020.³⁸ For Norway, both postponing the meeting to a later date and the adoption of written procedures as a substitute for the second substantive meeting were acceptable alternatives.³⁹ The United States opposed holding the meeting in a virtual format, citing consequent limitations on interactions between the parties and the Panel, within the parties' respective delegations, among the three panelists, and between the panelists and the Secretariat.⁴⁰ The United States also opposed web-casting the meeting owing to concerns of security and protection against manipulation of such webcasts.⁴¹ The United States further disagreed with

combined substantive meetings with the parties in this dispute and the other eight disputes; (b) a "two-stage" approach proposed by the United States with a first stage devoted solely to the United States' arguments under Article XXI of the GATT 1994; and (c) separate meetings for each of the disputes in which the same panelists had been appointed.

³⁵ See section 1.3.5.4 below.

³⁶ Panel communication to the parties dated 27 October 2020.

³⁷ Following its first substantive meeting with the parties, the Panel consulted the parties on various options for scheduling the second substantive meeting between 22 June-31 July 2020 or 14 September-16 October 2020, as well as an expedited timetable under which the second substantive meeting with the parties would be held in May 2020. While Norway favoured the earlier scheduling of the meeting, the United States requested that the meeting be scheduled between 14 September 2020 and 16 October 2020, citing conflicting summer holiday schedules, US federal holidays, and the need for sufficient time to adequately prepare for the second substantive meeting. Based on these consultations, the Panel scheduled its second meeting with the parties on 7 and 8 July 2020.

³⁸ United States' communication dated 2 June 2020, paras. 2-3; Norway's communication dated 2 June 2020.

³⁹ Norway's communication dated 2 June 2020.

⁴⁰ United States' communication dated 2 June 2020, paras. 9-10.

⁴¹ United States' communication dated 2 June 2020, para. 17.

Norway's suggestion that a written exchange could serve as an alternative to a second substantive meeting with contemporaneous oral exchange.⁴² On this basis, the United States requested that the Panel reschedule the second substantive meeting for a later date.⁴³ After reviewing the parties' comments, the Panel in its communication dated 12 June 2020 decided to postpone the meeting, indicating that it tentatively intended to schedule the meeting between 10 September and 20 October 2020.

1.27. Through multiple communications sent to the parties on 22 July 2020, 31 July 2020, 26 August 2020, 21 September 2020, 13 October 2020, and 23 October 2020, the Panel regularly consulted the parties on the feasibility of in-person meetings in 2020 and possible alternative arrangements. Both parties identified numerous potential obstacles to holding in-person meetings in 2020, including evolving travel and quarantine restrictions due to the pandemic, and maintained their divergent views on alternative arrangements as a substitute for in-person meetings.⁴⁴ In addition, Norway expressed that, in light of the pandemic and prolonged travel restrictions, it was willing to discuss alternative options, including the possibility of the second substantive meeting being conducted as a virtual hearing.⁴⁵

1.28. After it became apparent that no in-person meeting would be possible in the foreseeable future due to the COVID-19 pandemic, the Panel issued a decision on 10 November 2020 on the way forward in the proceedings. The Panel began by noting the various restrictions imposed on gatherings and international travel in relation to the COVID-19 pandemic, including those instituted by Switzerland in November 2020, and that under these circumstances, holding the second substantive meeting in the manner originally envisaged in the Timetable was not feasible. The Panel indicated its consistent efforts over the course of the dispute to maintain a balance between the efficient conduct of proceedings, the parties' due process rights, and the particular preferences expressed by each party, including the complainant's request to keep the timetables harmonized across the disputes in which the same three persons act as panelists. Based on the parties' comments and in the interest of continuing to advance the Panel's work, the Panel decided to proceed by holding the second substantive meeting virtually. The Panel further indicated its intention to hold the second substantive meeting in closed session given *inter alia* the limited access to the WTO building and the logistical demands of holding virtual substantive meetings.

1.3.5.3 Use of a virtual meeting platform for the second substantive meeting of the Panel with the parties

1.29. In its decision of 10 November 2020, the Panel noted its intention to conduct the second meeting through the Cisco Webex platform and circulated draft additional working procedures requiring, among other things, that all remote participants follow the security rules contained in these additional working procedures as well as any additional security guidance that may be provided by the host. The Panel also proposed to arrange advance testing sessions with the parties to ensure their remote participation and invited comments from the parties on the draft additional working procedures.

1.30. In its comments on the draft additional working procedures, the United States requested that the Panel (a) provide all questions to the parties at least two weeks in advance; (b) refrain from asking additional or follow-up questions during the session; and (c) prohibit parties from commenting on each other's responses to the Panel's questions during the session. The United States reasoned that health concerns prevented its delegation from gathering in person to coordinate responses. The United States further cited technical considerations – "including the inability of USTR employees to participate in a meeting via Webex from telework locations" – in support of its request. Finally, the United States requested that the Panel enable the Webex dial-in

⁴² United States' communication dated 2 June 2020, para. 15; United States' communication dated 5 June 2020, para. 3.

⁴³ United States' communication dated 2 June 2020, para. 11; United States' communication dated 5 June 2020, para. 1.

⁴⁴ Norway's communication dated 27 July 2020; United States' communication dated 28 July 2020; Norway's communication dated 9 September 2020; United States' communication dated 9 September 2020; Norway's communication dated 20 October 2020; United States' communication dated 20 October 2020; Norway's communication dated 4 November 2020; and United States' communication dated 4 November 2020.

⁴⁵ Norway's communication dated 20 October 2020.

feature to allow individuals from its delegation to connect by phone and reflect this adjustment in the proposed additional working procedures.⁴⁶

1.31. Taking note of the parties' comments, the Panel declined the United States' request to (a) refrain from asking additional or follow-up questions during the session, and (b) prohibit parties from commenting on each other's responses to the Panel's questions during the session. The Panel observed that it had decided to divide the second substantive meeting into two four-hour sessions with two weeks between the sessions. The Panel found that this arrangement would allow each party the time to confer within its delegation and respond to possible questions from the Panel or the other party throughout the course of the meeting. The Panel also noted that the parties would have the opportunity to provide further comments in writing in response to questions after the meeting.⁴⁷

1.32. In the Additional Working Procedures for virtual meetings, the Panel indicated that the meeting would be held in closed session, with remote access limited to registered participants. Accordingly, for security and confidentiality reasons, the Panel decided not to enable the dial-in feature on Webex.

1.3.5.4 Impact on coordination with the other disputes where the same three persons act as panelists

1.33. As discussed in section 1.3.4 of this Report, the Panel made several arrangements at each stage of the proceedings to maintain harmonized timetables in all disputes where the same three persons are acting as panelists. However, in its communications of 13 October 2020 and 23 October 2020, the Panel noted that the complainants across these disputes presented diverging views on the way forward for the second substantive meeting in light of the COVID-19 pandemic. The Panel indicated to the parties that this divergence was difficult to reconcile with Norway's initial request to maintain harmonized timetables in all disputes. Accordingly, the Panel sought the parties' views on the feasibility of maintaining such harmonization going forward. The Panel also invited the parties' comments on the implications of the differences among the complainants in these disputes on enhanced third-party rights, and in particular on access to written submissions and responses to Panel questions, if the Panel determined that it was not viable to maintain harmonized timetables.

1.34. Norway requested that the timetables in the disputes where the same three persons act as panelists should be harmonized to the greatest extent possible.⁴⁸ Norway further indicated that should this not be viable, it was willing to discuss appropriate alternative modalities with respect to due process concerns as well as third-party rights.⁴⁹

1.35. The United States objected to proceeding differently across the disputes in which the same three persons serve as panelists, arguing that doing so would provide a strategic benefit to the complainants to the disadvantage of the United States.⁵⁰ Moreover, the United States observed that should the Panel move forward with different formats and different timetables across these disputes, the United States would no longer agree to open any of the proceedings to public viewing.⁵¹ The United States reasoned that complainants participating in later meetings would have an opportunity to view the earlier open meetings and adjust their statements and arguments accordingly.⁵² For similar reasons, the United States also requested that the Panel rescind its decision on enhanced third-party rights in the event it acceded to the complainants' diverging requests, arguing that such enhanced rights would serve to unfairly advantage those third parties that are also parties in their own disputes.⁵³

1.36. The Panel provided its decision on the second substantive meeting to the parties on 10 November 2020, where it noted that Article 9.3 of the DSU provides for harmonizing timetables to the "greatest extent possible". The Panel observed that the compatibility of positions taken by parties across disputes, or lack thereof, was a significant factor in assessing the possibility of

⁴⁶ United States' communication dated 16 November 2020.

⁴⁷ Panel communication to the parties dated 1 December 2020.

⁴⁸ Norway's communication dated 20 October 2020.

⁴⁹ Norway's communication dated 4 November 2020.

⁵⁰ United States' communication dated 20 October 2020, para. 6.

⁵¹ United States' communication dated 4 November 2020, para. 5.

⁵² United States' communication dated 20 October 2020, para. 5.

⁵³ United States' communication dated 4 November 2020, para. 3.

harmonizing timetables. In particular, the Panel considered that the harmonization of timetables would not compel the adoption of alternative meeting procedures by virtual means even in those disputes where both the complainant and the respondent had expressed a preference to wait until in-person meetings were possible. In this light, the Panel concluded that if the divergent positions of the parties across the disputes resulted in certain meetings being held at a later date, it would no longer be possible to harmonize the timetables across the disputes. The Panel further noted that if the timetables across the disputes were not harmonized, the rights of third parties for subsequent stages in the disputes would be as provided for in Article 10 of the DSU, and the Panel would not grant third parties further access to any statements, submissions, or exchanges from the parties in each dispute.

1.37. Based on the foregoing, the Panel scheduled its second substantive meeting with the parties in this dispute for 14 and 28 January 2021. Rights of third parties for subsequent stages in the disputes were limited to those provided in Article 10 of the DSU.

2 FACTUAL ASPECTS

2.1 Section 232 and the United States Department of Commerce reports on steel and aluminium

2.1. This section provides the legislative and regulatory background of the measures at issue in this dispute and, in particular, of:

- a. Section 232 of the Trade Expansion Act of 1962, as amended (United States Code, Title 19, Section 1862) (Section 232)⁵⁴ and its implementing regulation, United States Code of Federal Regulations, Title 15, Part 705⁵⁵;
- b. "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", United States Department of Commerce Report, 11 January 2018 (Steel Report)⁵⁶; and
- c. "The Effects of Imports of Aluminum on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, As Amended", United States Department of Commerce Report, 17 January 2018 (Aluminium Report).⁵⁷

2.1.1 Section 232

2.2. Pursuant to Section 232, upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the United States (US) Secretary of Commerce shall immediately initiate an appropriate investigation to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion.⁵⁸ The US Secretary of Commerce shall also immediately provide notice to the US Secretary of Defense of any such investigation, and shall consult with the Secretary of Defense regarding the methodological and policy questions raised in such investigation.⁵⁹

2.3. Section 232 further provides that no later than 270 days after an investigation is initiated with respect to any article, the US Secretary of Commerce shall submit to the US President a report on the findings of the investigation with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security. Section 232 directs the US Secretary of Commerce to make recommendations for action or inaction based on such findings. If the US Secretary of Commerce finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the Secretary shall so advise the US President in such report.⁶⁰

⁵⁴ Section 232, (Exhibit NOR-12 and USA-1).

⁵⁵ Section 232 regulations, (Exhibit USA-2).

⁵⁶ Steel Report, (Exhibit NOR-1 and USA-7).

⁵⁷ Aluminium Report, (Exhibit NOR-2 and USA-8).

⁵⁸ Section 232, (Exhibit NOR-12 and USA-1), § 1862(b)(1)(A).

⁵⁹ Section 232, (Exhibit NOR-12 and USA-1), §§ 1862(b)(1)(B) and (b)(2)(A).

⁶⁰ Section 232, (Exhibit NOR-12 and USA-1), § 1862(b)(3)(A).

2.4. Within 90 days of receiving such report, the US President shall: (a) determine whether the President concurs with the finding of the Secretary; and (b) if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust imports of the article and its derivatives so that such imports will not threaten to impair national security.⁶¹ If the US President determines to take action to adjust imports of the article and its derivatives, the US President shall implement such action within 15 days.⁶² Further, the action taken by the US President may be the negotiation of an agreement which limits or restricts importation into, or exportation to, the United States of the article that threatens to impair US national security, or such other actions as the US President deems necessary to adjust the imports of the article so that the imports will not threaten to impair US national security.⁶³

2.5. Section 232 also sets out factors that should be analysed when conducting an investigation to determine the effects of imports of a product on the national security. In particular, it provides that the US Secretary of Commerce and the US President shall, in light of the requirements of national security and without excluding other relevant factors, give consideration to:

- a. domestic production needed for projected national defence requirements;
- b. the capacity of domestic industries to meet such requirements;
- c. existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defence;
- d. the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth; and
- e. the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements.⁶⁴

2.6. In addition to these factors, Section 232 provides that in the administration of this section, the US Secretary of Commerce and the US President shall further recognize the close relation of the economic welfare of the United States to its national security, and shall take into consideration:

- a. the impact of foreign competition on the economic welfare of individual domestic industries; and
- b. any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports.⁶⁵

2.7. Additional regulations in the United States Code of Federal Regulations, Title 15, Part 705 set out the procedures according to which the US Department of Commerce shall commence and conduct its investigation to determine the effect on the national security of the imports of any article, as well as issue the report and recommendation to the President of the United States for action or inaction regarding an adjustment of the imports of the article(s) in question.⁶⁶

2.1.2 The Steel Report

2.8. The Steel Report of 11 January 2018 summarizes the findings of an investigation conducted by the US Department of Commerce pursuant to Section 232 into the effect of imports of steel mill products on the national security of the United States.⁶⁷

⁶¹ Section 232, (Exhibit NOR-12 and USA-1), § 1862(c)(1)(A).

⁶² Section 232, (Exhibit NOR-12 and USA-1), § 1862(c)(1)(B).

⁶³ Section 232, (Exhibit NOR-12 and USA-1), § 1862(c)(3)(A).

⁶⁴ Section 232, (Exhibit NOR-12 and USA-1), § 1862(d).

⁶⁵ Section 232, (Exhibit NOR-12 and USA-1), § 1862(d).

⁶⁶ Section 232 regulations, (Exhibit USA-2), §§ 705.1-705.12.

⁶⁷ Steel Report, (Exhibit NOR-1 and USA-7).

2.1.2.1 Initiation and investigation process

2.9. On 19 April 2017, the US Secretary of Commerce initiated an investigation to determine the effect of imported steel on national security under Section 232. The US Department of Commerce notified the US Department of Defense of the investigation in a letter dated 19 April 2017.⁶⁸ On 20 April 2017, the US President signed a Presidential Memorandum directing the US Secretary of Commerce to proceed expeditiously in conducting his investigation and submit a report on his findings to the President.⁶⁹ On 21 April 2017, the US Department of Commerce published in the Federal Register a notice about the initiation of the investigation. The notice also announced the opening of the public comment period as well as a public hearing to be held on 24 May 2017.⁷⁰ The US Department of Commerce held a public hearing to elicit further information concerning the investigation in Washington, D.C., on 24 May 2017.⁷¹

2.10. In addition to the notification provided by its 19 April 2017 letter to the US Department of Defense, the US Department of Commerce carried out consultations with the US Department of Defense regarding methodological and policy questions that arose during the investigation. According to the Steel Report, discussions were held with the US Army Materiel Command, the Defense Logistics Agency, the US Navy/Naval Air Systems Command, and the Under Secretary of Defense for Acquisitions & Logistics, Manufacturing, and Industrial Base Policy. Discussions were also held with "appropriate officers of the United States", including the US Department of State, Department of the Treasury, Department of the Interior/US Geological Survey, the Department of Homeland Security/US Customs and Border Protection, the International Trade Commission, and the Office of the United States Trade Representative.⁷²

2.1.2.2 Product scope

2.11. The Steel Report describes its product coverage as steel mill products which are defined at the Harmonized System 6-digit level as: 720610 through 721650, 721699 through 730110, 730210, 730240 through 730290, and 730410 through 730690, including any subsequent revisions to these HS codes.⁷³ Generally, these products fall into five categories:

- a. Carbon and Alloy Flat Products (Flat Products): Steel products produced by rolling semi-finished steel through varying sets of rolls. This category includes sheets, strips, and plates.⁷⁴
- b. Carbon and Alloy Long Products (Long Products): Steel products that fall outside the flat products category. This category includes bars, rails, rods, and beams.⁷⁵
- c. Carbon and Alloy Pipe and Tube Products (Pipe and Tube Products): Either seamless or welded pipe and tube products. Some of these products may include stainless as well as alloys other than stainless.⁷⁶

⁶⁸ Steel Report, (Exhibit NOR-1 and USA-7), p. 18.

⁶⁹ Steel Report, (Exhibit NOR-1 and USA-7), p. 18.

⁷⁰ Steel Report, (Exhibit NOR-1 and USA-7), p. 18.

⁷¹ Steel Report, (Exhibit NOR-1 and USA-7), p. 18.

⁷² Steel Report, (Exhibit NOR-1 and USA-7), pp. 19-20.

⁷³ Steel Report, (Exhibit NOR-1 and USA-7), p. 21.

⁷⁴ Flat products are covered under the following 6-digit HS codes: 720810, 720825, 720826, 720827, 720836, 720837, 720838, 720839, 720840, 720851, 720852, 720853, 720854, 720890, 720915, 720916, 720917, 720918, 720925, 720926, 720927, 720928, 720990, 721011, 721012, 721020, 721030, 721041, 721049, 721050, 721061, 721069, 721070, 721090, 721113, 721114, 721119, 721123, 721129, 721190, 721210, 721220, 721230, 721240, 721250, 721260, 722511, 722519, 722530, 722540, 722550, 722591, 722592, 722599, 722611, 722619, 722691, 722692, 722693, 722694, 722699. (Steel Report, (Exhibit NOR-1 and USA-7), p. 21).

⁷⁵ Long products are covered under the following 6-digit HS codes: 721310, 721320, 721391, 721399, 721410, 721420, 721430, 721491, 721499, 721510, 721550, 721590, 721610, 721621, 721622, 721631, 721632, 721633, 721640, 721650, 721699, 721710, 721720, 721730, 721790, 722520, 722620, 722710, 722720, 722790, 722810, 722820, 722830, 722840, 722850, 722860, 722870, 722880, 722910, 722920, 722990, 730110, 730210, 730240, 730290. (Steel Report, (Exhibit NOR-1 and USA-7), pp. 21-22).

⁷⁶ Pipe and Tube products are covered under the following 6-digit HS codes: 730410, 730419, 730421, 730423, 730429, 730431, 730439, 730451, 730459, 730490, 730511, 730512, 730519, 730520, 730531,

- d. Carbon and Alloy Semi-finished Products (Semi-finished Products): The initial, intermediate solid forms of molten steel, to be re-heated and further forged, rolled, shaped, or otherwise worked into finished steel products. This category includes blooms, billets, slabs, ingots, and steel for castings.⁷⁷
- e. Stainless Products: Steel products, in flat-rolled, long, pipe and tube, and semi-finished forms, containing at minimum 10.5% chromium and, by weight, 1.2% or less of carbon, offering better corrosion resistance than other steel.⁷⁸

2.1.2.3 Findings and recommendations by the US Secretary of Commerce

2.12. The Steel Report refers to the nonexclusive lists of factors in Section 232 and its implementing regulations that the US Department of Commerce must consider in evaluating the effect of imports on the national security.⁷⁹ The Steel Report further refers to a determination by the US Department of Commerce in 2001 that (a) national defence includes both defence of the United States directly and its ability to project military capabilities globally, and (b) the term "national security" can be interpreted more broadly to include the general security and welfare of certain industries, beyond those necessary to satisfy national defence requirements that are critical to the minimum operations of the economy and government.⁸⁰

2.13. In the Steel Report, the US Secretary of Commerce determined that the displacement of domestic steel by excessive imports and the consequent adverse impact of those quantities of steel imports on the economic welfare of the domestic steel industry, along with the circumstance of global excess capacity in steel, were "weakening our internal economy" and therefore "threaten to impair" US national security as defined in Section 232.⁸¹ According to the Steel Report, the continued rising levels of imports of foreign steel threaten to impair the national security by placing the US steel industry at substantial risk of displacing the basic oxygen furnace and other steelmaking capacity, and the related supply chain needed to produce steel for critical infrastructure and national defence.⁸² The Steel Report refers to global excess steel capacity as a circumstance that contributes to the "weakening of [the US] internal economy" that "threaten[s] to impair" US national security as defined in Section 232.⁸³

2.14. In arriving at this general conclusion, the Steel Report relied on four main overarching findings, which in turn, comprise several intermediate findings:

- a. Steel is important to US national security because⁸⁴: (i) steel is needed for national defence requirements⁸⁵; (ii) steel is required for US critical infrastructure⁸⁶; (iii) domestic steel production is essential for national security⁸⁷; (iv) domestic steel production depends

730539, 730590, 730610, 730619, 730620, 730629, 730630, 730650, 730660, 730661, 730669, 730690. (Steel Report, (Exhibit NOR-1 and USA-7), p. 22).

⁷⁷ Semi-finished products are covered under the following 6-digit HS codes: 720610, 720690, 720711, 720712, 720719, 720720, 722410, 722490. (Steel Report, (Exhibit NOR-1 and USA-7), p. 22).

⁷⁸ Stainless steel products are covered under the following 6-digit HS codes: 721810, 721891, 721899, 721911, 721912, 721913, 721914, 721921, 721922, 721923, 721924, 721931, 721932, 721933, 721934, 721935, 721990, 722011, 722012, 722020, 722090, 722100, 722211, 722219, 722220, 722230, 722240, 722300, 730411, 730422, 730424, 730441, 730449, 730611, 730621, 730640. (Steel Report, (Exhibit NOR-1 and USA-7), p. 22).

⁷⁹ Steel Report, (Exhibit NOR-1 and USA-7), p. 13.

⁸⁰ Steel Report, (Exhibit NOR-1 and USA-7), p. 13 (referring to Department of Commerce, Bureau of Export Administration: The Effect of Imports of Iron Ore and Semi-Finished Steel on the National Security, October 2001). The Steel Report further clarifies that it uses the more recent 16 critical infrastructure sectors identified in Presidential Policy Directive 21 instead of the 28 critical industry sectors used by the Bureau of Export Administration in the 2001 Report. (Ibid. p. 14).

⁸¹ Steel Report, (Exhibit NOR-1 and USA-7), p. 55.

⁸² Steel Report, (Exhibit NOR-1 and USA-7), p. 55.

⁸³ Steel Report, (Exhibit NOR-1 and USA-7), p. 55.

⁸⁴ Steel Report, (Exhibit NOR-1 and USA-7), p. 23.

⁸⁵ Steel Report, (Exhibit NOR-1 and USA-7), p. 23.

⁸⁶ Steel Report, (Exhibit NOR-1 and USA-7), pp. 23-24.

⁸⁷ Steel Report, (Exhibit NOR-1 and USA-7), pp. 24-25.

on a healthy and competitive US industry⁸⁸; and (v) steel is consumed in critical industries.⁸⁹

- b. Imports in such quantities as are presently found adversely impact the economic welfare of the US steel industry due to⁹⁰: (i) continued increase in imports of steel products⁹¹; (ii) high import penetration⁹²; (iii) high import to export ratio⁹³; (iv) prevailing steel prices⁹⁴; (v) steel mill closures⁹⁵; (vi) declining employment trend since 1998⁹⁶; (vii) trade actions such as anti-dumping and countervailing duties⁹⁷; (viii) loss of domestic opportunities to bidders using imported steel⁹⁸; (ix) financial distress⁹⁹; and (x) limited capital expenditures arising from falling revenue and reduced profits.¹⁰⁰
- c. Displacement of domestic steel by excessive quantities of imports has the serious effect of weakening the US internal economy because¹⁰¹: (i) domestic steel production capacity is stagnant and concentrated¹⁰²; (ii) production is well below demand¹⁰³; (iii) utilization rates are well below economically viable levels¹⁰⁴; and (iv) declining steel production facilities limits capacity available for a national emergency.¹⁰⁵
- d. Global excess steel capacity is a circumstance that contributes to the weakening of the domestic economy because¹⁰⁶: (i) free markets globally are adversely affected by substantial chronic global excess steel production led by China¹⁰⁷; and (ii) increasing global excess steel capacity will further weaken the internal economy as US steel producers will face increasing import competition.¹⁰⁸

2.15. In the Steel Report, the US Secretary of Commerce recommends, due to the threat of steel imports to US national security, that the US President take immediate action by adjusting the level of imports through quotas or tariffs on steel imported into the United States, as well as direct additional actions to keep the US steel industry financially viable and able to meet US national security needs. The Steel Report states that the quota or tariff imposed should be sufficient, after accounting for any exclusions, to enable the US steel producers to be able to operate at about 80% or better of the industry's capacity utilization rate based on available capacity in 2017.¹⁰⁹

2.16. In particular, the Steel Report recommends the following two alternative courses of action:

- a. Global quota or tariff: The Steel Report recommends that this should be done by (i) imposing a quota of 63% of the 2017 import level on all imported steel products, applied on a country and steel product basis; or (ii) applying a 24% tariff on all imported steel products, in addition to any anti-dumping or countervailing duty collections applicable to any imported steel product.¹¹⁰

⁸⁸ Steel Report, (Exhibit NOR-1 and USA-7), p. 25.

⁸⁹ Steel Report, (Exhibit NOR-1 and USA-7), p. 25.

⁹⁰ Steel Report, (Exhibit NOR-1 and USA-7), p. 27.

⁹¹ Steel Report, (Exhibit NOR-1 and USA-7), p. 27.

⁹² Steel Report, (Exhibit NOR-1 and USA-7), p. 29.

⁹³ Steel Report, (Exhibit NOR-1 and USA-7), p. 30.

⁹⁴ Steel Report, (Exhibit NOR-1 and USA-7), pp. 31-32.

⁹⁵ Steel Report, (Exhibit NOR-1 and USA-7), p. 33.

⁹⁶ Steel Report, (Exhibit NOR-1 and USA-7), p. 35.

⁹⁷ Steel Report, (Exhibit NOR-1 and USA-7), p. 36.

⁹⁸ Steel Report, (Exhibit NOR-1 and USA-7), p. 36.

⁹⁹ Steel Report, (Exhibit NOR-1 and USA-7), p. 37.

¹⁰⁰ Steel Report, (Exhibit NOR-1 and USA-7), p. 40.

¹⁰¹ Steel Report, (Exhibit NOR-1 and USA-7), p. 41.

¹⁰² Steel Report, (Exhibit NOR-1 and USA-7), p. 41.

¹⁰³ Steel Report, (Exhibit NOR-1 and USA-7), p. 46.

¹⁰⁴ Steel Report, (Exhibit NOR-1 and USA-7), p. 47.

¹⁰⁵ Steel Report, (Exhibit NOR-1 and USA-7), p. 49.

¹⁰⁶ Steel Report, (Exhibit NOR-1 and USA-7), p. 51.

¹⁰⁷ Steel Report, (Exhibit NOR-1 and USA-7), p. 51.

¹⁰⁸ Steel Report, (Exhibit NOR-1 and USA-7), p. 53.

¹⁰⁹ Steel Report, (Exhibit NOR-1 and USA-7), p. 58.

¹¹⁰ Steel Report, (Exhibit NOR-1 and USA-7), pp. 59-60.

- b. Tariff on a subset of countries: The Steel Report alternatively recommends applying a 53% tariff on all imported steel products from Brazil, the Republic of Korea, the Russian Federation, Türkiye, India, Viet Nam, China, Thailand, South Africa, Egypt, Malaysia, and Costa Rica, in addition to any anti-dumping or countervailing duty collections applicable to any steel products from these countries. All other countries would be limited to 100% of their 2017 import level.¹¹¹

2.17. The Steel Report further states that, in selecting an alternative, the US President could determine that specific countries should be exempted from the proposed 63% quota or 24% tariff by granting those specific countries 100% of their prior imports in 2017, based on an overriding economic or security interest of the United States.¹¹² The Steel Report also recommends an appeal process by which affected US parties could seek an exclusion from the tariff or quota imposed and notes that the US Secretary of Commerce would grant such exclusions based on demonstrating (a) lack of sufficient US production capacity of comparable products or (b) specific national security based considerations.¹¹³

2.1.3 The Aluminium Report

2.18. The Aluminium Report of 17 January 2018 summarizes the findings of an investigation conducted by the US Department of Commerce pursuant to Section 232 into the effect of imports of aluminium products on the national security of the United States.¹¹⁴

2.1.3.1 Initiation and investigation process

2.19. On 26 April 2017, the US Secretary of Commerce initiated an investigation to determine the effect of imported aluminium on national security under Section 232.¹¹⁵ The US Department of Commerce notified the US Department of Defense of the investigation in a letter dated 26 April 2017.¹¹⁶ On 27 April 2017, the US President signed a Presidential Memorandum directing the US Secretary of Commerce to proceed expeditiously in conducting his investigation and submit a report on his findings to the President.¹¹⁷ On 3 May 2017, the US Department of Commerce invited interested parties to submit written comments, opinions, data, information, or advice.¹¹⁸ The US Department of Commerce held a public hearing to elicit further information concerning this investigation in Washington, D.C., on 22 June 2017.¹¹⁹

2.20. In addition to the notification to the US Department of Defense on 26 April 2017, the US Department of Commerce consulted with the US Department of Defense regarding methodological and policy questions that arose during the investigation and also consulted with other agencies of the US Government with expertise and information regarding the aluminium industry, including the US Geological Survey of the Department of the Interior and the US International Trade Commission.¹²⁰

2.1.3.2 Product scope

2.21. The Aluminium Report sets out its product scope in the following table:

¹¹¹ Steel Report, (Exhibit NOR-1 and USA-7), p. 60.

¹¹² Steel Report, (Exhibit NOR-1 and USA-7), p. 60.

¹¹³ Steel Report, (Exhibit NOR-1 and USA-7), p. 61.

¹¹⁴ Aluminium Report, (Exhibit NOR-2 and USA-8).

¹¹⁵ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 18.

¹¹⁶ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 18.

¹¹⁷ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 18.

¹¹⁸ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 19.

¹¹⁹ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 19.

¹²⁰ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 19.

Table 1: Harmonized Tariff Schedule for Aluminum Products¹²¹

Harmonized Tariff Schedule for Aluminum Products	
HTS Code	Description
7601	Unwrought aluminum
7604	Aluminum bars, rods and profiles
7605	Aluminum wire
7606	Aluminum plates, sheets, and strip, of a thickness exceeding 0.2 mm*
7607	Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm
7608	Aluminum tubes and pipes
7609	Aluminum tube and pipe fittings
7616.99.51.60	Other articles of aluminum: castings
7616.99.51.70	Other articles of aluminum: forgings
*Note: This category includes can sheet for aluminum can packaging	

2.1.3.3 Findings and recommendations by the US Secretary of Commerce

2.22. The Aluminium Report refers to the nonexclusive lists of factors in Section 232 and its implementing regulations that the US Secretary of Commerce must consider in evaluating the effect of imports on national security.¹²² The Aluminium Report further refers to a determination by the US Department of Commerce in 2001 that (a) national defence includes both defence of the United States directly and its ability to project military capabilities globally, and (b) the term "national security" can be interpreted more broadly to include the general security and welfare of certain industries, beyond those necessary to satisfy national defence requirements that are critical to the minimum operations of the economy and government.¹²³

2.23. In the Aluminium Report, the US Secretary of Commerce determined that the present quantities and circumstance of aluminium imports were "weakening our internal economy" and "threaten to impair the national security as defined in Section 232".¹²⁴ According to the Aluminium Report, the continued rise in levels of imports of foreign aluminium threatens to impair US national security by placing the US aluminium industry at substantial risk of losing the capacity to produce aluminium and aluminium products needed to support critical infrastructure and national defence.¹²⁵ The Aluminium Report refers to excess production and capacity in China as a major factor contributing to the decline in US domestic aluminium production and loss of domestic production capacity.¹²⁶

2.24. In arriving at this general conclusion, the Aluminium Report relies on findings including:

- a. Aluminium is essential to US national security because¹²⁷: (i) aluminium is required for US national defence¹²⁸; and (ii) aluminium is required for US critical infrastructure.¹²⁹

¹²¹ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 20.

¹²² Aluminium Report, (Exhibit NOR-2 and USA-8), p. 12.

¹²³ Aluminium Report, (Exhibit NOR-2 and USA-8), pp. 12-13 (referring to Department of Commerce, Bureau of Export Administration: The Effect of Imports of Iron Ore and Semi-Finished Steel on the National Security, October 2001). The Aluminium Report further clarifies that while it uses these interpretations of "national defense" and "national security", it refers to the more recent 16 critical infrastructure sectors identified in Presidential Policy Directive 21 instead of the 28 critical industry sectors used by the Bureau of Export Administration in the 2001 Report. (Ibid. p. 13).

¹²⁴ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 104.

¹²⁵ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 104.

¹²⁶ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 104.

¹²⁷ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 23.

¹²⁸ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 24.

¹²⁹ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 36.

- b. Domestic production of aluminium is essential to national security.¹³⁰
- c. Domestic aluminium production capacity is declining because¹³¹: (i) the United States is a relatively high-cost producer¹³²; and (ii) aluminium smelters are permanently shutting down.¹³³
- d. Domestic production is well below demand.¹³⁴
- e. US imports of aluminium are increasing in aggregate¹³⁵ and in particular, imports of (i) unwrought aluminium¹³⁶; (ii) aluminium bars, rods and profiles¹³⁷; (iii) aluminium plate, sheet and strip¹³⁸; (iv) aluminium foil¹³⁹; (v) aluminium pipes and tubes¹⁴⁰; and (vi) aluminium castings and forgings.¹⁴¹
- f. US aluminium exports are declining.¹⁴²
- g. The United States' import to export ratio for the aluminium product categories subject to this investigation is high.¹⁴³
- h. Aluminium imports are impacting the welfare of the US aluminium industry because:¹⁴⁴ (i) employment in the aluminium industry is declining as several smelters were either permanently shut down or temporarily idled¹⁴⁵; (ii) the financial status of the US aluminium industry is poor¹⁴⁶; (iii) research and development expenditures are falling¹⁴⁷; (iv) capital expenditures for the aluminium industry are increasing¹⁴⁸; and (v) aluminium prices have dropped sharply.¹⁴⁹

2.25. In the Aluminium Report, the US Secretary of Commerce recommends, due to the threat of aluminium imports to US national security, that the US President take immediate action by adjusting the level of these imports.¹⁵⁰ The recommended adjustments would be imposed on imports of: (i) unwrought aluminium (Harmonized Tariff Schedule (HTS) Code 7601); (ii) aluminium castings and forgings (HTS Codes 7616.99.51.60 and 7616.99.51.70); (iii) aluminium plate, sheet, strip, and foil (flat-rolled products) (HTS Codes 7606 and 7607); (iv) aluminium wire (HTS Code 7605); (v) aluminium bars, rods and profiles (HTS Code 7604); (vi) aluminium tubes and pipes (HTS Code 7608); and (vii) aluminium tube and pipe fittings (HTS Code 7609) based on 2017 annualized imports in those categories. The Aluminium Report states that the recommended quotas or tariffs would be designed, even after any exemptions (if granted), to enable US aluminium producers to utilize an average of 80% of their production capacity.¹⁵¹

2.26. In particular, the Aluminium Report recommends the following two alternative courses of action:

¹³⁰ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 39.

¹³¹ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 40.

¹³² Aluminium Report, (Exhibit NOR-2 and USA-8), p. 41.

¹³³ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 48.

¹³⁴ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 59.

¹³⁵ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 63.

¹³⁶ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 70.

¹³⁷ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 71.

¹³⁸ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 72.

¹³⁹ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 73.

¹⁴⁰ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 74.

¹⁴¹ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 75.

¹⁴² Aluminium Report, (Exhibit NOR-2 and USA-8), p. 75.

¹⁴³ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 84.

¹⁴⁴ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 89.

¹⁴⁵ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 89.

¹⁴⁶ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 91.

¹⁴⁷ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 95.

¹⁴⁸ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 97.

¹⁴⁹ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 100.

¹⁵⁰ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 107.

¹⁵¹ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 107.

- a. Global quota or tariff: The Aluminium Report recommends that action should be taken by imposing on unwrought aluminium and the other aluminium product categories (i) a quota of 86.7%; or (ii) a tariff rate of 7.7% in addition to any anti-dumping or countervailing duty collections applicable to such products.¹⁵²
- b. Tariff on a subset of countries: The Aluminium Report alternatively recommends applying a 23.6% tariff on all imported aluminium products from China; Hong Kong, China; the Russian Federation; Venezuela; and Viet Nam; in addition to anti-dumping or countervailing duty collections applicable to aluminium products from these countries. All other countries would be limited to 100% of their 2017 import volumes.¹⁵³

2.27. The Aluminium Report further states that, in selecting an alternative, the US President could determine that specific countries should be exempted from the proposed quota by granting those specific countries 100% of their prior imports in 2017 or exempting them entirely, based on an overriding economic or security interest of the United States, which could include their willingness to work with the United States to address global excess capacity and other challenges facing the US aluminium industry.¹⁵⁴ The Aluminium Report also recommends an appeal process by which affected US parties could seek an exclusion from the tariff or quota imposed and notes that the US Secretary of Commerce would grant exclusions based on demonstrating (a) a lack of sufficient US production capacity of comparable products or (b) specific national security based considerations.¹⁵⁵

2.1.4 Presidential Proclamations

2.28. The US Secretary of Commerce transmitted the Steel Report and the Aluminium Report to the US President on 11 January 2018 and 19 January 2018 respectively.¹⁵⁶

2.29. On 8 March 2018, the US President issued two proclamations adjusting imports into the United States: (a) Presidential Proclamation 9705 in relation to steel imports¹⁵⁷ and (b) Presidential Proclamation 9704 in relation to aluminium imports.¹⁵⁸ The US President concurred with the findings in the Steel and Aluminium Reports, and pursuant to the recommendations in these reports, imposed additional import duties of 25% and 10% respectively on certain steel and aluminium imports from all countries, with exemptions for imports from Canada and Mexico.¹⁵⁹ The US President welcomed any country with which the United States has a security relationship to discuss alternative ways to address the threatened impairment of US national security caused by imports from that country.¹⁶⁰ These proclamations also authorized the US Secretary of Commerce to provide relief from the additional duties for any steel or any aluminium article determined not to be produced in the United States in a sufficient and reasonably available amount or in a satisfactory quality, or based upon specific national security considerations.¹⁶¹

2.30. Following Presidential Proclamations 9704 and 9705, the US President issued additional proclamations adjusting steel and aluminium imports into the United States. As described in greater detail below, these proclamations removed the exemptions granted to Canada and Mexico¹⁶², granted various exemptions to certain WTO Members¹⁶³, introduced import quotas on steel and aluminium imports from certain countries¹⁶⁴, and increased the additional import duty applicable to

¹⁵² Aluminium Report, (Exhibit NOR-2 and USA-8), p. 108.

¹⁵³ Aluminium Report, (Exhibit NOR-2 and USA-8), pp. 108-109.

¹⁵⁴ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 109.

¹⁵⁵ Aluminium Report, (Exhibit NOR-2 and USA-8), p. 109.

¹⁵⁶ Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9), p. 11625; Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10), p. 11619.

¹⁵⁷ Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9), p. 11625.

¹⁵⁸ Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10), p. 11619.

¹⁵⁹ Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9), p. 11627; Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10), p. 11621.

¹⁶⁰ Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9), p. 11626; Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10), p. 11620.

¹⁶¹ Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9), p. 11627; Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10), p. 11621.

¹⁶² See section 2.2.3 below.

¹⁶³ See section 2.2.3 below.

¹⁶⁴ See section 2.2.2 below.

steel imports from Türkiye to 50%.¹⁶⁵ Subsequent proclamations also note the existence of agreements between the United States and countries exempted from the additional duties.

2.2 Measures at issue

2.31. In its panel request, Norway notes the following¹⁶⁶:

- a. In April 2017, the US Commerce Secretary initiated investigations into the effect of imported steel and aluminium on US national security, pursuant to Section 232. On 11 January and 17 January 2018, the US Department of Commerce released the Steel and Aluminium Reports.
- b. On 8 March 2018, the President of the United States issued Presidential Proclamations 9704 and 9705, under the authority conferred in Section 232. These instruments took action pursuant to the Commerce Secretary's recommendations by imposing additional import duties of 25% and 10%, respectively, on certain imported steel products and aluminium products from all countries, with a temporary exemption for imports from Canada and Mexico.
- c. Subsequent to the adoption of Presidential Proclamations 9704 and 9705, the President of the United States issued additional Proclamations. In sum, these instruments increased the duty on steel imports from Türkiye to 50%; removed the exemptions granted to Canada and Mexico; and granted various additional temporary and indefinite exemptions to certain other WTO Members.
- d. Indefinite exemptions to the steel and aluminium tariffs at issue have been granted to Argentina, Australia, Brazil and the Republic of Korea, in exchange for agreement with these countries on a range of measures. This range of measures includes, for Argentina, Brazil and the Republic of Korea, voluntary quantitative restrictions on exports of steel and aluminium products.
- e. Presidential Proclamations 9705 and 9704 provide for a product exclusion process. Both Proclamations authorize the Commerce Secretary to provide relief from the additional duties for any steel article, or any aluminium article, determined not to be produced in the United States in a sufficient and reasonably available amount or in a satisfactory quality, or based upon specific national security considerations. Presidential Proclamations 9776 and 9777 subsequently extended the product exclusions to steel and aluminium products imported from countries subject to quantitative limitations, in certain defined circumstances, including national security considerations.

2.32. Norway's panel request states that the measures at issue include, but are not limited to¹⁶⁷:

- a. Presidential Proclamation 9704 of 8 March 2018;
- b. Presidential Proclamation 9705 of 8 March 2018;
- c. Presidential Proclamation 9710 of 22 March 2018;
- d. Presidential Proclamation 9711 of 22 March 2018;
- e. Presidential Proclamation 9739 of 30 April 2018;
- f. Presidential Proclamation 9740 of 30 April 2018;
- g. Presidential Proclamation 9758 of 31 May 2018;

¹⁶⁵ See section 2.2.1 below.

¹⁶⁶ Norway's panel request, p. 2.

¹⁶⁷ Norway's panel request, pp. 1-4.

- h. Presidential Proclamation 9759 of 31 May 2018;
- i. Presidential Proclamation 9772 of 10 August 2018;
- j. Presidential Proclamation 9776 of 29 August 2018;
- k. Presidential Proclamation 9777 of 29 August 2018;
- l. Interim Final Rule regarding the Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum Into the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum, published on 19 March 2018;
- m. Interim Final Rule regarding Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum, published on 11 September 2018;
- n. 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 (19 U.S.C. 1862), US Department of Commerce, Bureau of Industry and Security, Office of Technology Evaluation, 11 January 2018; and
- o. The Effect of Imports of Aluminum on the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1972, as amended, US Department of Commerce, Bureau of Industry and Security, Office of Technology Evaluation, 17 January 2018.

2.33. Norway's panel request specifies that it also covers any amendments, successor, replacement or implementing measures and any exemptions applied.¹⁶⁸

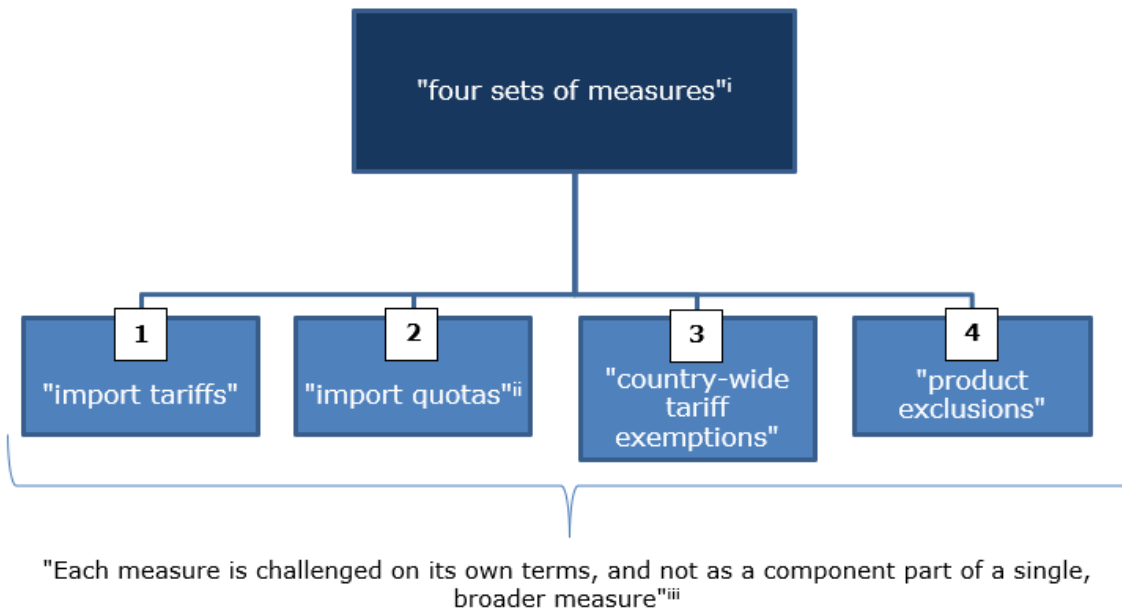
2.34. In its first written submission, Norway describes the measures at issue as (a) the aluminium and steel tariffs at issue; (b) exemptions to the tariffs granted to certain WTO Members, and the quotas agreed, in place of duties, with certain of those Members; and (c) exclusions to the tariffs granted to certain aluminium and steel products.¹⁶⁹ In response to questions from the Panel, Norway further argues that its panel request identifies four sets of measures: (a) the import tariffs; (b) the import quotas; (c) the country-wide tariff exemptions; and (d) the product exclusions, and that each measure is challenged on its own terms, and not as a component part of a single, broader measure.¹⁷⁰

2.35. The following diagram depicts the Panel's understanding of Norway's presentation of the measures at issue at the time of the establishment of the Panel on 21 November 2018:

¹⁶⁸ Norway's panel request, p. 4.

¹⁶⁹ Norway's first written submission, para. 24.

¹⁷⁰ Norway's response to Panel's question No. 1.

Figure 1: Norway's presentation of measures at issue at the time of Panel establishment

ⁱ Norway's response to Panel questions No. 1.a and 2.a. See also first written submission ("[t]he measures at issue implement the DOC Reports' findings. They are: (1) the aluminium and steel tariffs at issue ...(2) exemptions to the tariffs granted to certain WTO Members, and the quotas agreed, in place of duties, with certain of those Members ... and (3) exclusions to the tariffs granted to certain aluminium and steel products").

ⁱⁱ Norway's response to Panel question No. 2.a ("Norway challenges ['certain measures agreed between the United States and the countries exempted from the additional duties'] solely to the extent that they involve import quotas").

ⁱⁱⁱ Norway's response to Panel question No. 1.a.

2.36. The following sections describe the measures that Norway challenges in this dispute.

2.2.1 Import tariffs

2.37. Pursuant to Presidential Proclamation 9705 of 8 March 2018, all imports of steel products as specified in the Proclamation shall be subject to an additional 25% *ad valorem* duty. According to this Proclamation, this rate of duty is in addition to any other duties, fees, exactions, and charges applicable to such imported steel articles.¹⁷¹

2.38. Pursuant to Presidential Proclamation 9704 of 8 March 2018, all imports of aluminium articles as specified in the Proclamation shall be subject to an additional 10% *ad valorem* duty. According to this Proclamation, this rate of duty is in addition to any other duties, fees, exactions, and charges applicable to such imported aluminium articles.¹⁷²

2.39. Subsequently, Presidential Proclamation 9772 of 10 August 2018 imposed a 50% *ad valorem* duty on steel articles imported from Türkiye, beginning on 13 August 2018.¹⁷³

2.2.2 Import quotas

2.40. Presidential Proclamation 9740 of 28 April 2018 describes how the United States and the Republic of Korea agreed upon a quota on steel imports.¹⁷⁴ Part A of the Annex to this Proclamation sets out the amendments to US Note 16 of subchapter III of chapter 99 of the Harmonized Tariff

¹⁷¹ Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9), p. 11627.

¹⁷² Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10), p. 11621.

¹⁷³ Presidential Proclamation 9772, (Exhibit NOR-5), p. 40430.

¹⁷⁴ Presidential Proclamation 9740, (Exhibit NOR-8 and USA-13), p. 20683.

Schedule of the United States (HTSUS) that provide for this quota treatment¹⁷⁵, and Part B of the Annex to the Proclamation details the annual aggregate limits for the applicable quotas.¹⁷⁶

2.41. Presidential Proclamation 9759 of 31 May 2018 introduced quotas on steel products from Argentina and Brazil.¹⁷⁷ The Annex to this Proclamation details the annual aggregate limits for the applicable quotas.¹⁷⁸

2.42. Presidential Proclamation 9758 of 31 May 2018 introduced quotas for aluminium products from Argentina.¹⁷⁹ The Annex to this Proclamation details the annual aggregate limits for the applicable quotas.¹⁸⁰

2.2.3 Country-wide tariff exemptions

2.43. With respect to steel products, Presidential Proclamation 9705 of 8 March 2018 sets out that the additional 25% *ad valorem* duty on imports of steel shall not be applied to imports from Canada and Mexico.¹⁸¹

2.44. Subsequently, Presidential Proclamation 9711 of 22 March 2018 amended Presidential Proclamation 9705 and introduced exemptions for Australia, Argentina, the Republic of Korea, Brazil, and the member countries of the European Union, in addition to those already granted to Canada and Mexico, until 1 May 2018.¹⁸²

2.45. Presidential Proclamation 9740 of 30 April 2018 introduced further modifications by (a) extending the exemptions granted to Canada, Mexico, and the European Union until 1 June 2018¹⁸³; (b) extending the exemptions for Argentina, Australia, and Brazil until an unspecified date¹⁸⁴; and (c) extending the exemption to the Republic of Korea until an unspecified date.¹⁸⁵

2.46. Presidential Proclamation 9759 of 31 May 2018 further extended the exemptions from the additional import duties granted to Argentina, Australia, and Brazil until an unspecified date.¹⁸⁶ This Proclamation did not extend the exemptions for Canada, Mexico, and the European Union.

2.47. With respect to aluminium products, Presidential Proclamation 9704 of 8 March 2018 sets out that the additional 10% *ad valorem* duty on imports of aluminium shall not be applied to imports from Canada and Mexico.¹⁸⁷

2.48. Subsequently, Presidential Proclamation 9710 of 22 March 2018 amended Presidential Proclamation 9704 and introduced exemptions for Australia, Argentina, the Republic of Korea, Brazil, and the member countries of the European Union, in addition to those already granted to Canada and Mexico, until 1 May 2018.¹⁸⁸

2.49. Presidential Proclamation 9739 of 30 April 2018 introduced further modifications by (a) extending the exemptions granted to Canada, Mexico, and the European Union until 1 June 2018¹⁸⁹; (b) extending the exemption for Argentina, Australia, and Brazil until an unspecified date¹⁹⁰; and (c) ending the exemption granted to the Republic of Korea.¹⁹¹

¹⁷⁵ Presidential Proclamation 9740, (Exhibit NOR-8 and USA-13), p. 20685.

¹⁷⁶ Presidential Proclamation 9740, (Exhibit NOR-8 and USA-13), pp. 20697-20705.

¹⁷⁷ Presidential Proclamation 9759, (Exhibit NOR-10 and USA-15), pp. 25857-25858.

¹⁷⁸ Presidential Proclamation 9759, (Exhibit NOR-10 and USA-15), p. 25861.

¹⁷⁹ Presidential Proclamation 9758, (Exhibit NOR-9 and USA-16), pp. 25850-25851.

¹⁸⁰ Presidential Proclamation 9758, (Exhibit NOR-9 and USA-16), pp. 25853-25855.

¹⁸¹ Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9), pp. 11626-11627.

¹⁸² Presidential Proclamation 9711, (Exhibit NOR-7 and USA-11), pp. 13361-13363.

¹⁸³ Presidential Proclamation 9740, (Exhibit NOR-8 and USA-13), p. 20685.

¹⁸⁴ Presidential Proclamation 9740, (Exhibit NOR-8 and USA-13), p. 20684.

¹⁸⁵ Presidential Proclamation 9740, (Exhibit NOR-8 and USA-13), p. 20684.

¹⁸⁶ Presidential Proclamation 9759, (Exhibit NOR-10 and USA-15), p. 25858.

¹⁸⁷ Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10), pp. 11620-11621.

¹⁸⁸ Presidential Proclamation 9710, (Exhibit NOR-6 and USA-12), p. 13357.

¹⁸⁹ Presidential Proclamation 9739, (Exhibit NOR-11 and USA-14), p. 20678.

¹⁹⁰ Presidential Proclamation 9739, (Exhibit NOR-11 and USA-14), pp. 20677-20678.

¹⁹¹ Presidential Proclamation 9739, (Exhibit NOR-11 and USA-14), pp. 20678-20679.

2.50. Presidential Proclamation 9758 of 31 May 2018 further extended the exemptions from the additional import duties granted to Argentina and Australia until an unspecified date.¹⁹² This Proclamation did not extend the exemptions for Brazil, Canada, Mexico, and the European Union.¹⁹³

2.2.4 Product exclusions

2.51. Presidential Proclamations 9705 and 9704 of 8 March 2018 authorized the US Secretary of Commerce to provide relief from the additional duties set out therein for any steel or aluminium article determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality and also to provide such relief based on specific national security considerations.¹⁹⁴

2.52. On 19 March 2018, the US Department of Commerce issued the requirements for submissions requesting exclusions from the remedies instituted in the Presidential Proclamations adjusting imports of steel and aluminium into the United States (March Interim Final Rule).¹⁹⁵ This document specifies the requirements and process by which parties in the United States may submit requests for exclusions from the duties instituted by the US President, including how parties in the United States may submit objections to exclusion requests. It further identifies the relevant time periods for submitting such exclusion requests and any objections to those requests, the method for submitting such requests, and the information that must be included in such requests and objections.¹⁹⁶

2.53. On 11 September 2018, US Department of Commerce issued a document titled "Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum" (September Interim Final Rule).¹⁹⁷ This document introduces revisions to the requirements set out in the March Interim Final Rule and "changes to the exclusion processes in this rule ... informed by both the comments received in response to the March 19 rule and the Department's experience with managing the exclusion process".¹⁹⁸ According to this document, the modifications were aimed at improving transparency, effectiveness, and fairness of the product exclusion process, including by adding a rebuttal and surrebuttal process.¹⁹⁹

2.54. Presidential Proclamations 9777 and 9776 of 29 August 2018 authorized the US Secretary of Commerce to provide relief from quantitative limitations on steel and aluminium articles adopted pursuant to Section 232, including those set forth in Presidential Proclamations 9740, 9759, and 9758, on the same basis as the Secretary is authorized to provide relief from the duties established in Presidential Proclamations 9704 and 9705.²⁰⁰

¹⁹² Presidential Proclamation 9758, (Exhibit NOR-9 and USA-16), pp. 25849-25850.

¹⁹³ Presidential Proclamation 9758, (Exhibit NOR-9 and USA-16), p. 25850.

¹⁹⁴ Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10), p. 11621 and Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9), p. 11627. Presidential Proclamation 9711 of 22 March 2018 amended Presidential Proclamation 9705 of 8 March 2018 by introducing the following language: "Such relief may be provided to directly affected parties on a party-by-party basis taking into account the regional availability of particular articles, the ability to transport articles within the United States, and any other factors as the Secretary deems appropriate". (Presidential Proclamation 9711, (Exhibit NOR-7 and USA-11), p. 13364). Presidential Proclamation 9710 of 22 March 2018 amended Presidential Proclamation 9704 of 8 March 2018 by introducing the following language: "Such relief may be provided to directly affected parties on a party-by-party basis taking into account the regional availability of particular articles, the ability to transport articles within the United States, and any other factors as the Secretary deems appropriate". (Presidential Proclamation 9710, (Exhibit NOR-6 and USA-12), p. 13358).

¹⁹⁵ March Interim Final Rule, (Exhibit NOR-76 and USA-20), pp. 12106-12112.

¹⁹⁶ March Interim Final Rule, (Exhibit NOR-76 and USA-20), p. 12110.

¹⁹⁷ September Interim Final Rule, (Exhibit NOR-20 and USA-21), pp. 46026-46065.

¹⁹⁸ September Interim Final Rule, (Exhibit NOR-20 and USA-21), p. 46027.

¹⁹⁹ September Interim Final Rule, (Exhibit NOR-20 and USA-21), p. 46027.

²⁰⁰ Presidential Proclamation 9777, (Exhibit NOR-22 and USA-18), p. 45026 and Presidential Proclamation 9776, (Exhibit NOR-21 and USA-19), p. 45020.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. In its panel request, Norway requests that the Panel find that the measures listed in its request are inconsistent with the United States' obligations under the following provisions of the covered agreements²⁰¹:

- a. Article 2.1 of the Agreement on Safeguards, because the United States applies safeguard measures to the products in question without first having determined, pursuant to other provisions of the Agreement on Safeguards, that such products are 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;
- b. Article 2.2 of the Agreement on Safeguards, because the United States does not apply the safeguard measures to imported products irrespective of their source;
- c. Article 5.1 of the Agreement on Safeguards, because the United States is applying safeguard measures beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment;
- d. Article 11.1(b) of the Agreement on Safeguards to the extent that the United States seeks or has sought any voluntary export restraints, orderly marketing arrangements, or any other similar measures on the export or the import side;
- e. Articles 12.1 and 12.2 of the Agreement on Safeguards, because the United States has failed to comply with any of the notification and consultation obligations set out in these provisions;
- f. Article I:1 of the GATT 1994, because, with respect to customs duties and charges of any kind imposed on or in connection with importation, and with respect to all rules and formalities in connection with importation, the United States fails to accord any advantage, favour, privilege or immunity granted by the United States to certain other countries immediately and unconditionally to the like product originating in the territories of all other Members;
- g. Article II:1(a) and (b) of the GATT 1994, because the United States has imposed import duties on certain steel and aluminium products in excess of the duties set forth and provided in the United States' Schedule of Concessions and Commitments annexed to the GATT 1994, and has failed to exempt products of Norway subject to the measures at issue from ordinary customs duties in excess of those set forth and provided in the United States' Schedule of Concessions and Commitments annexed to the GATT 1994 and from all other duties or charges in excess of those imposed on the date of the GATT 1994 or those directly and mandatorily required to be imposed thereafter by legislation in force in the United States on that date.;
- h. Article X:3(a) of the GATT 1994, because the United States has failed to administer its laws, regulations, decisions and rulings in relation to the measures at issue in a uniform, impartial and reasonable manner;
- i. Article XI:1 of the GATT 1994, because the United States has instituted restrictions other than duties, taxes or other charges, made effective through quotas, on the importation of products of the territory of other Members;
- j. Article XIX:1(a) of the GATT 1994, because the United States has suspended tariff concessions without the products at issue being imported into the territory of the United States in such increased quantities and under such conditions as to cause or to threaten serious injury to domestic producers in the United States of like or directly

²⁰¹ Norway's panel request, pp. 4-5.

competitive products, as a result of unforeseen developments and of the effect of the obligations incurred under the GATT 1994; and

- k. Article XIX:2 of the GATT 1994, because the United States has failed to give notice in writing to the WTO as far in advance as may be practicable and has failed to afford the WTO and WTO Members having a substantial interest as exporters of the products concerned an opportunity to consult with it in respect of the proposed action.

3.2. The United States requests that the Panel find that the United States has invoked its essential security interests under Article XXI(b) of the GATT 1994 and so report to the DSB.²⁰²

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 23 of the Working Procedures adopted by the Panel (see Annex B).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of certain third parties are reflected in their executive summaries, provided in accordance with paragraph 26 of the Working Procedures adopted by the Panel (see Annex C).

6 INTERIM REVIEW

6.1. On 29 June 2022, the Panel issued its Interim Report to the parties. On 3 August 2022, the parties submitted written requests for review of the Interim Report. Neither party requested an interim review meeting. On 31 August 2022, the parties submitted comments on each other's requests for review of the Interim Report.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report sets out the Panel's response to the requests made at the interim review stage, including certain requests by the parties discussed in greater detail below.

6.3. The Panel notes that the parties' requests for review of the Interim Report include requests to provide more detailed summaries of their arguments. Throughout the Report, the Panel has summarized the parties' arguments in order to facilitate understanding of the contested issues addressed in the Panel's reasoning and findings. The Panel has not comprehensively reproduced every aspect of the parties' arguments, which are more fully reflected in the executive summaries annexed to this Report. Rather, the Panel has summarized the relevant arguments in the context of its own objective assessment of the matter before it, having regard for its mandate and discretion to make such findings as will assist the DSB in making the recommendations or rulings provided for in the relevant covered agreements. In this regard, it is generally within the discretion of a panel to decide which arguments or evidence it addresses or relies on in reaching its findings.²⁰³ Subject to the explanations and modifications described below, the Panel considers that the parties' arguments are adequately reflected and addressed in this Report, including the annexes thereto, to fulfil the requirements of the Panel's mandate under the DSU.²⁰⁴

6.4. In addition, the Panel has made typographical and other editorial modifications in the Report, including in response to the parties' requests. The discussion below refers to the numbering of sections, paragraphs, and footnotes in the Final Report.

6.1 Article XIX of the GATT 1994 and the Agreement on Safeguards

6.5. The United States requests the Panel to include in **paragraph 7.65** "additional support" for its conclusions regarding the terms "pursuant to" in Article 11.1(c) of the Agreement on Safeguards. In particular, the United States argues that the Panel's conclusions in this paragraph are supported by the ordinary meaning of the terms "sought, taken or maintained" in Article 11.1(c). Norway

²⁰² United States' first written submission, para. 184.

²⁰³ See e.g. Appellate Body Reports, *Ukraine – Ammonium Nitrate*, para. 6.42; *US – COOL*, para. 299; *EC – Poultry*, para. 135; *EC – Hormones*, para. 135.

²⁰⁴ See section 7.1 below.

disagrees with the United States' request and considers that the existing findings on Article 11.1(c) are sufficient to resolve the question of whether the challenged measures are subject to the Agreement on Safeguards. Norway further notes that the United States' proposed addition is a recitation of its argument and, if the change proposed by the United States is accepted, requests the inclusion of additional reasoning to address its arguments.

6.6. In section 7.7.2 of its Report, the Panel has examined the terms "pursuant to" in Article 11.1(c) considering their ordinary meaning and having regard for the relevant context provided by terms used elsewhere in the Agreement on Safeguards, including those that appear to convey a relationship of consistency with the requirements of another provision of the covered agreements. The Panel has further considered the use of terms in the three authentic language versions of the Agreement on Safeguards in accordance with the customary rules of interpretation of public international law. The Panel has also found support for its conclusions in the object and purpose of the Agreement on Safeguards, as expressed in its preamble, and the negotiating history of Article 11.1(c). Accordingly, the Panel does not consider it necessary to additionally address the United States' arguments concerning the terms "sought, taken or maintained" in Article 11.1(c) to determine the meaning of "pursuant to" in that provision.

6.7. The Panel has taken note of the United States' arguments concerning the meaning of "sought" in Article 11.1(c), which are related to the United States' contention that formal notification of safeguard measures to the WTO is a "condition precedent" to the applicability of safeguard disciplines. As part of its objective assessment of the legal characterization of the measures under Article 11.1(c), the Panel has taken into account the manner in which the measures at issue were notified to relevant WTO bodies or committees. Recalling the nature of the Panel's inquiry on the applicability of safeguard disciplines to the measures at issue, the Panel does not consider it necessary to address in further detail the United States' arguments on the meaning of "sought" in Article 11.1(c). In this respect, the Panel additionally recalls its mandate and discretion to make such findings as will assist the DSB in making the rulings and recommendations provided for in the relevant covered agreements.

6.8. The United States requests the Panel to revise **paragraph 7.72** to accurately reflect its argument that "a key condition precedent to the exercise of [the right to apply a safeguard measure] 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." According to the United States, by suggesting "the United States' [contends] that, based on Article XIX:2 of the GATT 1994, formal notification of safeguard measures to the WTO is a 'condition precedent' to the applicability of safeguard disciplines", the Panel misstates the United States' position. Norway considers that the Panel's description of the United States' argument is accurate and correctly summarized as meaning that notification is a condition precedent for the applicability of safeguards disciplines for the United States.

6.9. The Panel notes that, in its submissions, the United States refers variously to "notice", "invocation", and "invocation through notice" under Article XIX:2 of the GATT 1994 as a "condition precedent" for applicability of safeguard disciplines. The Panel has accordingly retained its summary of the United States' arguments in this respect and revised the corresponding footnote to clarify the various terms used by the United States in its submissions to the Panel.

6.10. Norway suggests revisions to **paragraph 7.68** as it considers that this paragraph provides "an incomplete and confusing description" of Norway's argument regarding the terms "other than" in Article 11.1(c) of the Agreement on Safeguards. The United States does not object to expanding the summary of Norway's argument or rephrasing it to more closely reflect the terms Norway used in its submissions. The United States makes additional textual suggestions to Norway's proposed revision and requests a summary of its own arguments made in response to Norway.

6.11. The Panel states in the penultimate sentence of paragraph 7.68 that this sentence sets out the Panel's view of Norway's arguments. The Panel has added a footnote to this sentence referring to the relevant submissions by Norway on which the Panel bases its view. The Panel has similarly revised the final sentence of paragraph 7.68 to indicate that this sentence reflects the Panel's understanding of Norway's arguments. In this light and recalling its approach to reflecting the parties' arguments on the issues raised in this dispute, the Panel does not consider it necessary to further revise or expand the summaries of the parties' arguments in this paragraph.

6.2 Article XXI(b) of the GATT 1994

6.12. The United States requests an addition to **paragraph 7.94** of certain arguments it puts forward on the interpretation of Article XXI(b), including its arguments on which phrase in Article XXI(b) is modified by subparagraphs (i) and (ii) and the reconciliation of different language versions of Article XXI(b). The United States also requests that **paragraph 7.95** include a more complete description of the complainant's arguments on the interpretation of Article XXI(b). Norway disagrees with the United States' requested additions on what is qualified by the subparagraphs of Article XXI, which Norway considers are already captured in the Panel Report. Norway comments that the United States' requested additions "gloss over and diminish the internal shifts and inconsistencies" in the United States' arguments on what is qualified by the subparagraphs of Article XXI. Norway further contends that the United States' requests concern matters within the Panel's discretion that fall outside the scope of interim review. In addition, Norway considers that its own proposed interpretation of Article XXI(b) is adequately summarized and notes that citations to its interpretive arguments are contained throughout the Panel's reasoning on Article XXI(b).

6.13. Recalling its approach to reflecting the parties' arguments on the issues raised in this dispute, the Panel declines to expand the summaries of the parties' arguments in these paragraphs. In response to the United States' request, the Panel further notes that modifications to the Interim Report discussed below include expanded reference to arguments that the United States requested to be reproduced in these paragraphs.

6.14. The United States requests that the Panel delete the **footnote to paragraph 7.100** and instead address its substantive content in the body of the Report, particularly concerning the United States' arguments on the differences in the French and Spanish versions of Article XXI(b) and the reconciliation of the three language versions of the text. In the United States' view, the Panel does not engage with these arguments and "misstates them in a footnote reference". The United States requests further engagement with these arguments and, specifically, that the Panel "explain why it is incorrect to read the sentence [in Article XXI(b)] as consisting of three alternatives" for each subparagraph. Norway disagrees with the United States' comment that the Panel misstates or fails to engage with the United States' arguments in this paragraph and footnote. Norway considers that the summary in the footnote accurately reflects the United States' submissions and that, contrary to the United States' assertion, the Panel engages extensively with the United States' interpretive arguments under Article XXI(b) regarding a "single relative clause" and the interpretation that best reconciles the three texts.

6.15. The Panel acknowledges the United States' indication in its request for interim review that it "agrees (in the interpretation that best reconciles the three language versions) with the Panel that each of the paragraphs 'describe[s] the action referred to in Article XXI(b)', but mediated through the relative clause 'which it considers'." The Panel has accordingly retained the statement of its understanding that the parties agree that the subparagraphs qualify and relate to the "action" in Article XXI(b), notwithstanding some disagreement as to the precise basis for this conclusion. The Panel has also expanded the summary of the United States' arguments regarding the reconciliation of texts in the three authentic language versions and its contention that, under this reconciled interpretation, the terms of the provision still form a "single relative clause" that begins with the phrase "which it considers" and contains the entirety of each subparagraph.

6.16. Regarding the United States' request for further elaboration in the body of the Report, the Panel briefly reviews certain points of its analysis of the United States' arguments to clarify the overall context in which the footnote appears in the Panel's reasoning regarding the interpretation of Article XXI(b) in this dispute. In section 7.8.2, the Panel focuses specifically on the United States' argument that "which it considers" qualifies the subparagraphs of Article XXI(b) within a "single relative clause" that entirely reserves the subparagraphs to the judgment of the invoking Member. In accordance with Article 3.2 of the DSU, the Panel's textual analysis addresses the function and ordinary meaning of the subparagraphs as describing certain kinds of permitted "action", including reference to the structure and punctuation of Article XXI of the GATT 1994. In this regard, the Panel concludes that the paragraphs and subparagraphs form alternative endings to a complete sentence under Article XXI, and the opening terms of each of the subparagraphs ("relating to" and "taken") qualify the "action" in paragraph (b). Moreover, the subparagraphs are exhaustive in establishing the circumstances in which a Member may take the "action" under Article XXI(b).

6.17. Following these textual conclusions, the Panel addresses grammatical aspects of the parties' arguments as well as other aspects of textual interpretation and ordinary meaning, particularly the principle of effective treaty interpretation and the exhaustive types of "action" specified in the subparagraphs of Article XXI(b). The Panel additionally addresses relevant context in Articles XXII and XXIII of the GATT 1994 and the DSU, the object and purpose of maintaining the balance of rights and obligations under the covered agreements, and non-treaty materials submitted by the parties relating to the interpretation of Article XXI of the DSU. Based on the entirety of this analysis, the Panel concludes that the terms "which it considers" in Article XXI(b) do not qualify the subparagraphs to render them "self-judging" or "non-justiciable" as argued by the United States.

6.18. In this manner, the Panel has addressed multiple aspects of the interpretation of Article XXI(b) with specific reference to the United States' argument regarding a "single relative clause" purportedly encompassing the subparagraphs of that provision. As one element of this analysis, the Panel has noted the concordance of plural and feminine terms in the French and Spanish versions of Article XXI(b) to support the qualification of the term "action" by the subparagraphs. In other parts of its assessment, the Panel has also examined the ordinary meaning of actions "relating to" specified "materials" and "traffic" and to actions "taken in time of" specified circumstances. The Panel has further accounted for the structure of Article XXI(b) and the textual separation of the subparagraphs into an enumerated list, which corresponds to the role of the subparagraphs as alternative sentence endings that collectively and exhaustively delimit the scope of Article XXI(b).

6.19. The Panel recalls its mandate and discretion to make such findings as will assist the DSB in making the recommendations or rulings provided for in the relevant covered agreements. In assessing the contested issues of interpretation regarding Article XXI(b) and the review of its invocation by a Member in dispute settlement proceedings, the Panel did not find it necessary to address in greater detail the parties' arguments on the reconciliation of the three authentic texts of the provision. In addition, the United States does not explain the relevance of these arguments to the Panel's overall analysis and conclusions on whether a "single relative clause" beginning with the phrase "which it considers" renders Article XXI(b) "self-judging" or "non-justiciable" in the sense argued by the United States. To the extent the United States' request concerns the weight assigned to its arguments and the merits of the Panel's analysis, the Panel notes that interim review is not an appropriate stage for relitigating arguments already submitted by the parties and addressed to the extent necessary in the Panel's findings.²⁰⁵ In these circumstances, the Panel has modified this footnote to expand the summary of the parties' arguments and to clarify that the Panel does not consider it necessary for the purposes of this dispute to address in further detail the parties' arguments on the reconciliation of the three authentic texts in relation to the contested issues of interpretation under of Article XXI(b) and its application to the measures at issue in this dispute.

6.20. The United States requests that the Panel introduce certain modifications to **paragraphs 7.107 and 7.108** in order to more accurately reflect its arguments on English grammar rules in the context of the interpretation of Article XXI(b). Norway considers that the Panel accurately summarizes the United States' argument regarding the grammatical construction of Article XXI(b). Norway further comments that the relevant paragraphs appear within the Panel's substantive reasoning and that it is inappropriate to inject long statements of the United States' arguments into the Panel's own reasoning. Finally, Norway requests similar elaborations on summaries of its own arguments should the Panel accept the United States' request, which Norway does not consider necessary for the Panel's reasoning.

6.21. The Panel has made the requested modification in paragraph 7.107 to clarify the context regarding subparagraphs (i) and (ii) of Article XXI(b) in which the United States referred to the rules of English grammar. The Panel declines the additional suggested text in paragraph 7.108 in which the Panel is addressing grammatical considerations as part of its overall assessment of the contested issues of interpretation under Article XXI(b) in this dispute. In particular, the Panel's analysis in these paragraphs notes the absence of a definitive rule of grammar supporting the United States' construction of the provision as containing a "single relative clause" that wholly reserves the conditions and circumstances of the subparagraphs to the judgment of the invoking Member. The Panel has modified these paragraphs to clarify that, with respect to the interpretation of Article XXI(b), the qualification of the noun "action" in paragraph (b) by the subparagraphs is not

²⁰⁵ See e.g. Panel Reports, *India – Solar Cells*, para. 6.24; *Indonesia – Iron or Steel Products*, Annex A-3, paras. 2.3-2.4; *US – Poultry (China)*, para. 6.32.

solely determined by rigid application of grammar but follows from the ordinary meaning of these terms, as elaborated in the remainder of the Panel's analysis.

6.22. Norway requests a modification to **paragraph 7.116** to clarify that the Panel is referring to the position taken by the United States with respect to whether Article XXI(b) contains a "single relative clause" that wholly reserves the conditions and circumstances of the subparagraphs to the judgment of the invoking Member. The United States objects to Norway's request and considers that the conclusion is clear as originally written.

6.23. The Panel declines to amend the language of this paragraph, which concerns the argument of the United States on a "single relative clause" in Article XXI(b) that wholly reserves the conditions and circumstances of the subparagraphs to the judgment of the invoking Member.

6.24. The United States requests that the Panel expand the summary of arguments in **paragraph 7.121** on the interpretation of the terms "emergency in international relations" in Article XXI(b)(iii), and that the Panel address these arguments in **paragraph 7.125** setting out the Panel's interpretation of these terms. Norway does not agree with the United States' request and recalls that panels are not required to address each and every argument raised by a party. Norway considers that the Panel's analysis resolves the parties' dispute as the Panel explains its interpretation of subparagraph (iii) and the application of the conditions therein. Norway comments that the United States does not explain how the requested additions are necessary to resolve the dispute between the parties, also taking into account "the further additions that would be required to capture Norway's position on these points".

6.25. As noted, the Panel has not comprehensively reproduced every aspect of the parties' arguments but rather has referred to the parties' arguments in order to facilitate understanding of the contested issues addressed in the Panel's reasoning and findings. In this connection, the Panel has focused on the gravity or severity of an "emergency in international relations" within the meaning of Article XXI(b)(iii), particularly regarding the impact on international relations of situations falling under that provision. Moreover, the Panel has interpreted the terms "emergency in international relations" in accordance with Article 3.2 of the DSU and its mandate to make such findings as will assist the DSB in making the recommendations or rulings provided for in the covered agreements. In section 7.8.3, the Panel has addressed the interpretation of Article XXI(b)(iii) to the extent necessary to assess whether, based on the evidence and arguments submitted by the parties, the measures at issue were "taken in time of war or other emergency in international relations". On the basis of the foregoing, the Panel does not consider it necessary to further address the United States' arguments in this regard.

6.3 Appendices

6.26. The United States requests that the Panel incorporate the analysis and conclusions contained in **Appendices A and B** into the main body of the Report. The United States considers the materials described in these appendices to be integral to the Panel's analysis and notes that they were a subject of disagreement and argument by the parties. Norway suggests that the Panel could address the United States' request by stating in the Report that Appendices A and B are an integral part of its Report.

6.27. The Panel recalls its conclusion in Appendix A that its review of the negotiating history of Article 11.1(c) of the Agreement on Safeguards confirms its interpretation of that provision. The Panel has also concluded that the materials examined in Appendix B support the general conclusion that the terms of Article XXI(b) of the GATT 1994 establish a right to take action for the protection of essential security interests in the conditions and circumstances described in the three subparagraphs. The appendices set out in greater detail the specific materials examined, the arguments advanced by the parties, and the bases for the Panel's conclusions. The Panel therefore declines the United States' request, and the Panel has modified the references to the appendices in the Report to specify which appendix is being referred to in the Panel's analysis.

6.28. Norway comments that a number of paragraphs, including **paragraphs 2.11, 2.23, 2.31, 3.2, 3.7, and 4.2 of Appendix B**, do not provide an accurate depiction its views and requests that the Panel's summary more fully reflect its arguments on the materials pertaining to the interpretation of Article XXI of the GATT 1994. The United States does not comment on Norway's request.

6.29. The Panel has reviewed Norway's submissions and modified paragraphs 2.11, 2.23, 2.31, 3.2, 3.7, and 4.2 of Appendix B in order to better reflect Norway's arguments relating to the interpretation of Article XXI of the GATT 1994.

6.30. Norway requests that the Panel clarify its position in **paragraphs 4.41 and 7.66 of Appendix B** with regard to the interpretive weight given, respectively, to internal documents of the US delegation at the ITO/GATT 1947 negotiations and comments made by delegations at a GATT Council meeting addressing the invocation of Article XXI by the United States in relation to certain measures affecting Nicaragua. The United States does not object to Norway's request.

6.31. The Panel notes the following to clarify the context of the statements referred to by Norway. In section 4 of Appendix B, the Panel has reviewed certain internal documents of the US delegation at the ITO/GATT 1947 negotiations. At the outset, the Panel makes a general observation that Article 32 of the Vienna Convention does not limit the scope of supplementary means of treaty interpretation to which there may be recourse. Against that background, with certain limitations and caveats explained further in section 4.2, the Panel does not consider the internal documents of the US delegation at the ITO/GATT 1947 negotiations to be *a priori* entirely irrelevant. In the subsequent assessment of the content of these documents, the Panel reiterates the inherent limitations to these materials for the interpretive issues in this dispute and notes that the review of the materials submitted confirms, or at least does not undermine, the Panel's interpretation of Article XXI of the GATT 1994.

6.32. In section 7 of Appendix B, the Panel has reviewed materials pertaining to the views expressed by GATT contracting parties in connection with prior invocations of Article XXI of the GATT 1947. At the beginning of its analysis, the Panel notes that neither party in this dispute assigns any particular value to these "views" under either Articles 31 or 32 of the Vienna Convention. The Panel further notes that the materials submitted point to heterogeneous, conflicting views expressed by GATT contracting parties over time, and cannot thus provide any relevant guidance for the contested issues in this dispute.

6.33. As indicated in the summary provided above, the review of the documents in question did not lead the Panel to modify its understanding of Article XXI of the GATT 1994 under Article 31 of the Vienna Convention. Accordingly, the Panel clarifies that Appendix B should not be read as suggesting that greater interpretive value was given to internal documents of the US delegation at the ITO/GATT 1947 negotiations as compared to the views expressed by GATT contracting parties in relation to prior invocations of Article XXI of the GATT 1947.

7 FINDINGS

7.1 Mandate under the DSU

7.1. The Panel was established by the DSB in accordance with Article 6 of the DSU with standard terms of reference, as provided in Article 7.1 of the DSU, "[t]o examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB" in the complainant's panel request and "to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements". Pursuant to Article 7.2 of the DSU, the Panel is required to "address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute".

7.2. The matter referred to the DSB in the complainant's panel request comprises claims under the GATT 1994 and the Agreement on Safeguards with respect to the measures at issue.²⁰⁶ In response to these claims, the United States requests that the Panel find that the United States has invoked its essential security interests under Article XXI(b) of the GATT 1994 and so report to the DSB.²⁰⁷ Although the United States acknowledges that "the Panel has jurisdiction over this dispute, because the DSB has established the Panel to examine the matter set out in the panel request"²⁰⁸, it argues that its "invocation of Article XXI is a non-justiciable issue as Article XXI makes its invocation

²⁰⁶ See section 3 above.

²⁰⁷ United States' first written submission, para. 184.

²⁰⁸ United States' first written submission, para. 181.

self-judging by the Member taking the security action".²⁰⁹ In the United States' view, "[i]t follows that the Panel may not make findings on the complainant's claims because they are not appropriate or suitable for adjudication by the Panel and may not make recommendations because no finding of WTO-inconsistency can be made."²¹⁰

7.3. In response to questions from the Panel, the United States clarifies that "the United States is not requesting that the Panel refrain from applying the rules and procedures of the DSU" but rather submits that "[the United States'] approach reflects an outcome consistent with a panel's terms of reference from the DSB and function of a panel under the DSU, and a proper interpretation of Article XXI(b) under the Vienna Convention" on the Law of Treaties (Vienna Convention).²¹¹ According to the United States, the Panel's "jurisdiction" conferred by Articles 7.1 and 11 of the DSU is constrained by "the ordinary meaning of the terms in Article XXI(b)", as interpreted in accordance with the customary rules of interpretation of public international law. The United States thus clarifies that its arguments on "justiciability" and the "political" nature of the questions involved rest on the interpretation of the terms of Article XXI(b) in accordance with the interpretive principles of Article 3.2 of the DSU and the Panel's terms of reference.²¹² As addressed in greater detail below, the complainant also refers to these interpretive principles and the requirements of the Panel's terms of reference in contesting the United States' characterization of Article XXI(b) as "non-justiciable".²¹³

7.4. Based on its terms of reference, the Panel's mandate under the DSU is to examine the matter raised by the complainant in its panel request and to address the United States' invocation of Article XXI(b) of the GATT 1994. The purpose of this examination is to enable the Panel to make such findings as will assist the DSB in discharging its responsibilities under the covered agreements. In fulfilling this mandate, the Panel is mindful of its function and duty under Article 11 of the DSU 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. The Panel is further guided by the role of WTO dispute settlement, as recognized in Article 3.2 of the DSU, to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.²¹⁴

7.5. The Panel observes that the parties affirm these fundamental principles regarding the assessment of the complainant's claims and the United States' invocation of Article XXI(b) of the GATT 1994 under the rules and procedures of the DSU.²¹⁵ However, the parties dispute the application of these principles to the matter before the Panel, particularly with respect to the applicability of Article XIX of the GATT 1994 and the Agreement on Safeguards to the measures at issue, and the relationship between those disciplines and Article XXI(b) of the GATT 1994. Regarding the United States' invocation of Article XXI(b), the parties further dispute the extent to which the terms of this provision reserve discretion to the invoking Member taking action that it considers necessary for the protection of its essential security interests, as well as the applicability of this provision to the challenged measures based on the arguments and evidence submitted in these proceedings.

²⁰⁹ United States' first written submission, para. 183. The United States submits that "'jurisdiction' can be defined as the extent of power of the Panel under the DSU to exercise its judicial authority or decide a particular case", while "'justiciability', by contrast, relates to whether a matter is appropriate or suitable for adjudication by a court, or in this context, whether an issue is subject to findings by the Panel under the DSU." (Ibid. para. 181).

²¹⁰ United States' first written submission, para. 183. The United States further argues that "the self-judging text included in Article XXI" reflects a recognition that "issues of essential security are inherently political in nature, and there are no legal criteria by which a Member's consideration of its essential security interests can be objectively determined". (Ibid.).

²¹¹ United States' response to Panel question Nos. 26-29.

²¹² See United States' response to Panel question No. 54 (arguing that "it is not the political nature of the issues covered under Article XXI(b) that lead to an interpretation that the provision is self-judging" but rather "[i]t is the text of Article XXI(b) that establishes its self-judging nature"); see also United States' opening statement at the first meeting of the Panel, paras. 3-4 and 64.

²¹³ See section 7.8 below.

²¹⁴ See Appellate Body Reports, *Japan – Alcoholic Beverages II*, para. 31; *EC – Computer Equipment*, para. 82; Panel Report, *US – Section 301 Trade Act*, para. 7.75.

²¹⁵ See e.g. United States' response to Panel question No. 25 ("the Panel's function is to objectively assess the matter before it by interpreting Article XXI(b) in accordance with the customary rules of interpretation"); Norway's response to Panel question Nos. 26 and 27.

7.6. The Panel is required under the DSU to assess these disputed issues in an objective manner and to make findings on the basis of that assessment that will assist the DSB in making the recommendations or rulings provided for in the covered agreements. In furtherance of this mandate, the Panel will examine the matter within its terms of reference by assessing the applicability of and conformity with the relevant provisions of the GATT 1994 and the Agreement on Safeguards, based on the interpretive principles of Article 3.2 of the DSU and the arguments and evidence presented by the parties. As prescribed by Article 12.7 of the DSU, the Panel will set out its relevant findings of fact, the applicability of relevant provisions, and the basic rationale behind any findings and recommendations that it makes.

7.2 Order of analysis

7.7. In considering the appropriate order of analysis of the issues outlined above, the Panel has discretion to structure its analysis taking into account the specific measures, claims, arguments, and relevant provisions at issue.²¹⁶ Having considered the arguments presented by the parties in this dispute²¹⁷, the Panel will first address issues concerning its terms of reference and the identification of the measures at issue. Following this determination of the measures within its terms of reference, the Panel will examine the complainant's claims that the measures are inconsistent with certain provisions of the covered agreements.

7.8. In principle, the obligations set forth in the WTO covered agreements apply cumulatively.²¹⁸ In this dispute, the parties disagree as to whether the WTO rules on safeguards set forth in Article XIX of the GATT 1994 and the Agreement on Safeguards apply to the measures at issue, and the complainant raises other claims under the GATT 1994 which are independent of those contested issues of applicability. Taking these circumstances into account, along with the operation of the measures at issue and the manner in which the parties have presented their arguments, the Panel considers it appropriate to begin its assessment with the claims under Articles I:1, II:1, XI:1, and X:3 of the GATT 1994.

7.9. The Panel will first assess the consistency of the relevant measures with Article II:1 of the GATT 1994 and the relevant commitments in the United States' Schedule of Concessions. The Panel will then assess the claims under Article I:1 of the GATT 1994 concerning most-favoured-nation treatment. The Panel will next address the claims under Article XI:1 of the GATT 1994 concerning quantitative restrictions, followed by the claims under Article X:3 of the GATT 1994 concerning the administration of measures. The Panel will then assess the remainder of the complainant's claims under Article XIX of the GATT 1994 and the Agreement on Safeguards, including the parties' disagreement as to the applicability of this provision and agreement to the measures at issue.

7.10. The Panel will next address the United States' invocation of Article XXI(b) of the GATT 1994 in relation to any measures falling within the Panel's terms of reference found to be inconsistent with provisions of the covered agreements. The Panel will assess the arguments and evidence submitted by the parties in relation to the measures at issue beginning with the parties' disagreement as to the meaning of the terms of Article XXI(b) of the GATT 1994 interpreted in

²¹⁶ See Appellate Body Reports, *Canada – Wheat Exports and Grain Imports*, para. 126; *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.229; Panel Reports, *India – Solar Cells*, paras. 7.41-7.42; *Russia – Pigs (EU)*, para. 7.30. In disputes involving security exceptions under Article XXI(b) of the GATT 1994 and Article 73 of the TRIPS Agreement, previous panels have exercised discretion regarding the order of analysis based on their consideration of the specific circumstances of the dispute, including arguments made by the parties and other relevant provisions at issue. (See Panel Reports, *Russia – Traffic in Transit*, paras. 7.20-7.26; *Saudi Arabia – IPRs*, paras. 7.1-7.3).

²¹⁷ While not bound by the presentation of claims and arguments by the parties, the Panel notes that the parties have taken different views on the appropriate order of analysis of the issues in this dispute. The complainant considers that the Panel should commence with examination of the claims under the Agreement on Safeguards and Article XIX of the GATT 1994, followed by other claims under the GATT 1994, before turning to the United States' invocation of Article XXI(b). The United States maintains that the Panel should begin by addressing Article XXI(b) as the invocation of this provision means that there are no findings that would assist the DSB in making recommendations or giving rulings as to the complainant's claims. (United States' response to Panel question Nos. 21-23).

²¹⁸ The Panel is also mindful that there may be circumstances in disputes where more than one covered agreement applies and it is appropriate to begin the analysis with provisions from an agreement that "deals specifically, and in detail" with the measures at issue. (See Appellate Body Reports, *Brazil – Desiccated Coconut*, pp. 12-13; *Canada – Periodicals*, p. 19; and *EC – Bananas III*, para. 204; Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.76-7.79; *US – Customs Bond Directive*, paras. 7.170-7.171).

accordance with Article 3.2 of the DSU and the customary rules of interpretation of public international law. On the basis of this assessment, the Panel will provide its findings and recommendations in accordance with the DSU.

7.3 Article II:1 of the GATT 1994

7.3.1 Introduction

7.11. Norway argues that the aluminium and steel tariffs violate Articles II:1(a) and II:1(b) of the GATT 1994.²¹⁹ Norway considers that in terms of design and structure, the aluminium and steel tariffs are "ordinary customs duties" under Article II:1(b).²²⁰ Norway contends that, for each and every tariff line for the relevant products, the aluminium and steel tariffs exceed the bound rates set out in the United States' Schedule, and as a result, violate Article II:1(b) and also Article II:1(a).²²¹ Finally, even if the tariffs do not constitute "ordinary customs duties" under the first sentence of Article II:1(b), Norway considers that they constitute prohibited "other duties or charges".²²²

7.12. The United States has not advanced any arguments or evidence contesting the claims under Articles II:1(a) and (b) of the GATT 1994.²²³

7.13. Article II:1 of the GATT 1994 provides in relevant part:

(a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

7.14. Additionally, the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 provides in relevant part:

Members hereby agree as follows:

1. In order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, the nature and level of any "other duties or charges" levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply. It is understood that such recording does not change the legal character of "other duties or charges".

²¹⁹ Norway's first written submission, paras. 16 and 426-427; second written submission, para. 49; opening statement at the first meeting of the Panel, para. 20; response to Panel question Nos. 1, para. 2, No. 21, para. 244, and No. 71, para. 657; responses to Panel's questions following the first meeting, Annex I; and opening statement at the second meeting of the Panel, para. 28.

²²⁰ Norway's first written submission, paras. 432-433.

²²¹ Norway's first written submission, paras. 434-436.

²²² Norway's first written submission, para. 437.

²²³ See United States' closing statement at the second meeting of the Panel, para. 7 (indicating that the United States "has imposed duties on certain steel and aluminum products on a non-MFN basis and in excess of the levels set out in its WTO Goods Schedule").

7.15. Article II:1(a) of the GATT 1994 contains a general prohibition against according treatment less favourable to imports than that provided for in a Member's Schedule.²²⁴ The first sentence of Article II:1(b) prohibits the imposition of ordinary customs duties on importation in excess of those rates set forth in a Member's Schedule.²²⁵ The second sentence of Article II:1(b) prohibits the imposition of other duties or charges of any kind on or in connection with importation in excess of those imposed on the date of entry into force of the GATT 1994 (or those directly and mandatorily required to be imposed thereafter by legislation in force on that date).²²⁶ According to the Understanding on the Interpretation of Article II:1(b), the nature and level of any such "other duties or charges" must be recorded in a Member's Schedule.²²⁷

7.16. In this dispute, the complainant focuses its arguments on inconsistency with Article II:1(b) and alleges a consequential violation of Article II:1(a).²²⁸ Prior WTO adjudicators have considered that Article II:1(b) prohibits "a specific kind of practice that will always be inconsistent with paragraph (a)" because application of duties in excess of what is provided for in a Member's Schedule necessarily constitutes "less favourable" treatment within the meaning of Article II:1(a).²²⁹ Given these considerations, the Panel will assess whether the challenged measures result in the imposition of duties in excess of what is provided for in the United States' Schedule under Article II:1(b), and thus accord less favourable treatment than that provided for in the Schedule in violation of Article II:1(a).

7.17. The Panel will begin by identifying the concessions and obligations for the relevant products in the United States' Schedule before turning to the treatment of those products under the additional duties.²³⁰

7.3.2 Additional duties on steel and aluminium products

7.18. In March 2018, the United States imposed additional duties of 25% on steel products and 10% on aluminium products.²³¹ The following tables identify the steel and aluminium products covered by the additional duties and provide a comparative analysis of the United States' bound rates and its additional duty rates in relation to those products. The United States' Schedule does not record any "other duties or charges" with respect to the steel and aluminium products at issue.²³²

²²⁴ See Appellate Body Reports, *Argentina – Textiles and Apparel*, para. 45; *Colombia – Textiles*, para. 5.34. See also Panel Reports, *EC – Chicken Cuts*, para. 7.63; *EC – IT Products*, para. 7.99.

²²⁵ See Appellate Body Reports, *India – Additional Import Duties*, para. 150; *Colombia – Textiles*, para. 5.35.

²²⁶ See Appellate Body Report, *India – Additional Import Duties*, para. 151; Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.78.

²²⁷ See Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.78. See also Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.84-7.90.

²²⁸ Norway's first written submission, para. 436.

²²⁹ Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 45-47. See also Panel Reports, *EC – Chicken Cuts*, paras. 7.64-7.65; *EC – IT Products*, para. 7.747.

²³⁰ See Norway's first written submission, paras. 432-437. In a footnote as part of its Article II:1 analysis, Norway additionally referred to the United States having, as of 13 August 2018, imposed a duty of 50% on steel products from Türkiye through Presidential Proclamation 9772. (See Norway's first written submission, fn 414 to para. 432. See also *ibid.* para. 5 and Table 2). In its responses to the Panel's questions, Norway also referred to Presidential Proclamation 9772 as having been linked to its claims under Articles II:1(a) and (b) of the GATT 1994 in its panel request. (See Norway's response to Panel question Nos. 2 and 85). However, Norway did not raise any arguments or specifically request findings under Articles II:1(a) and (b) of the GATT 1994 in respect of this duty. The Panel has therefore declined to make findings in respect of this duty, in the context of this dispute.

²³¹ See Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10); Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9). See also section 2.2.1 for a detailed description.

²³² United States Bound Concessions at the HS 6-digit subheading level.

Table 2: Steel Products Subject to Additional Duties under Section 232

Steel Products Subject to Additional Duties			
#	HTS Code	Rates of customs duties	
		Bound rates ²³³	Additional duty
1.	7206-7215	0	+25%
2.	7216 (except certain subheadings) ²³⁴		
3.	7217-7229		
4.	7301.10.00		
5.	7302.10		
6.	7302.40.00		
7.	7302.90.00		
8.	7304-7306		

Source: United States Bound Concessions at the HS 6-digit subheading level; Presidential Proclamation 9705²³⁵

Table 3: Aluminium Products Subject to Additional Duties under Section 232

Aluminium Products Subject to Additional Duties			
#	HTS Code	Rates of customs duties	
		Bound rates ²³⁶	Additional duty
1.	7601	0-2.6%	+10%
2.	7604	1.5-5%	
3.	7605	2.6-4.2%	
4.	7606	2.7-6.5%	
5.	7607	0-5.8%	
6.	7608	0-5.7%	
7.	7609	5.7%	
8.	7616.99.51	2.5% ²³⁷	

Source: United States Bound Concessions at the HS 6-digit subheading level; Presidential Proclamation 9704²³⁸

²³³ Pursuant to Chapters 72 and 73 of the HTSUS, the generally applied rate for these products is also 0% for all relevant subheadings.

²³⁴ Exceptions for subheadings 7216.61.00, 7216.69.00, and 7216.91.00.

²³⁵ Harmonized Tariff Schedule of the United States (2019) Revision 2, Chapter 99, (Exhibit NOR-15), subchapter III, Notes 16(b) and 19(b); United States Bound Tariffs, (Exhibit NOR-69); and Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9). The Panel additionally relied on data from the WTO's Consolidated Tariff Schedule (CTS) Database and online versions of the United States' harmonized tariff schedule, <https://hts.usitc.gov/current> (accessed 22 June 2022).

²³⁶ Pursuant to Chapter 76 of the HTSUS, the generally applied rate for the relevant subheadings are as follows: for HTS Code 7601, 0-2.6%; for HTS Code 7604, 1.5-5%; for HTS Code 7605, 2.6-4.2%; for HTS Code 7606, 2.7-6.5%; for HTS Code 7607, 0-5.8%; for HTS Code 7608, 5.7%; for HTS Code 7609, 5.7%; and for HTS Code 7616.99.51, 2.5%. In respect of HTS Code 7608, tariff lines 7608.10.00 and 7608.20.000, as described in the United States' Schedule, are subdivided into two categories of (A) and (B). The former applies to products certified for use in civil aircraft, for which a bound rate of zero applies. The latter applies to all other products, for which a bound rate of 5.7% applies. The HTSUS does not draw a distinction between (A) and (B) by simply providing for a rate of 5.7%.

²³⁷ In WTO document WT/Let/493, the heading is elaborated to 7616.99.50 ("Other"), for which the duty rate is listed as 2.5%. In the HTSUS, this heading is elaborated to 7616.99.51 ("Other"), for which the duty rate is listed as 2.5%. Norway lists this figure as 0-2.5%, which appears to be an error. (See Norway's first written submission, para. 434).

²³⁸ See Harmonized Tariff Schedule of the United States (2019) Revision 2, Chapter 99, (Exhibit NOR-15), subchapter III, Notes 16(b) and 19(b); United States Bound Tariffs, (Exhibit NOR-69); and

7.19. The Panel recalls that the first sentence of Article II:1(b) prohibits the imposition of ordinary customs duties on importation in excess of those rates set forth in a Member's Schedule, whereas the second sentence prohibits the imposition of all other duties or charges of any kind on or in connection with importation except as recorded in a Member's Schedule. To fall within the scope of Article II:1(b), the additional duties must therefore qualify as either "ordinary customs duties" under the first sentence, or "other duties or charges" under the second sentence.

7.20. The term "ordinary customs duties" is not defined in the GATT 1994.²³⁹ However, previous WTO panels and the Appellate Body have highlighted several factors that are relevant to this characterization. First, the word "ordinary" has been defined as referring to duties "of the usual kind, not singular or exceptional"²⁴⁰ or "occurring in regular custom or practice".²⁴¹ Second, the "customs dut[y]" must be imposed "on [the product's] importation"; in other words, the obligation to pay must accrue at the moment of or by virtue of the product's importation into the Member's customs territory.²⁴² Third, neither the form which the duty takes, nor the basis on which it is calculated, will necessarily be dispositive.²⁴³ Rather, panels have examined duties by their design and structure²⁴⁴ and found certain duties and charges, based on their particular features, not to constitute "ordinary customs duties" in the sense of Article II:1(b).²⁴⁵ The term "all other duties or charges of any kind" has been interpreted broadly as a residual category, which covers all duties or charges on or in connection with importation that are neither "ordinary customs duties" nor the duties or charges expressly provided for in Article II:2 of the GATT 1994.²⁴⁶

7.21. In the present dispute, Norway argues that the additional duties of 25% on steel products and 10% on aluminium products constitute "ordinary customs duties" inconsistent with the first sentence of Article II:1(b) of the GATT 1994. In particular, Norway highlights the following features:

- a. the chargeable event for the imposition of the tariffs is importation into the United States of a steel or aluminium good, with duty liability arising because the products are imported;
- b. the tariffs are imposed at an *ad valorem* rate of 25% (steel) and 10% (aluminium), with the customs value of the product serving as the tax base;
- c. the tariffs are imposed as part of a single, cumulative fiscal charge together with other ordinary customs duties applied by the United States to the relevant products; and
- d. the tariffs are characterized as "ordinary customs duties" in the HTSUS.²⁴⁷

Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10). The Panel additionally relied on data from the WTO's CTS Database and online versions of the United States' harmonized tariff schedule, <https://hts.usitc.gov/current> (accessed 22 June 2022).

²³⁹ See Appellate Body Report, *Chile – Price Band System*, para. 265.

²⁴⁰ See Panel Report, *Chile – Price Band System*, para. 7.51.

²⁴¹ Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.83.

²⁴² Appellate Body Report, *China – Auto Parts*, para. 158. In *Dominican Republic – Safeguard Measures*, the panel thus noted that: "the expression 'ordinary customs duties' in Article II:1(b) of the GATT 1994 refers to duties collected at the border which constitute 'customs duties' in the strict sense of the term" and "this expression does not cover all possible extraordinary or exceptional duties collected in customs." (Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.85).

²⁴³ Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.84 (referring to Appellate Body Report, *Chile – Price Band System*, paras. 216 and 271-278). See also Appellate Body Reports, *China – Auto Parts*, para. 162 (noting that "the time at which a charge is collected or paid is not decisive"); *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 416 (noting in passing that "it is unusual that a tariff concession inscribed in a Member's Schedule would be limited in time").

²⁴⁴ See Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.85 (noting that to determine whether the duties are "ordinary customs duties", panels "must consider the design and structure of the measures concerned"). See also Appellate Body Report, *Argentina – Textiles and Apparel*, para. 55; Panel Report, *Russia – Tariff Treatment*, para. 7.92.

²⁴⁵ See e.g. Appellate Body Reports, *Peru – Agricultural Products*, paras. 5.70-5.76; *Chile – Price Band System (Article 21.5 – Argentina)*, paras. 167 and 171; Panel Reports, *Peru – Agricultural Products*, paras. 7.373-7.374; *Dominican Republic – Import and Sale of Cigarettes*, para. 7.115.

²⁴⁶ Panel Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.113; *Dominican Republic – Safeguard Measures*, para. 7.79. See also Appellate Body Report, *India – Additional Import Duties*, para. 157.

²⁴⁷ Norway's first written submission, para. 432.

7.22. In the alternative, Norway argues that even if the tariffs do not constitute "ordinary customs duties", they constitute "other duties or charges" that are prohibited under the second sentence of Article II:1(b).²⁴⁸

7.23. In the Panel's view, the additional duties at issue bear certain features which suggest that they may best be characterized as "ordinary customs duties" for the purposes of Article II:1(b). In particular, the additional duties are: (a) levied on all imports of the covered steel and aluminium products; (b) calculated on an *ad valorem* basis; (c) described as "tariffs" and "ordinary customs dut[ies]" in the relevant Presidential Proclamations; and (d) operationalized as "ordinary customs dut[ies]" and inscribed in the "Rates of Duty – General" column of the United States' tariff schedule.²⁴⁹ These duties are also clearly applicable to products "on their importation into the territory" of the United States in the sense of Article II:1(b). Moreover, the United States has not contested Norway's characterization of the duties under Article II:1(b), but rather accepts that it has imposed duties "in excess of the levels set out in its WTO Goods Schedule".²⁵⁰ Accordingly, the Panel considers that the additional duties are "ordinary customs duties" under the first sentence of Article II:1(b).

7.24. However, the Panel is cognizant that the additional duties also bear other features which reflect the particular process under Section 232 through which they were imposed and maintained. First, the additional duties were not inscribed through an amendment or replacement of the existing MFN tariff, but rather through inscription in subchapter III of chapter 99 of the HTSUS, titled "Temporary Modifications Established Pursuant to Trade Legislation".²⁵¹ As such, the duties expressly apply "in addition" to any pre-existing tariffs.²⁵² Second, although the additional duties are generally applicable on an MFN basis, they are subject to a number of country exemptions.²⁵³ Finally, while the additional duties are not expressly imposed for a temporary period, certain aspects of their implementation suggest that they may not be intended as permanent adjustments to the MFN tariff rate. These include the aforementioned inscription in subchapter III of chapter 99, as well as the stipulated requirement in the relevant Presidential Proclamations that "[t]he Secretary shall continue to monitor" these duties.²⁵⁴ In the circumstances of this dispute and mindful of these other features, the Panel will also consider whether the additional duties as "other duties or charges" would be inconsistent with the second sentence of Article II:1(b).

7.25. As "ordinary customs duties" under Article II:1(b), it is evident that the additional duties of 25% on steel products and 10% on aluminium products exceed the United States' bound rates of 0% and 0-6.5% on steel and aluminium products respectively.²⁵⁵ These products are therefore not exempt from ordinary customs duties in excess of those set forth in the United States' Schedule, in a manner inconsistent with the first sentence of Article II:1(b). Moreover, the United States' Schedule does not record any "other duties or charges" with respect to the steel and aluminium products at issue.²⁵⁶ Even if considered to be "other duties or charges", the additional duties would therefore exceed those imposed on the entry into force of the GATT 1994 or directly and mandatorily required to be imposed thereafter, in a manner inconsistent with the second sentence of Article II:1(b).

²⁴⁸ Norway's first written submission, para. 437.

²⁴⁹ See Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10); Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9).

²⁵⁰ See United States' closing statement at the second meeting of the Panel, para. 7.

²⁵¹ See Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10), Annex; Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9), Annex.

²⁵² See Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10), p. 11621; Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9), p. 11627 (stating that the duties apply "*in addition to any other duties, fees, exactions or charges applicable*" to the imported articles). (emphasis added)

²⁵³ See section 2.2.3 for a detailed description. See also Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10), p. 11620; Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9), p. 11626. See also Presidential Proclamation 9710, (Exhibit NOR-6 and USA-12); Presidential Proclamation 9711, (Exhibit NOR-7 and USA-11); Presidential Proclamation 9739, (Exhibit NOR-11 and USA-14); Presidential Proclamation 9740, (Exhibit NOR-8 and USA-13); Presidential Proclamation 9758, (Exhibit NOR-9 and USA-16); and Presidential Proclamation 9759, (Exhibit NOR-10 and USA-15). These will be elaborated in more detail in the context of Norway's claim under Article I:1 of the GATT 1994.

²⁵⁴ See Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10); Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9).

²⁵⁵ See para. 7.18 above.

²⁵⁶ United States Bound Concessions at the HS 6-digit subheading level.

7.26. Accordingly, the Panel considers that the additional duties are inconsistent with the first sentence of Article II:1(b) as "ordinary customs duties" exceeding the United States' bound rates for the relevant products. Even if the additional duties were considered "other duties or charges", the Panel considers that these duties would also be inconsistent with the second sentence of Article II:1(b). On either basis, the additional duties on steel and aluminium products would therefore be inconsistent with Article II:1(b) of the GATT 1994. As the additional duties are inconsistent with Article II:1(b) by exceeding the levels in the United States' Schedule, the United States has necessarily accorded treatment less favourable than that provided for in its Schedule. The Panel therefore concludes that the additional duties are also inconsistent with Article II:1(a) of the GATT 1994.

7.3.3 Conclusion

7.27. Regarding Norway's claims under Article II of the GATT 1994, the Panel concludes that the additional duties of 25% on steel products and 10% on aluminium products do not accord the treatment provided for in the United States' Schedule, contrary to Article II:1(b) and Article II:1(a) of the GATT 1994.

7.4 Article I:1 of the GATT 1994

7.4.1 Introduction

7.28. Norway argues that the aluminium and steel tariffs give rise to discriminatory restrictions that are inconsistent with Article I:1 of the GATT 1994.²⁵⁷ Norway considers that the steel and aluminium tariffs are subject to Article I:1 because they constitute "ordinary customs duties" under Article II:1(b).²⁵⁸ Norway further advances that it is rebuttably presumed that aluminium and steel products from exempted countries are "like" those from all other WTO Members.²⁵⁹ Furthermore, in Norway's view, the measures at issue confer an "advantage" on imports from Members that qualify for a country exemption, by either exempting imports from the tariffs without the imposition of any import restrictions, or by, in effect, affording countries the opportunity to choose between its preferred import regime: either tariff or quota.²⁶⁰ Finally, Norway advances that this advantage is not extended "immediately and unconditionally" to like aluminium and steel products originating in other countries.²⁶¹

7.29. The United States has not advanced any arguments or evidence contesting the complainant's claim under Article I:1 of the GATT 1994.²⁶²

7.30. Article I:1 of the GATT 1994 provides:

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded

²⁵⁷ Norway's first written submission, paras. 438-440; response to Panel's questions following the first meeting, Annex I; response to Panel question Nos. 1, para. 2, and No. 21, para. 244; second written submission, para. 49 and fn 35 to para. 49; and opening statement at the second meeting of the Panel, para. 28.

²⁵⁸ Norway's first written submission, paras. 446-447. Norway further considers that the quotas granted to Argentina, Brazil, and the Republic of Korea constitute "rules and formalities in connection with importation". (Ibid).

²⁵⁹ Norway's first written submission, paras. 448-449.

²⁶⁰ Norway's first written submission, paras. 450-464. Norway recalls that the Presidential Proclamations provide that the United States is willing to discuss with any country with which it has a "security relationship", and "arrive at a satisfactory alternative means" of addressing the perceived impacts on imports. (Ibid. para. 451).

²⁶¹ Norway's first written submission, para. 466.

²⁶² See United States' closing statement at the second meeting of the Panel, para. 7 (the United States accepting that it "has imposed duties on certain steel and aluminum products on a non-MFN basis and in excess of the levels set out in its WTO Goods Schedule").

immediately and unconditionally to the like product originating in or destined for the territories of all other [Members].

7.31. Article I:1 of the GATT 1994 prohibits, with respect to measures falling within its scope of application, discrimination among like products originating in or destined for different countries.²⁶³ The obligation to accord most-favoured-nation treatment as set out in Article I:1 of the GATT 1994 has been understood to require equality of competitive opportunities for like imported products from any Member.²⁶⁴

7.32. The Panel will proceed by examining the challenged measures under Article I:1 of the GATT 1994, specifically concerning the country exemptions for steel and aluminium products.²⁶⁵

7.4.2 Country exemptions for steel and aluminium products

7.33. As described in greater detail above²⁶⁶, in March 2018, the United States imposed additional import duties of 25% on steel products and 10% on aluminium products.²⁶⁷ At that time, Australia, Argentina, Brazil, and the Republic of Korea were temporarily exempted from the additional duties on both steel and aluminium products.²⁶⁸ By May 2018, the United States had agreed to various "satisfactory alternative means" with these countries, including: (a) exemptions for steel and aluminium products from Australia; and (b) exemptions for steel and aluminium products from Argentina, as well as steel products from Brazil and the Republic of Korea, including through the alternative of import quotas.²⁶⁹ In Norway's view, through granting country exemptions to Australia, Argentina, Brazil, and the Republic of Korea, the United States affords an "advantage" to products from these countries which has not been extended "immediately and unconditionally" to like aluminium and steel products originating in other countries.²⁷⁰

7.34. The Panel recalls that the exemptions in question relate to the additional duties on steel and aluminium products, which have been found under Article II:1(b) of the GATT 1994 to constitute "ordinary customs duties" applicable on importation into the territory of the United States.²⁷¹ As such, they also relate to "customs duties and charges" connected with importation falling within the scope of Article I:1 of the GATT 1994.²⁷²

7.35. By design, the country exemptions exclude steel and aluminium products of certain origins from the application of the additional duties, conferring differential treatment to exempted products in comparison to those subject to the duties. Furthermore, it is undisputed that the additional duties apply to all qualifying products imported into the United States and that the relevant country exemptions apply to products from select countries (i.e. Australia, Argentina, Brazil, and the Republic

²⁶³ Appellate Body Report, *Canada – Autos*, para. 84.

²⁶⁴ See Appellate Body Report, *EC – Seal Products*, paras. 5.86-5.87. Under Article I:1 of the GATT 1994, a complainant must demonstrate that: (a) the measure at issue falls within the scope of Article I:1; (b) the imported products at issue are "like"; (c) the measure confers an "advantage, favour, privilege or immunity" on any product originating in the territory of any country; and (d) the advantage, favour, privilege or immunity granted is not extended "immediately" and "unconditionally" to like products originating in the territory of all Members. (See Appellate Body Report, *EC – Seal Products*, para. 5.86).

²⁶⁵ See Norway's first written submission, paras. 438-466; response to Panel's questions following the first meeting, Annex I.

²⁶⁶ See section 2.2 above.

²⁶⁷ See Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10); Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9).

²⁶⁸ See Presidential Proclamation 9710, (Exhibit NOR-6 and USA-12); Presidential Proclamation 9711, (Exhibit NOR-7 and USA-11).

²⁶⁹ See Presidential Proclamation 9739, (Exhibit NOR-11 and USA-14); Presidential Proclamation 9740, (Exhibit NOR-8 and USA-13); Presidential Proclamation 9758, (Exhibit NOR-9 and USA-16); and Presidential Proclamation 9759, (Exhibit NOR-10 and USA-15). These exemptions were extended based on the United States' "security relationship" with these Members. (Ibid).

²⁷⁰ Norway's first written submission, paras. 452-466.

²⁷¹ Moreover, even if not considered to qualify as "ordinary customs duties", the additional duties would in any event be inconsistent with the second sentence of Article II:1(b) of the GATT 1994 as "other duties or charges". See section 7.3 above.

²⁷² Previous panels have found exemptions from import duties to fall within the scope of Article I:1 of the GATT 1994. (See e.g. Panel Reports, *Canada – Autos*, para. 10.16; *Indonesia – Autos*, paras. 7.3-7.5).

of Korea) solely on the basis of origin.²⁷³ The United States does not contest that the measures exempt certain products based exclusively on origin contrary to the obligation to accord most-favoured-nation treatment under Article I:1.²⁷⁴ Therefore, with respect to the imposition of customs duties, the country exemptions accord an "advantage"²⁷⁵ to steel and aluminium products from the exempted countries that is not accorded immediately and unconditionally to "like products"²⁷⁶ originating in non-exempted countries. The Panel thus concludes that, by granting country exemptions from the additional duties to Australia, Argentina, Brazil, and the Republic of Korea, the United States acted inconsistently with Article I:1 of the GATT 1994.

7.36. In the context of its claim under Article I:1, Norway also raised specific arguments concerning the import quotas for steel and aluminium products from Argentina, Brazil, and the Republic of Korea, to the extent that these exempted countries were afforded a choice of import restriction (i.e. tariff or quota).²⁷⁷ The Panel notes that such quotas relate solely to countries that are exempted from the additional duties, and the existence of such quotas does not negate the fact that the products to which they apply are exempted from the additional duties.²⁷⁸ Given the foregoing finding on the advantage accorded by the exemptions, the Panel does not consider it necessary for the purposes of this dispute to determine whether any particular alternative treatment of exempted products from Argentina, Brazil, and the Republic of Korea, including under any import quota, would constitute a distinct violation of Article I:1 of the GATT 1994.

7.4.3 Conclusion

7.37. Regarding Norway's claims under Article I of the GATT 1994, the Panel concludes that the country exemptions for steel and aluminium products confer an advantage to products from Australia, Argentina, Brazil, and the Republic of Korea that has not been accorded immediately and unconditionally to like products from all other Members, in a manner inconsistent with Article I:1 of the GATT 1994.

²⁷³ See section 2.2.3 above. The Panel notes that a "presumption of likeness" has been applied in prior disputes in situations where the only distinguishing factor under the challenged measure was the origin of the products. These previous disputes suggest that, where a measure makes distinctions exclusively on the basis of origin, it will typically not be necessary to conduct a detailed analysis of "likeness" of the relevant products. (See Panel Report, *Russia – Railway Equipment*, paras. 7.897-7.899; see also Panel Reports, *Colombia – Ports of Entry*, paras. 7.355-7.356; *US – Poultry (China)*, paras. 7.424-7.432).

²⁷⁴ See United States' closing statement at the second meeting of the Panel, para. 7 (accepting that it has imposed duties on certain steel and aluminium products "on a non-MFN basis").

²⁷⁵ See Appellate Body Report, *Canada – Autos*, para. 79; Panel Reports, *EC – Bananas III*, para. 7.239; *EC – Seal Products*, para. 7.595. Previous panels have found country exemptions conferring duty free treatment to constitute an "advantage" under Article I:1. (See Panel Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, paras. 7.152-7.153. See also Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 353).

²⁷⁶ See fn 273 above. In the specific circumstances of this dispute, including the lack of any rebuttal by the United States, the Panel considers that the challenged measures apply to "like products" within the meaning of Article I:1 of the GATT 1994, without the need to conduct a detailed "likeness" analysis.

²⁷⁷ See Norway's first written submission, paras. 454-466. The Panel recalls that Norway identifies the country-wide tariff exemptions as a distinct measure with distinct legal consequences, and only challenges this measure under Article I:1. (Norway's response to Panel question No. 2, paras. 3-9; response to Panel's questions following the first meeting, Annex I). However, Norway considers that these exemptions include where the United States either foregoes import restrictions altogether or applies a quota to imports. (See Norway's first written submission, paras. 438-440).

²⁷⁸ The Panel further notes that all the "satisfactory alternative means", regardless of their specific form, were extended by the United States on the basis of their "security relationship" with the exempted countries and based on the determination that "imports from these countries [would] no longer threaten to impair the national security". (See Presidential Proclamation 9710, (Exhibit NOR-6 and USA-12); Presidential Proclamation 9711, (Exhibit NOR-7 and USA-11); Presidential Proclamation 9739, (Exhibit NOR-11 and USA-14); Presidential Proclamation 9740, (Exhibit NOR-8 and USA-13); Presidential Proclamation 9758, (Exhibit NOR-9 and USA-16); and Presidential Proclamation 9759, (Exhibit NOR-10 and USA-15)).

7.5 Article XI:1 of the GATT 1994

7.5.1 Introduction

7.38. Norway challenges the import quotas under Article XI:1 of the GATT 1994.²⁷⁹ Norway argues that the import quotas are, by definition, quantitative restrictions on imports of aluminium and steel to the United States, which are prohibited under this provision.²⁸⁰

7.39. The United States has not advanced any arguments or evidence contesting the complainant's claim under Article XI:1 of the GATT 1994.²⁸¹

7.40. Article XI:1 of the GATT 1994 provides that:

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any Member on the importation of any product of the territory of any other Member or on the exportation or sale for export of any product destined for the territory of any other Member.

7.41. Article XI:1 lays down a general obligation to eliminate quantitative restrictions by prohibiting Members from instituting or maintaining prohibitions or restrictions other than duties, taxes, or other charges on the importation, exportation, or sale for export of any product of another Member or destined for another Member.²⁸² Such prohibitions or restrictions are prohibited whether or not they are "made effective" through "quotas, import or export licenses or other measures".²⁸³

7.42. The Panel will proceed by examining the challenged measures under Article XI:1 of the GATT 1994, specifically concerning the import quotas for steel and aluminium products.²⁸⁴

7.5.2 Import quotas for steel and aluminium products

7.43. By May 2018, the United States imposed import quotas as an alternative to the additional duties on steel and aluminium products for: (a) steel and aluminium products from Argentina; (b) steel products from Brazil; and (c) steel products from the Republic of Korea.²⁸⁵ Norway challenges these as quantitative restrictions that are prohibited under Article XI:1 of the GATT 1994.²⁸⁶

7.44. The challenged measures comprise import quotas for steel and aluminium products from Argentina, Brazil, and the Republic of Korea. Such "quotas" are expressly listed in Article XI:1 as a method by which prohibitions or restrictions on importation may not be made effective.²⁸⁷ The United States does not contest that the import quotas prohibit or restrict importation of steel and aluminium products, contrary to the obligation to eliminate quantitative restrictions set forth in Article XI:1 of the GATT 1994.²⁸⁸ Based on these considerations, the Panel concludes that the import

²⁷⁹ Norway's response to Panel question No. 2(f). See also Norway's response to Panel's questions following the first meeting, Annex I; opening statement at the second meeting of the Panel, para. 28; and response to Panel question No. 97.

²⁸⁰ Norway's second written submission, para. 49.

²⁸¹ See United States' closing statement at the second meeting of the Panel, para. 7.

²⁸² Previous panels and the Appellate Body have noted that the scope of Article XI:1 is broad, capturing any measures through which a prohibition or restriction is produced or becomes operative. (See e.g. Appellate Body Reports, *Argentina – Import Measures*, paras. 5.216-5.219; Panel Report, *India – Quantitative Restrictions*, para. 5.128).

²⁸³ See e.g. Panel Report, *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)*, para. 7.160.

²⁸⁴ See Norway's response to Panel question No. 2(f); second written submission, para. 49.

²⁸⁵ See Presidential Proclamation 9740, (Exhibit NOR-8 and USA-13); Presidential Proclamation 9758, (Exhibit NOR-9 and USA-16); and Presidential Proclamation 9759, (Exhibit NOR-10 and USA-15).

²⁸⁶ Norway's second written submission, para. 49.

²⁸⁷ WTO and GATT panels have previously found import and export quotas to constitute "restrictions" prohibited by Article XI:1, as such quotas necessarily have a limiting effect. (See Panel Reports, *China – Raw Materials*, paras. 7.207-7.209 and 7.224; *China – Rare Earths*, para. 7.200; and GATT Panel Report, *EEC – Import Restrictions*, paras. 9 and 31-32).

²⁸⁸ See United States' closing statement at the second meeting of the Panel, para. 7.

quotas for steel and aluminium products from Argentina, Brazil, and the Republic of Korea are inconsistent with Article XI:1 of the GATT 1994.

7.5.3 Conclusion

7.45. Regarding Norway's claims under Article XI of the GATT 1994, the Panel concludes that by imposing import quotas on steel and aluminium products from Argentina, Brazil, and the Republic of Korea, the United States has instituted prohibitions or restrictions other than duties, taxes or other charges on the importation of those products of the territory of those Members, inconsistently with Article XI:1 of the GATT 1994.

7.6 Article X:3 of the GATT 1994

7.46. Norway challenges the administration of the "two exceptions to the US aluminium and steel tariffs", namely the country exemptions and the product exclusions, under Article X:3(a) of the GATT 1994.²⁸⁹ Regarding the country exemptions, Norway focuses on two aspects: "(1) the absence of any administrative process that applicant countries should follow in seeking an exemption; and (2) the use of inherently vague and undefined eligibility criteria." Norway considers both aspects to give rise to unreasonable administration that is inconsistent with Article X:3(a).²⁹⁰

7.47. With respect to the product exclusions, Norway explains that in deciding whether to exclude a particular imported steel or aluminium product from the additional duties, the DOC gives US producers an opportunity to object to the admission of imported products subject to an exclusion request. Norway argues that these US producers have an important commercial interest that is "adverse to admitting the imported product subject to the exclusion request" and by "affording US producers a formal opportunity to shield their own production from import competition", the United States administers the product exclusion process in a partial and unreasonable manner.²⁹¹

7.48. The United States has not advanced any arguments or evidence contesting Norway's claims under Article X:3(a) of the GATT 1994.

7.49. The Panel recalls its findings of inconsistency in relation to the additional duties, country exemptions and import quotas on steel and aluminium under the GATT 1994. The Panel considers that the findings of inconsistency under other provisions of the GATT 1994 are sufficient, in the circumstances of the present dispute, to assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements as required under the DSU.²⁹² In light of these findings, the Panel does not consider it necessary to make findings on Norway's claims relating to the administration of the processes for excluding certain countries or products from measures that have already been found inconsistent with other obligations under the GATT 1994. The Panel thus declines to make findings regarding the claims under Article X:3(a) of the GATT 1994.

7.7 Article XIX of the GATT 1994 and the Agreement on Safeguards

7.7.1 Introduction

7.50. Norway claims that certain measures at issue are safeguard measures and are inconsistent with certain obligations under the Agreement on Safeguards. Norway also claims that certain measures at issue constitute "voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side" within the meaning of Article 11.1(b) of the Agreement on Safeguards. The United States disputes the applicability of Article XIX of the GATT 1994 and the Agreement on Safeguards to the measures at issue and additionally argues that

²⁸⁹ Norway's first written submission, para. 467.

²⁹⁰ Norway's first written submission, paras. 492-493.

²⁹¹ Norway's first written submission, para. 534.

²⁹² See e.g. Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, paras. 5.189-5.190 and 5.194; *US – Upland Cotton*, para. 732. The Panel further notes various instances in which previous panels have declined to make findings under Article X:3 of the GATT 1994 based on other findings of inconsistency concerning the underlying measure being administered, including duties in excess of the bound rates in a Member's Schedule of Concessions. (See Panel Reports, *Peru – Agricultural Products*, para. 7.501; *Argentina – Import Measures*, para. 6.498; *Indonesia – Autos*, para. 14.152; and *Russia – Railway Equipment*, para. 7.939).

Article XXI of the GATT 1994 is a defence to the complainant's claims under the Agreement on Safeguards.

7.51. The Panel will first address the parties' disagreement as to the applicability of Article XIX of the GATT 1994 and the Agreement on Safeguards to the measures at issue. In doing so, the Panel will address specific issues of interpretation contested by the parties in accordance with Article 3.2 of the DSU and customary rules of interpretation of public international law. The Panel will then assess the evidence and arguments submitted by the parties in relation to the relevant measures at issue in light of the conclusions reached regarding the interpretation of Article XIX of the GATT 1994 and the Agreement on Safeguards.

7.7.2 Interpretation of Article XIX of the GATT 1994 and the Agreement on Safeguards in accordance with Article 3.2 of the DSU

7.52. Article XIX of the GATT 1994 is entitled "Emergency Action on Imports of Particular Products" and provides in relevant part:

1. (a) 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.

7.53. Article 1 of the Agreement on Safeguards is a "General Provision" and provides:

This 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.

7.54. Article 11 of the Agreement on Safeguards contains the following provisions on "Prohibition and Elimination of Certain Measures":

1. (a) 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.

(b) Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.^{[3],[4]} These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with paragraph 2.

(c) This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994.

³ An import quota applied as a safeguard measure in conformity with the relevant provisions of GATT 1994 and this Agreement may, by mutual agreement, be administered by the exporting Member.

⁴ Examples of similar measures include export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection.

7.55. The Panel notes that a threshold question presented by the parties' arguments concerns the applicability of Article XIX of the GATT 1994 and the Agreement on Safeguards to the measures at issue. Norway emphasizes the characterization of the measures at issue as safeguards or other prohibited measures under Article 11.1(b) of the Agreement on Safeguards based on objective

features of the measures at issue.²⁹³ The United States refers to Article XXI of the GATT 1994 and contends that the Agreement on Safeguards is inapplicable to the measures at issue by virtue of Article 11.1(c) as the measures were "sought, taken or maintained ... pursuant to provisions of GATT 1994 other than Article XIX".²⁹⁴

7.56. The Panel recalls that it is required under Article 11 of the DSU 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.²⁹⁵ Moreover, the Panel is required to address the parties' disagreement regarding the applicability of the relevant covered agreements in accordance with Article 3.2 of the DSU and the customary rules of interpretation of public international law.²⁹⁶ The rule of interpretation set out in Article 31(1) of the Vienna Convention forms part of such "customary rules of interpretation of public international law" and provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms in their context and in the light of its object and purpose."²⁹⁷ Regarding the interpretation of treaties authenticated in two or more languages, the customary rules in Article 33 of the Vienna Convention provide that "[t]he terms of the treaty are presumed to have the same meaning in each authentic text" and that in case of a difference between authentic texts "which the application of articles 31 and 32 [of the Vienna Convention] does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted".²⁹⁸

7.57. The Panel notes that the Agreement on Safeguards "establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994".²⁹⁹ In this regard, Article 11.1(a) of the Agreement on Safeguards provides that "[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." Article 11.1(a) is one of three paragraphs under Article 11.1 of the Agreement on Safeguards as part of provisions entitled "Prohibition and Elimination of Certain Measures" under which Article 11.1(b) prohibits "voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side". Article 11.1(c) refers to measures "sought, taken or maintained ... pursuant to provisions of GATT 1994 other than Article XIX", to which the Agreement on Safeguards "does not apply".

7.58. According to its express terms, Article 11.1(c) removes certain measures from the scope of application of the Agreement on Safeguards, including the rules specified in Article 11.1(a) and the prohibition under Article 11.1(b).³⁰⁰ This is supported by the unambiguous reference in Article 11.1(c) to the inapplicability of the Agreement on Safeguards as a whole in respect of measures "sought, taken or maintained ... pursuant to provisions of GATT 1994 other than

²⁹³ Norway's first written submission, paras. 90-156 and 392-420. Norway specifically argues that the measures at issue objectively present the constituent features of safeguard measures under Article XIX of the GATT 1994. (See *ibid.* (referring to Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60)).

²⁹⁴ United States' response to Panel question Nos. 77 and 78; see also second written submission, section II.A.

²⁹⁵ The Panel further notes the principle affirmed in past disputes that panels under the DSU have independence in the structure of their analysis and the development of legal reasoning, as well as latitude in the evidence on the record relied upon to reach findings that will assist the DSB. (See e.g. Appellate Body Reports, *EC – Hormones*, para. 156; *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.61; Panel Reports, *India – Solar Cells*, para. 7.41; *EC – Export Subsidies on Sugar (Australia)*, para. 7.121 and fn 437).

²⁹⁶ See section 7.1 above.

²⁹⁷ See e.g. Appellate Body Reports, *US – Gasoline*, p. 17; *India – Patents (US)*, para. 46; *Argentina – Textiles and Apparel*, para. 42; *US – Carbon Steel*, para. 61. The Panel notes the parties' agreement that the Panel should be guided by the ordinary meaning of the terms of the Agreement on Safeguards in their context and in light of the object and purpose of the agreement. (See Norway's response to Panel question No. 20 and United States' response to Panel question No. 20. See also Norway's second written submission, paras. 37-44; United States' second written submission, section IV.B).

²⁹⁸ See e.g. Appellate Body Reports, *US – Softwood Lumber IV*, para. 59; *EC – Bed Linen (Article 21.5 – India)*, fn 153; *US – Upland Cotton*, para. 424; and *US – Stainless Steel (Mexico)*, fn 200.

²⁹⁹ Article 1 of the Agreement on Safeguards.

³⁰⁰ The French and Spanish versions of Article 11.1(c) use the terms "*ne s'applique pas*" and "*no es aplicable*" respectively to denote that the Agreement on Safeguards is inapplicable to "*mesures*" or "*medidas*" described in that provision. The Panel understands that the parties agree that Article 11.1(c) excludes certain measures from the scope of application of the Agreement on Safeguards, notwithstanding their disagreement as to when such measures may be considered to have been "sought, taken or maintained ... pursuant to provisions of the GATT 1994 other than Article XIX" within the meaning of Article 11.1(c). (See Norway's response to Panel question No. 20; United States' response to Panel question Nos. 20 and 22).

Article XIX". The Panel notes that the paragraphs of Article 11.1 of the Agreement on Safeguards do not contain any terms explicitly indicating the limitation or qualification of any paragraph in relation to another.³⁰¹ In this respect, Article 11.1 does not subordinate any of the paragraphs in relation to one another concerning the applicability of the Agreement on Safeguards. The Panel thus considers that finding the measures at issue to fall within the scope of Article 11.1(c) would fully address the matter within the Panel's terms of reference under the Agreement on Safeguards as there would be no basis to assess claims of inconsistency under an agreement that "does not apply" to the measures at issue. The Panel is mindful in this connection of its mandate to make only such findings under the covered agreements as will assist the DSB in this dispute, taking into account the specific measures at issue, the evidence and arguments submitted by the parties, and the Panel's overall conclusions reached with respect to the matter referred to the DSB.

7.59. In the circumstances of this dispute, the Panel therefore considers that it is appropriate to determine whether the measures at issue can be characterized as having been "sought, taken or maintained ... pursuant to provisions of GATT 1994 other than Article XIX" within the meaning of Article 11.1(c) of the Agreement on Safeguards. The Panel will focus its assessment on the terms of Article 11.1(c) of the Agreement on Safeguards, and particularly, the terms "pursuant to" and "other than", in their context and in light of the object and purpose of the Agreement on Safeguards.

7.60. Regarding the terms "pursuant to" in Article 11.1(c), Norway argues that this phrase refers to measures that are in conformity with or consistent with provisions of the GATT 1994. As a consequence, Norway considers that the measures sought, taken or maintained by a Member must satisfy the conditions of "provisions of GATT 1994 other than Article XIX" to be excluded from the scope of the Agreement on Safeguards.³⁰² For the United States, the expression "pursuant to" is different from the terms "in compliance with" or "consistent with", and serves the function of "direct[ing] the Panel to the other GATT 1994 provision pursuant to which the measure in question was attempted or tried".³⁰³

7.61. The Panel will assess the meaning of "pursuant to" as it is used in Article 11.1(c) having regard for relevant context and the use of terms in the three authentic language versions of the Agreement on Safeguards, in accordance with the customary rules of interpretation of public international law. The expression "pursuant to" in Article 11.1(c) denotes the existence of a relationship between the measures of a Member and provisions of the GATT 1994 other than Article XIX.³⁰⁴ The term "pursuant" when used with the preposition "to" may mean "under", "in accordance with", "in consequence of", or "as authorized by".³⁰⁵ Taken in isolation, the terms "pursuant to" could potentially accommodate a range of meanings. Within this range of meanings, the terms "pursuant to" in the context of Article 11.1(c) could be understood as consistency with the requirements of a provision of the GATT 1994 other than Article XIX, or a different relationship that does not require such consistency. For example, a measure could be characterized under Article 11.1(c) as being "pursuant to" a provision in the sense of being sought, taken, or maintained under the purview of that provision without necessarily meeting the requirements of the specific terms of such other provision.

7.62. The Panel finds instructive the contrast between "pursuant to" in Article 11.1(c) and terms used elsewhere in the Agreement on Safeguards that appear to convey a relationship of consistency with the requirements of another provision of the covered agreements. This is particularly evident in the other paragraphs of Article 11.1 of the Agreement on Safeguards that provide immediate

³⁰¹ The paragraphs of Article 11.1 can be contrasted in this respect with other provisions of the covered agreements that explicitly limit or qualify the scope of that provision by reference to another provision in the covered agreements, including within the same article. See e.g. Article 5.6 of the Agreement on Safeguards ("Notwithstanding the provisions of paragraph 5 ..."); Article 3.3 of the SPS Agreement ("Notwithstanding the above ..."); Article X:6 of the WTO Agreement ("Notwithstanding the other provisions of this Article ..."); Article 3.1 of the Agreement on Agriculture ("Subject to the provisions of Article 6 ..."); Article XII:1 of the GATT 1994 ("... subject to the provisions of the following paragraphs of this Article"); Article 7.1 of the Agreement on Safeguards ("... provided that the pertinent provisions of Articles 8 and 12 are observed").

³⁰² Norway's response to Panel question No. 20.b.

³⁰³ United States' response to Panel question Nos. 20 and 96.

³⁰⁴ Similarly, in the French and Spanish versions of Article 11.1(c), the phrases "*en vertu de*" and "*de conformidad con*" respectively describe the relationship between the measures ("*aux mesures*" and "*las medidas*") and provisions of the GATT 1994 other than Article XIX ("*disposiciones del GATT de 1994 autres que l'article XIX*" and "*disposiciones del GATT de 1994, aparte del artículo XIX*").

³⁰⁵ Shorter Oxford English Dictionary, 5th Edition (Oxford University Press, 2003), p. 2411; *Garner's Dictionary of Legal Usage*, 3rd Edition (Oxford University Press, 2011), p. 737.

context to the terms of Article 11.1(c) and use the expressions "in accordance with" and "in conformity with" other provisions. The obligation for safeguard measures to meet the requirements of Article XIX of the GATT 1994 and the Agreement on Safeguards is expressed in Article 11.1(a) by providing that Members' safeguard measures must "*conform*[]" with the provisions of that Article applied *in accordance with* this Agreement".³⁰⁶ Similarly, the elimination of measures prohibited under Article 11.1(b) is expressed in the obligation that such measures "shall be brought into *conformity with* this Agreement or phased out *in accordance with*" the mandatory timetables and requirements set out in Article 11.2.³⁰⁷ These explicit references in Article 11.1 to "conformity" and actions "in accordance with" other provisions are comparable to other uses of these terms in the Agreement on Safeguards that similarly appear to denote consistency with the referenced requirements.³⁰⁸

7.63. The contrast in meaning between "pursuant to" in Article 11.1(c) and terms expressing a standard of consistency finds support in the French version of the provision referring to "*mesures ... en vertu de dispositions de GATT de 1994 autre que l'article XIX*". As in the English text, the Agreement on Safeguards uses the French terms "*conformes*" and "*conformément*" in Articles 11.1(a) and 11.1(b) for "conforms" and "in accordance with", which similarly appear to indicate consistency or conformity with the legal provisions specified in those paragraphs.³⁰⁹ In contrast, the French version of Article 11.1(c) foregoes the term "*conformément*" in favour of "*en vertu de*", whose dictionary meanings include "*en conséquence de*" (as a consequence of), "*par l'effet de*" (by the effect of), "*par le pouvoir de*" (by the power of), and "*au nom de*" (in the name of or on behalf of).³¹⁰ The Panel further notes that the use of the French term "*conformément*" in various provisions of the Agreement on Safeguards corresponds to English references to "conformity" and actions being "in accordance with" other provisions.³¹¹ The terms of Article 11.1(c) in both English and French thus reflect a departure from terms used in other provisions of the Agreement on Safeguards that appear to convey a requirement of conformity or consistency.

7.64. The Panel notes the terminology used in the Spanish version of the Agreement on Safeguards, which in Article 11.1(c) provides that the Agreement does not apply to measures sought, taken or maintained "*de conformidad con otras disposiciones del GATT de 1994*". Dictionary meanings of the terms "*de conformidad con*" include "*con arreglo a*" or "*a tenor de*" (according to), "*en proporción o correspondencia a*" (in proportion or correspondence to), or "*de la misma suerte o manera que*" (in the same way or manner).³¹² The Spanish terms "*de conformidad con*" are also used in the provisions referred to above in which the English and French terms use variants of "conformity" or "*conformité*", as well as "in accordance with" in English, and appear to indicate a requirement of conformity or consistency with the other referenced legal provisions. This is notably the case in Articles 11.1(a) and (b) where the Spanish text uses similar terms ("*conformes*" and "*de conformidad con*") as those used in English and French. The Spanish version of Article 11.1(c) refers to "*conformidad con otras disposiciones del GATT de 1994*", unlike the English and French terms in Article 11.1(c) that reflect

³⁰⁶ Emphasis added.

³⁰⁷ Emphasis added. See also footnote 3 to Article 11.1(b) of the Agreement on Safeguards ("[a]n import quota applied as a safeguard measure *in conformity with* the relevant provisions of GATT 1994 and this Agreement may, by mutual agreement, be administered by the exporting Member") (emphasis added). The indication of consistency or conformity with certain requirements is further supported by the mandatory terms "shall" and "must" in Article 11.2 establishing the obligations with which a measure must be in conformity or accordance.

³⁰⁸ See e.g. Article 4.1(b) ("'threat of serious injury' shall be understood to mean serious injury that is clearly imminent, *in accordance with* the provisions of paragraph 2") (emphasis added); Article 4.2(c) ("The competent authorities shall publish promptly, *in accordance with* the provisions of Article 3 ...") (emphasis added); Article 7.2 ("[t]he period mentioned in paragraph 1 may be extended provided that the competent authorities of the importing Member have determined, *in conformity with* the procedures set out in Articles 2, 3, 4 and 5 ...") (emphasis added). In prior disputes under the Agreement on Safeguards, the Appellate Body has referred to other provisions in the Agreement on Safeguards establishing requirements with which safeguard measures must be in conformity, such as the conditions in Article 2.1 and the requirements of Articles 3 and 4. (See Appellate Body Reports, *US – Line Pipe*, para. 84; *US – Steel Safeguards*, para. 264).

³⁰⁹ See also footnote 3 to Article 11.1(b) of the Agreement on Safeguards ("*Un contingent d'importation appliqué en tant que mesure de sauvegarde conformément aux dispositions pertinentes du GATT de 1994 et du présent accord pourra, par accord mutuel, être administré par le Membre exportateur*").

³¹⁰ Le Petit Robert Dictionnaire de la Langue Française (2000), p. 2663.

³¹¹ See e.g. Article 4.1(b) ("*conformément aux dispositions du paragraphe 2*"); Article 4.2(c) ("*conformément aux dispositions de l'article 3*"); and Article 7.2 ("*conformément aux procédures énoncées aux articles 2, 3, 4 et 5*").

³¹² *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), pp. 420-421.

a clear departure from references to "conformity" or being "in accordance with" other legal provisions.³¹³

7.65. On balance, these considerations indicate that the terms "pursuant to" in Article 11.1(c) of the Agreement on Safeguards do not require consistency with provisions of the GATT 1994 other than Article XIX for a measure to fall under that paragraph. The text of Article 11.1(c) does not make any explicit reference to a requirement of conformity with the provisions of GATT 1994 in English or French in contrast to other provisions of the Agreement on Safeguards, including those that provide immediate context for Article 11.1(c). The use of the French terms "*en vertu de*" in Article 11.1(c) is especially compelling in this regard in signalling a contrast to the term "*conformément*" and indicates a different legal relationship than consistency or conformity with the requirements of a provision of the GATT 1994 other than Article XIX.

7.66. The comparison of terms in the different language versions is instructive but not in itself dispositive regarding the interpretation of Article 11.1(c) of the Agreement on Safeguards in accordance with Article 3.2 of the DSU.³¹⁴ The terms of Article 11.1(c) must be interpreted in accordance with their ordinary meaning in their context and in light of the object and purpose of the Agreement on Safeguards. Moreover, to the extent that the Spanish text "discloses a difference of meaning" when compared to the text of Article 11.1(c) in English and French, the Panel finds guidance in the rule of interpretation in Article 33(4) of the Vienna Convention that, if such difference cannot be removed by application of Articles 31 and 32 of the Vienna Convention, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.³¹⁵

7.67. The Panel considers that interpreting the terms "pursuant to" in Article 11.1(c) to refer to measures sought, taken, or maintained under the purview of another provision of the GATT 1994, without entailing consistency with the requirements of such other provision, accords with the specific context in which those terms appear. The terms "pursuant to" in Article 11.1(c) form part of a provision governing the applicability of the Agreement on Safeguards rather than the consistency of measures with the rules and requirements of that agreement.³¹⁶ Accordingly, the nature of the relevant inquiry under Article 11.1(c) does not relate to another provision of the GATT 1994 as a legal exception or justification for inconsistencies with the Agreement on Safeguards.³¹⁷ Rather, the

³¹³ The Spanish terms "*de conformidad con*" are also used in other provisions of the Agreement on Safeguards that appear to indicate a standard of consistency across all language versions. (See e.g. Article 4.1(b) ("*de conformidad con las disposiciones del párrafo 2*"); Article 4.2(c) ("*de conformidad con las disposiciones del artículo 3*"); and Article 7.2 ("*de conformidad con los procedimientos establecidos en los artículos 2, 3, 4 y 5*"). The Panel further notes that the terms "*de conformidad con*" are translated with some variation in English, including provisions in which the corresponding term for "*de conformidad con*" in the English version is "under" within the specific context of the provision in question. (See Article 7.1 ("The period shall not exceed four years, unless it is extended *under* paragraph 2.") (emphasis added); Article 7.4 ("A measure extended *under* paragraph 2 ...") (emphasis added)).

³¹⁴ The Panel notes that the terms "pursuant to" appear in various provisions of the Agreement on Safeguards for which the corresponding French and Spanish terms reflect the potential range of meanings of these terms according to their specific context. For example, Article 2.1 provides that a safeguard measure may be applied "only if that Member has determined, pursuant to the provisions set out below," various conditions for the application of safeguard measures. The context of mandatory conditionality in which "pursuant to" appears in Article 2.1 ("may apply a safeguard measure ... only if") is reflected in the French and Spanish, respectively, as "*conformément*" and "*con arreglo a*". As another example, Article 10 of the Agreement on Safeguards refers to "safeguard measures taken pursuant to Article XIX of GATT 1947" where the corresponding French and Spanish terms ("*au titre de*" and "*al amparo del*" respectively) do not appear to indicate consistency or conformity.

³¹⁵ As noted above, this rule of interpretation forms part of the "customary rules of interpretation of public international law" referred to in Article 3.2 of the DSU. See para. 7.56 above.

³¹⁶ See Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.57 (distinguishing "factors pertaining to the legal characterization of a measure for purposes of determining the *applicability* of the WTO safeguard disciplines" from "the substantive conditions and procedural requirements that determine the *WTO consistency* of a safeguard measure") (emphasis original).

³¹⁷ The Panel notes in this regard that Article 11.1(c) of the Agreement on Safeguards serves a similar role to certain provisions in the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures (SCM Agreement), which allow Members to take measures "under" other provisions of the GATT 1994 but do not indicate a requirement of conformity with such other provisions. Moreover, the French and Spanish versions of these provisions do not use terms such as "*conformément*" and "*conformidad*" but rather "*au titre*" and "*al amparo*" respectively. (See Article 18.1 of the Anti-Dumping Agreement, footnote 24 and Article 32.1 of the SCM Agreement, footnote 56). At the same time, the Panel notes differences in the

relevant inquiry under Article 11.1(c) corresponds to the threshold issue of applicability and leaves as a separate inquiry whether a measure is consistent with the requirements of such other provision "pursuant to" which the measure was sought, taken, or maintained.

7.68. These considerations are also relevant for the interpretation of the terms "other than" in Article 11.1(c) of the Agreement on Safeguards. The parties dispute the meaning of these terms particularly in relation to their arguments on the characterization of measures as safeguards within the meaning of Article XIX of the GATT 1994 and Article 1 of the Agreement on Safeguards. In this connection, Norway contends that a measure may possess certain objective features of a safeguard measure and, if so, such measure would not be pursuant to a provision "other than" Article XIX in the sense of Article 11.1(c).³¹⁸ In the Panel's view, Norway's interpretation of the terms "provisions ... other than" amounts to meaning provisions that are exclusively other than Article XIX of the GATT 1994. The Panel understands this interpretation to mean that the Agreement on Safeguards could still be applicable to a measure notwithstanding its characterization as being pursuant to another provision of the GATT 1994.³¹⁹

7.69. With respect to the ordinary meaning of the terms "other than", dictionary definitions include "besides", "except" or "apart from".³²⁰ The Panel notes that all three language versions of Article 11.1(c) contain terms that are not qualified by any specification or limitation with respect to being "other than" Article XIX of the GATT 1994. The ordinary meaning of these terms in their context encompasses measures that are pursuant to another provision of the GATT 1994, and the Panel does not find in the text of Article 11.1(c) the imposition of an additional requirement or limitation of being exclusively pursuant to such other provision. This interpretation is consonant with the context of the paragraphs of Article 11.1 that together establish the conditions for the applicability of the Agreement on Safeguards. The question of applicability is addressed under Article 11.1(c) by terms specifying a relationship between a measure and a provision of the GATT 1994 "other than" Article XIX, namely that a measure is "pursuant to" such other relevant provision, and providing that the Agreement on Safeguards does not apply to such measure.³²¹

7.70. The Panel finds support for these conclusions in the object and purpose of the Agreement on Safeguards as expressed in its preamble recognizing "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". In this regard, the preamble further expresses recognition of the need for "a comprehensive agreement, applicable to all Members and based on the basic principles of GATT 1994". An essential corollary of the "multilateral control over safeguards" and elimination of "measures that escape such control" under the Agreement on Safeguards is the explicit preservation under Article 11.1(c) of the right for Members to adopt measures under legal provisions of the GATT 1994 that are part of the "basic principles" affirmed and reinforced by the Agreement on Safeguards. The Panel considers significant in this regard the placement of Article 11.1(c) in the list of paragraphs under Article 11.1 as part of provisions entitled "Prohibition and Elimination of Certain

terminology and structure of Article 11.1(c) of the Agreement on Safeguards compared to these footnotes, which provide that the particular terms of Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement are "not intended to preclude actions under other relevant provisions of GATT 1994". By contrast, Article 11.1(c) is in the main text of the provision and expressly states conditions under which the agreement "does not apply". (See Appellate Body Report, *US - Offset Act (Byrd Amendment)*, para. 262 (referring to Appellate Body Report, *US - 1916 Act*, para. 123) (describing the "accessory footnotes" as "clarifications of the main provisions" on the "specific action" Members are permitted to take against dumping or subsidies)).

³¹⁸ Norway's response to Panel Question 20.b.

³¹⁹ See Norway's opening statement at the second meeting, para. 24 ("for a measure to be subject to [Article 11.1(c)], the legal basis for the measure must be drawn from the universe of GATT 'provisions' *besides* Article XIX. If the 'provisions' forming the legal base *include* Article XIX, they are not 'other than' Article XIX") (emphasis original). See also Norway's second written submission, para. 37.

³²⁰ The terms of Article 11.1(c) in French and Spanish ("*autres que*" and "*aparte de*" respectively) similarly mean different from or with the omission of. See *Le Petit Robert Dictionnaire de la Langue Française* (2000), pp. 185-186 and *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), p. 120.

³²¹ In the context of the objective assessment required under Article 11 of the DSU, the relevant provision under Article 11.1(c) of the Agreement on Safeguards (i.e. the provision of the GATT 1994 "other than" Article XIX) depends on the specific circumstances of the dispute, including the measures and claims at issue, legal provisions raised by the parties, as well as the relevant evidence and arguments submitted by the parties.

Measures". The imposition of obligations to "clarify and reinforce the disciplines of GATT 1994", as notably expressed in Articles 11.1(a) and (b), is explicitly conditioned by the terms of Article 11.1(c) on the applicability of the agreement as a whole. The requirement under Article 11.1(c) for a measure to be "pursuant to" a provision "other than" Article XIX of the GATT 1994 thus serves the maintenance of a balance of rights and obligations that are in turn based on the terms of such other provision.

7.71. The relevant provision of the GATT 1994 other than Article XIX in this dispute is Article XXI entitled "Security Exceptions", which provides *inter alia* that "[n]othing 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".³²² In accordance with the requirements of Article 11 of the DSU, the Panel will assess the applicability of the Agreement on Safeguards to the measures at issue in light of the foregoing interpretive considerations on Article 11.1(c) as well as the evidence and arguments submitted by the parties in this dispute. Taking into account the case-specific nature of the relevant inquiry on applicability rather than conformity, the Panel will identify relevant aspects of the design and application of the measures with specific reference to their legal characterization under Article 11.1(c) of the Agreement on Safeguards. The Panel will give due consideration to all relevant evidence in this regard including the domestic law and procedures under which the measures were adopted as well as any relevant notifications or statements to the official bodies of the WTO.³²³

7.72. The Panel takes note of the United States' arguments in relation to the meaning of the term "sought" in Article 11.1(c) of the Agreement on Safeguards, which are related to the United States' contention that, based on Article XIX:2 of the GATT 1994, formal notification of safeguard measures to the WTO is a "condition precedent" to the applicability of safeguard disciplines.³²⁴ As detailed below, the Panel considers the manner in which the measures were raised before the WTO, including notifications to relevant WTO bodies or committees, as part of the assessment of the evidence and arguments submitted on all relevant aspects of the measures at issue in this dispute. The Panel does not consider it necessary for the purposes of this dispute to address in further detail the United States' arguments on WTO notification being a "condition precedent" for the applicability of safeguard disciplines.

7.73. Finally, the Panel notes that the parties have referred to certain aspects of the negotiating history of the Agreement on Safeguards in support of their respective positions. Under Article 32 of the Vienna Convention, recourse to supplementary means of interpretation, including the preparatory work of a treaty, may be had either to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. The Panel does not consider that the application of Article 31 of the Vienna Convention to the interpretation of Article 11.1(c) of the Agreement on Safeguards leaves the meaning of the provision ambiguous or obscure, nor does the Panel find that it leads to a result which is manifestly absurd or unreasonable. Nevertheless, the Panel has examined the negotiating history of the

³²² See section 7.8 below.

³²³ The Panel notes that the Appellate Body identified various relevant factors for the determination of whether measures constitute safeguard measures under Article XIX of the GATT 1994. In this dispute, the relevant inquiry is directed by the terms of Article 11.1(c) to a provision other than Article XIX of the GATT 1994. Nevertheless, there is a broad parallel in both contexts of distinguishing questions of legal applicability from those concerning legal consistency and, for the former, making an objective examination of the specific measures at issue according to the relevant provision of the GATT 1994 upon which to determine the applicability of the Agreement on Safeguards. (See Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60).

³²⁴ United States' second written submission, sections IV.B.1 ("Article 11.1(c) Supports That Invocation is a Condition Precedent for ... a Member's exercise of its right to take action under Article XIX and Application of Safeguards Rules") and IV.B.2 ("Other Provisions of the Agreement on Safeguards Also Support that Notice is a Condition Precedent for Action Under Article XIX"). For the various terms used by the United States to describe the "condition precedent" for the applicability of safeguard disciplines, see United States' second written submission, para. 153 ("notice is a condition precedent to taking action under Article XIX"); paras. 155-156 ("[t]he 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 ... [w]ithout such notice, a Member is not seeking legal authority pursuant to Article XIX"); para. 180 ("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"); and para. 211 ("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").

provision in order to confirm the meaning resulting from the application of Article 31 of the Vienna Convention. As detailed in Appendix A to this Report, the Panel's review of the negotiating history of Article 11.1(c) of the Agreement on Safeguards confirms the conclusions reached by the Panel regarding the interpretation of that provision.

7.74. Based on the foregoing, the Panel will assess the applicability of the Agreement on Safeguards in this dispute according to whether the measures at issue were sought, taken, or maintained pursuant to Article XXI of the GATT 1994 within the meaning of Article 11.1(c) of the Agreement on Safeguards.

7.7.3 Assessment of the measures at issue

7.75. The United States adopted the measures at issue under Section 232 and the related procedures set out in Title 15, Part 705 of the Code of Federal Regulations.³²⁵ According to the terms of the domestic legislation, Section 232 concerns actions taken by the United States for "[s]afeguarding national security".³²⁶ Moreover, Section 232 authorizes the US Secretary of Commerce to investigate the effects of imports of an article on US national security³²⁷, in consultation with the Secretary of Defense and other appropriate officers of the United States.³²⁸ If the Secretary of Commerce determines that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the US President may adjust the imports of that article into the United States.³²⁹ In this respect, Section 232 directs the US Secretary of Commerce and the US President to give consideration among other factors to the domestic production needed for projected national defence and the impact of foreign competition on the economic welfare of domestic industries essential to US national security.³³⁰

7.76. The US Secretary of Commerce commenced investigations under Section 232 to determine the effects of imports of certain steel and aluminium products on US national security in April 2017.³³¹ The findings of these investigations were published in January 2018 in the Steel and Aluminium Reports, where the US Secretary of Commerce determined that present quantities of steel and aluminium imports were "weakening [the United States'] internal economy" and therefore "threaten to impair" its national security.³³² According to these reports, rising levels of imports of foreign steel and aluminium place at substantial risk the capacity of domestic industries to produce steel and aluminium for critical infrastructure and national defence³³³, especially in times of national emergencies.³³⁴ The reports recommend corrective actions against imports in the form of tariffs and quotas with a view to improve domestic capacity utilization and stabilize US production at the level required for its security needs.³³⁵

³²⁵ See section 2.1 above.

³²⁶ Section 232, (Exhibit NOR-12 and USA-1), § 1862. Title 15, Part 705 of the Code of Federal Regulations sets out the procedures by which the US Department of Commerce commences and conducts an investigation "to determine the effect on the national security of the imports of any article". (See Section 232 regulations, (Exhibit USA-2), § 705.2).

³²⁷ Section 232, (Exhibit NOR-12 and USA-1), § 1862(b)(1)(A).

³²⁸ Section 232, (Exhibit NOR-12 and USA-1), §§ 1862(b)(2)(A)(i) and b(2)(A)(ii).

³²⁹ Section 232, (Exhibit NOR-12 and USA-1), § 1862(c)(1)(A).

³³⁰ Section 232, (Exhibit NOR-12 and USA-1), § 1862(d); Section 232 regulations, (Exhibit USA-2), § 705.4.

³³¹ Steel Report, (Exhibit NOR-1 and USA-7), p. 18; Aluminium Report, (Exhibit NOR-2 and USA-8), p. 18. See also sections 2.1.2 and 2.1.3 above.

³³² Steel Report, (Exhibit NOR-1 and USA-7), p. 55; Aluminium Report, (Exhibit NOR-2 and USA-8), p. 104.

³³³ Steel Report, (Exhibit NOR-1 and USA-7), p. 55; Aluminium Report, (Exhibit NOR-2 and USA-8), p. 104.

³³⁴ Steel Report, (Exhibit NOR-1 and USA-7), pp. 55-56; Aluminium Report, (Exhibit NOR-2 and USA-8), p. 105 (also noting that rising imports have placed at risk the capability of domestic industries to "quickly shift production capacity used for commercial products to defense and critical infrastructure production that provides the United States a surge capability that is vital to national security, especially in an unexpected or extended conflict or national emergency").

³³⁵ Aluminium Report, (Exhibit NOR-2 and USA-8), pp. 104-105. See also Steel Report, (Exhibit NOR-1 and USA-7), p. 58 (recommending quotas or tariffs on steel imported into the United States to increase domestic capacity utilization and to keep the domestic steel industry financially viable and able to meet US national security needs).

7.77. The measures at issue in this dispute on imports of steel and aluminium into the United States are based on the abovementioned findings and recommendations by the US Secretary of Commerce.³³⁶ The Presidential Proclamations concurring with these findings and recommendations describe the measures as "necessary" and "appropriate" to address the threatened impairment of national security.³³⁷ Presidential Proclamations 9704 and 9705 providing for additional duties on steel and aluminium imports state that "[t]his relief will ... revive idled facilities, open closed [smelters and] mills, preserve necessary skills by hiring new [steel and aluminium workers], and maintain or increase production", which in turn will "reduce [the United States'] need to rely on foreign producers for [steel and aluminium] and ensure that domestic producers can continue to supply all the [steel and aluminium] necessary for critical industries and national defense".³³⁸ These proclamations further describe the additional duties as "an important first step in ensuring the economic viability" of the United States' domestic steel and aluminium industry, without which "the industry will continue to decline, leaving the United States at risk of becoming reliant on foreign producers ... to meet [its] national security needs".³³⁹ These Presidential Proclamations thus describe the national security objectives that the United States seeks to achieve by adopting measures against a "high level of imports".³⁴⁰

7.78. The national security considerations expressed in the domestic legal instruments and acts underlying the measures at issue are also observable in the application of the additional duties on steel and aluminium imports, including their country and product scope. In this regard, Presidential Proclamations 9704 and 9705 recognize that the United States may remove or modify the restriction on steel and aluminium imports from a country if it determines that imports from the country no longer threaten to impair its national security.³⁴¹ The United States exempted various countries from the additional duties on steel and aluminium imports following such determinations³⁴², based on its "important security relationships" and "security, defense, and intelligence partnership[s]" with these countries as well as their "shared concern about global excess capacity, a circumstance that is contributing to the threatened impairment of [US] national security".³⁴³ The Panel also notes that the additional duties are applied to products that are determined by the relevant domestic authorities of the United States to be important for its military systems and critical infrastructure.³⁴⁴

7.79. These considerations indicate that the measures at issue were designed and expected to operate in relation to the United States' determination of a threat to its national security under the relevant domestic laws. In this regard, the Panel notes several other relevant aspects of the measures at issue and their application supporting this conclusion. For example, Presidential Proclamations 9740, 9758 and 9759 introduce quotas restricting steel and aluminium imports from certain countries to provide "effective, long-term alternative means" to address their contribution to

³³⁶ See e.g. Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10), p. 11619 and Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9), p. 11626 noting that the US President concurs with the Secretary's findings in the Steel and Aluminium Reports and has considered the recommendations in these reports.

³³⁷ Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10), p. 11620; Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9), p. 11626.

³³⁸ Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10), p. 11620; Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9), p. 11626.

³³⁹ Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10), p. 11620; Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9), pp. 11626-11627.

³⁴⁰ Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10), p. 11620; Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9), p. 11626.

³⁴¹ Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10), p. 11620; Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9), p. 11626 (further noting that the United States may make corresponding adjustments to the additional duties applicable to other countries as its national security interests require).

³⁴² See section 2.2.3 above for a list of the exempted countries.

³⁴³ Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10), p. 11620; Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9), p. 11626; Presidential Proclamation 9710, (Exhibit NOR-6 and USA-12), pp. 13355-13356; Presidential Proclamation 9711, (Exhibit NOR-7 and USA-11), pp. 13361-13362.

³⁴⁴ Steel Report, (Exhibit NOR-1 and USA-7), Appendix H and Appendix I; Aluminium Report, (Exhibit NOR-2 and USA-8), pp. 24-39. See also Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10), p. 11623 (providing for additional duties on imports of unwrought aluminium; aluminium bars, rods and profiles; aluminium wires; aluminium plates, sheets, strips and foil; aluminium tubes, pipes and tube or pipe fittings; and aluminium castings and forgings) and Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9), p. 11629 (providing for additional duties on imports of flat-rolled steel products; steel bars and rods; steel wire; steel sheet piling; steel rails; steel fish-plates and sole plates; steel tubes, pipes and hollow profiles; steel ingots; products of stainless steel; and other products of iron or steel). See also Steel Report, (Exhibit NOR-1 and USA-7), pp. 21-22; Aluminium Report, (Exhibit NOR-2 and USA-8), p. 20.

the threat to national security as determined by the United States.³⁴⁵ These quotas are applied only in respect of countries with which the United States has identified "important security relationships".³⁴⁶ Presidential Proclamations 9704, 9705, 9776, and 9777 set out a product exclusion process to provide relief from the additional duties and import quotas based on "specific national security considerations".³⁴⁷ Moreover, the Presidential Proclamations discussed above indicate that the measures at issue may be modified or removed based on monitoring by the US Secretary of Commerce and review of "the status of [steel and aluminium] imports with respect to national security".³⁴⁸ The Panel also considers relevant the procedures under which the measures were adopted and applied, and in particular the consultations carried out with departments of government such as the US Department of Defense in relation to certain criteria for determining effects of imports on national security.³⁴⁹

7.80. The Panel further notes that the national security considerations described above are reflected in notifications and statements made by the United States before various official bodies of the WTO both prior to and following the adoption of the measures at issue. In a meeting of the WTO Council of Goods on 10 November 2017, before completing its Section 232 investigations into steel and aluminium imports, the United States noted that these investigations "were being conducted by the Bureau of Industry and Security (BIS), a Department of the US Commerce Agency". The United States further remarked that the purpose of these investigations was to "determine the effect of steel and aluminium imports on US national security, and whether the global excess capacity problem in those industries was threatening the ability of the United States to meet its national security needs".³⁵⁰

7.81. In subsequent discussions at the WTO, the United States explicitly referred to Article XXI of the GATT 1994 in connection with the measures on steel and aluminium under Section 232. Shortly after Presidential Proclamations 9704 and 9705 introduced the additional duties discussed above, the United States provided information concerning these proclamations in a meeting of the WTO Council for Trade in Goods. At this meeting, the United States referred to "the findings and recommendations in investigations concerning the impact of steel and aluminium imports on US national security" and indicated that it was providing this information "pursuant to Section 232 of the Trade Expansion Act of 1962, as amended, and consistent with the Decision Concerning

³⁴⁵ Presidential Proclamation 9740, (Exhibit NOR-8 and USA-13), pp. 20683-20684; Presidential Proclamation 9758, (Exhibit NOR-9 and USA-16), p. 25850; and Presidential Proclamation 9759, (Exhibit NOR-10 and USA-15), pp. 25857-25858. Moreover, these proclamations follow Presidential Proclamations 9710 and 9711 discussing the appropriate means to ensure that exemptions from the additional duties do not undermine the national security objectives of the duties and noting that without "satisfactory alternative means addressing long-term solutions... the industry will continue to decline, leaving the United States at risk of becoming reliant on foreign producers of [steel and aluminium] to meet [its] national security needs". (See Presidential Proclamation 9710, (Exhibit NOR-6 and USA-12), pp. 13356-13357 and Presidential Proclamation 9711, (Exhibit NOR-7 and USA-11), pp. 13362-13363).

³⁴⁶ See Presidential Proclamation 9740, (Exhibit NOR-8 and USA-13), p. 20683; Presidential Proclamation 9758, (Exhibit NOR-9 and USA-16), p. 25849; and Presidential Proclamation 9759, (Exhibit NOR-10 and USA-15), p. 25857.

³⁴⁷ Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10), p. 11621; Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9), p. 11627; Presidential Proclamation 9776, (Exhibit NOR-21 and USA-19), p. 45020; and Presidential Proclamation 9777, (Exhibit NOR-22 and USA-18), p. 45026. See also the March Interim Final Rule, (Exhibit NOR-76 and USA-20), p. 12111 and the September Interim Final Rule, (Exhibit NOR-20 and USA-21), p. 46058 (explaining that this criterion allows the US Department of Commerce, in consultation with other parts of the US Government as warranted, to consider impacts on US national security that may result from not approving an exclusion and that the demonstrated concern with US national security would need to be tangible, clearly explained and would be ultimately determined by the US Government).

³⁴⁸ Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10), pp. 11621-11622; Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9), p. 11628. See also Presidential Proclamation 9740, (Exhibit NOR-8 and USA-13), p. 20684; Presidential Proclamation 9758, (Exhibit NOR-9 and USA-16), p. 25850; and Presidential Proclamation 9759, (Exhibit NOR-10 and USA-15), p. 25858. The Panel notes that the measures applicable to imports from certain countries have been modified under this authority. (See e.g. Presidential Proclamation 9772, (Exhibit NOR-5)).

³⁴⁹ See Steel Report, (Exhibit NOR-1 and USA-7), pp. 18-20 and Appendices E-G; Aluminium Report, (Exhibit NOR-2 and USA-8), pp. 18-19 and Appendices A-B. See also Presidential Proclamation 9704, (Exhibit NOR-3 and USA-10); Presidential Proclamation 9705, (Exhibit NOR-4 and USA-9); Presidential Proclamation 9758, (Exhibit NOR-9 and USA-16); and Presidential Proclamation 9759, (Exhibit NOR-10 and USA-15) (directing the US Secretary of Commerce to consider adjustments to the additional duties and import quotas in consultation with the Secretary of Defense).

³⁵⁰ Council for Trade in Goods, Minutes of the Meeting held on 10 November 2017, G/C/M/130, (Exhibit USA-80), pp. 26-27.

Article XXI of the General Agreement taken by the GATT Council on 30 November 1982".³⁵¹ In a communication shortly thereafter to the Committee on Safeguards, the United States responded to a request for consultations under Article 12.3 of the Agreement on Safeguards and referred to information it had provided to the WTO Council for Trade in Goods "consistent with the Decision Concerning Article XXI of the General Agreement taken by the GATT Council on 30 November 1982".³⁵²

7.82. In a meeting of the WTO General Council on 8 May 2018, the United States referred to "the reasons underlying the United States' defense of critical national security interests" and recalled the Presidential Proclamations under Section 232 "determining that tariffs are necessary to adjust imports of steel and aluminum articles that threaten to impair the national security of the United States". The United States further referred at that meeting to having "previously informed Members about the proclamations issued by the President pursuant to Section 232 of the Trade Expansion Act of 1962, as amended". The United States additionally referred to its "statement at the Council for Trade in Goods meeting on March 23 – a statement we provided consistent with the Decision Concerning Article XXI of the General Agreement taken by the GATT Council on 30 November 1982".³⁵³ At a meeting of the DSB following the complainant's request for establishment of a panel in this dispute, the United States referred to the determination that "imports of steel and aluminum threaten to impair U.S. national security".³⁵⁴

7.83. On 28 September 2018, the United States notified import quotas on steel products from the Republic of Korea, Argentina, and Brazil, and aluminium products from Argentina to the WTO Committee on Market Access. In this notification, the United States listed Article XXI of the GATT 1994 as the "WTO Justification and Grounds for Restriction".³⁵⁵

7.84. Based on the foregoing evidence, the Panel considers that a central aspect of the design and application of the measures at issue is their relation to the United States' determination of a threat to its national security under the relevant domestic laws. The national security considerations of the United States are manifest in the application, modification, and removal of the additional duties, quotas, and exemptions discussed above. Moreover, this aspect of the measures was emphasized and explicitly linked to Article XXI of the GATT 1994 by the United States in a series of notifications and statements to various official bodies of the WTO. The Panel considers significant the indications at both the domestic and multilateral levels that the measures at issue related to the United States' determination of a threat to its national security and the explicit references to Article XXI of the GATT 1994 as the legal basis under the covered agreements pursuant to which the measures were sought, taken, or maintained.³⁵⁶ While the domestic legal status or statements by a Member to official WTO bodies are not determinative of the legal characterization of measures under the covered agreements in dispute settlement, the Panel considers such evidence to be relevant within the context of an objective assessment under Article 11.1(c) of the Agreement on Safeguards. This is particularly so where there is evidence contemporaneous with the adoption of the measures that is

³⁵¹ Council for Trade in Goods, Minutes of the Meeting held on 23 and 26 March 2018, G/C/M/131, (Exhibit USA-81), pp. 26-27.

³⁵² Committee on Safeguards, Communication from the United States, G/SG/168, (Exhibit USA-82), pp. 1-2 and fn 2.

³⁵³ Statement dated 8 May 2018 of the Deputy US Trade Representative and US Permanent Representative to the WTO, WTO General Council, (Exhibit USA-83), p. 3 (further noting that the United States did not take action pursuant to Section 201 of the Trade Act of 1974, which is the law under which the United States imposes safeguard measures).

³⁵⁴ Statements dated 29 October 2018, 21 November 2018, and 4 December 2018 of the United States, WTO Dispute Settlement Body, (Exhibit NOR-23 (excerpt) and USA-84 (full version)). The United States further stated as follows at this meeting with respect to Article XXI of the GATT 1994 and the measures at issue:

The United States has given detailed explanations that the measures at issue are justified under Article XXI of the GATT 1994. In particular, we have explained that these measures are necessary to address the threatened impairment that these imports of steel and aluminum articles pose to U.S. national security.

³⁵⁵ 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, (Exhibit USA-85), p. 6.

³⁵⁶ Given the consistent indications both prior and subsequent to the adoption of the measures at issue, the Panel finds support for the measures being "sought, taken or maintained" within the meaning of Article 11.1(c). The Panel notes in this regard the disjunctive nature of these requirements and does not consider it necessary in the circumstances of this dispute to make separate determinations as to which evidence reflects the measures having been "sought", "taken", or "maintained" pursuant to a provision of the GATT 1994 other than Article XIX.

confirmed by other relevant evidence of the measures' design and application. In this dispute, the features of the measures outlined above indicate that the United States' determination of a threat to its national security under Section 232 is a central aspect of the measures with respect to their legal characterization as being sought, taken, or maintained pursuant to Article XXI of the GATT 1994.³⁵⁷

7.85. Regarding the applicability of Article XIX of the GATT 1994 and the Agreement on Safeguards, Norway refers to the findings in the Steel and Aluminium Reports pertaining to the adverse impact of imports on domestic steel and aluminium industries of the United States. In particular, Norway highlights that the reports identify increased imports of steel and aluminium to the United States, determine that there was injury to the domestic steel and aluminium industries due to increased imports, and examine such injury by reference to factors that are typically associated with a finding under Article 4.2(a) of the Agreement on Safeguards.³⁵⁸

7.86. The Panel notes that the findings in the Steel and Aluminium Reports pertaining to the state of the United States' domestic steel and aluminium industries, including the decrease in domestic production, high import penetration, low-capacity utilization and declining employment, are made in the context of the determination by the US Secretary of Commerce that steel and aluminium are important to the United States' national defence requirements and critical infrastructure sectors. These reports discuss the displacement of domestic steel and aluminium by imports in relation to the risk that the United States' domestic industries will be rendered incapable of meeting its national security needs, especially in times of national emergencies. The Steel and Aluminium Reports also recall the direction under Section 232 that the relationship between the weakening of the United States' internal economy and impairment of its national security shall be determined by reference to factors including "any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects".³⁵⁹ The reports recommend measures to increase the capacity utilization of the United States' domestic industries with the specific objective of enabling them to meet projected national security needs.³⁶⁰

7.87. Viewed in their context, the findings in the Steel and Aluminium Reports confirm that the aspects of the measures most central to their legal characterization under Article 11.1(c) of the Agreement on Safeguards concern the national security considerations as reflected in Section 232 and reiterated in the relevant domestic legal acts and instruments. The examination in the Steel and Aluminium Reports of the state of the domestic steel and aluminium industries is an element of the United States' determination of a threat to its national security under the relevant domestic laws. The Panel considers that it would be improper to assess such factors in isolation from the threat to national security that was determined to exist under Section 232 on the basis of those and other factors.

7.7.4 Conclusion

7.88. In conclusion, the evidence before the Panel in relation to the design and application of the measures at issue indicates that the measures were sought, taken, or maintained pursuant to Article XXI of the GATT 1994. Accordingly, the measures were sought, taken, or maintained pursuant

³⁵⁷ See e.g. Appellate Body Reports, *China – Auto Parts*, para. 171; *Indonesia – Iron or Steel Products*, para. 5.60.

³⁵⁸ Norway's first written submission, section VI.A.3.

³⁵⁹ Section 232, (Exhibit NOR-12 and USA-1), § 1862(d); Section 232 regulations, (Exhibit USA-2), § 705.4.

³⁶⁰ See Aluminium Report, (Exhibit NOR-2 and USA-8), p. 107 ("import restrictions could help address the threat to U.S. national security... [Q]uotas or tariffs would be designed, even after any exemptions (if granted), to enable U.S. aluminum producers to utilize an average of 80 percent of their production capacity. The quotas and tariffs described below should be sufficient to enable U.S. aluminum producers to operate profitably under current market prices for aluminum and will allow them to reopen idled capacity") and 108 ("A worldwide quota ...would help ensure the viability of those U.S. producers to meet national security needs"). See also Steel Report, (Exhibit NOR-1 and USA-7), p. 58 ("Due to the threat of steel imports to the national security, as defined in Section 232, the Secretary recommends that the President take immediate action by adjusting the level of imports through quotas or tariffs on steel imported into the United States, as well as direct additional actions to keep the U.S. steel industry financially viable and able to meet U.S. national security needs. The quota or tariff imposed should be sufficient, after accounting for any exclusions, to enable the U.S. steel producers to be able to operate at about an 80 percent or better of the industry's capacity utilization rate based on available capacity in 2017").

to a provision of the GATT 1994 other than Article XIX within the meaning of Article 11.1(c) of the Agreement on Safeguards.

7.89. The Panel's assessment of the measures being under the purview of Article XXI of the GATT 1994 is without prejudice to the consistency of the measures with the specific terms and requirements of Article XXI. The Panel recalls that its conclusions under Article 11.1(c) pertain solely to the issue of applicability of the Agreement on Safeguards rather than the consistency of the measures at issue with the requirements of the other provision, namely Article XXI of the GATT 1994, pursuant to which the measures were sought, taken, or maintained.

7.8 Article XXI(b) of the GATT 1994

7.8.1 Introduction

7.90. The United States invokes Article XXI(b) of the GATT 1994 in relation to the measures at issue as "action[s] which [the United States] considers necessary for the protection of its essential security interests". The Panel will address the United States' invocation of Article XXI(b) of the GATT 1994 in relation to whether the measures found to be inconsistent with Articles I:1, II:1, and XI:1 of the GATT 1994 are "actions" falling within the scope of Article XXI(b) of the GATT 1994.

7.91. The Panel will first address the parties' interpretive disagreement on the extent to which the terms of Article XXI(b) of the GATT 1994 permit review of a Member's invocation of that provision in proceedings under the DSU. In doing so, the Panel will address specific issues of interpretation contested by the parties, including the United States' arguments as to the "self-judging" nature and "non-justiciability" of Article XXI(b) of the GATT 1994, in accordance with Article 3.2 of the DSU and customary rules of interpretation of public international law. The Panel will then assess the evidence and arguments submitted by the parties in relation to the measures found to be inconsistent with provisions of the GATT 1994 in light of the conclusions reached regarding the interpretation of Article XXI(b) of the GATT 1994.

7.8.2 Interpretation of Article XXI(b) of the GATT 1994 in accordance with Article 3.2 of the DSU

7.92. Article XXI of the GATT 1994 is entitled "Security Exceptions" and provides:

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(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

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

7.93. The United States submits that the Panel should limit its findings in this dispute to recognizing the invocation of Article XXI(b) because "[t]he text of [the provision], in its context and in the light of the agreement's object and purpose, establishes that the exception is self-judging."³⁶¹ According to the United States, "[t]he self-judging nature of ... Article XXI(b) is demonstrated by that

³⁶¹ United States' first written submission, para. 22.

provision's reference to actions that the Member 'considers necessary' for the protection of its essential security interests."³⁶² Consequently, "the only requirement for the Member invoking Article XXI is for the Member to consider that a particular action is necessary to protect its essential security interests in any of the circumstances identified in Article XXI(b)."³⁶³ The United States maintains that this requirement is met "once the Member indicates, in the context of dispute settlement, that it has made such a determination" that it "consider[s] one or more of the circumstances set forth in Article XXI(b) to be present".³⁶⁴

7.94. A premise of the United States' characterization of Article XXI(b) as "self-judging" is that, based on "the text and grammatical structure" of the provision, "the phrase 'which it considers' qualifies all of the terms in the single relative clause that follows the word 'action'".³⁶⁵ According to the United States, this "single relative clause" in Article XXI(b) "begins with '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 'action'".³⁶⁶ The United States argues from this premise that, "[b]ecause 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."³⁶⁷ The United States thus posits an "overall grammatical structure" of Article XXI(b) according to which a panel may not "determine, for itself, whether a security interest is 'essential' to the Member in question, or whether the circumstances described in one of the subparagraphs exists".³⁶⁸

7.95. Norway contests the interpretive and grammatical basis of the United States' argument and emphasizes the objective review in dispute settlement proceedings of terms in Article XXI(b) that are not qualified by the phrase "which it considers".³⁶⁹ Norway thus disputes the characterization of Article XXI(b) as "self-judging" and contends that the measures are not justified under this provision based on the arguments and evidence before the Panel. In particular, Norway argues that the United States' interpretation fails to give effective meaning to the subparagraphs of Article XXI(b) and is incompatible with the requirements of the DSU concerning the independent review of matters raised under the covered agreements.³⁷⁰

7.96. The Panel recalls that it is required to address the United States' invocation of Article XXI(b) of the GATT 1994 in accordance with Article 3.2 of the DSU and the customary rules of interpretation of public international law.³⁷¹ A threshold point of interpretive disagreement between the parties is the extent to which the terms of Article XXI(b) of the GATT 1994 permit review of a Member's invocation of that provision by a panel established under the DSU. While the parties refer to numerous aspects of treaty interpretation in relation to this question, both parties base their positions primarily on the terms of Article XXI(b) of the GATT 1994 and the rule of interpretation set out in Article 31(1) of the Vienna Convention that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms in their context and in the light of its object and purpose."³⁷² As noted above³⁷³, this rule of interpretation forms part of the "customary rules of interpretation of public international law" referred to in Article 3.2 of the DSU.³⁷⁴ Accordingly, the Panel will examine the ordinary meaning of the terms of Article XXI(b) of the GATT 1994 in their

³⁶² United States' first written submission, para. 24.

³⁶³ United States' response to Panel question No. 33.

³⁶⁴ United States' response to Panel question No. 52.a; see also response to Panel question Nos. 35 and 38; second written submission, para. 34.

³⁶⁵ United States' second written submission, paras. 7-8; see also *ibid.* para. 13 ("the ordinary meaning of the terms of Article XXI(b) establishes that, contrary to the Norway's arguments, the word 'considers' qualifies all the terms in the chapeau and the subparagraph endings of Article XXI(b)").

³⁶⁶ United States' response to Panel question No. 36.

³⁶⁷ United States' second written submission, para. 33; see also response to Panel question Nos. 39 and 40 ("The text reserves to the Member the judgment as to whether action is necessary in one or more of those circumstances for the protection of its essential security interests.").

³⁶⁸ United States' response to Panel question No. 37.

³⁶⁹ See Norway's response to Panel question Nos. 35-37.

³⁷⁰ See e.g. Norway's opening statement at the first meeting of the Panel; Norway's response to Panel question No. 32.

³⁷¹ See section 7.1 above.

³⁷² See Norway's response to Panel question No. 56; United States' response to Panel question No. 56.

³⁷³ See para. 7.56 above. See also Appellate Body Reports, *US – Gasoline*, p. 17; *India – Patents (US)*, para. 46; *Argentina – Textiles and Apparel*, para. 42; *US – Carbon Steel*, para. 61.

³⁷⁴ See e.g. Appellate Body Report, *US – Gasoline*, p. 17.

context and in light of the treaty's object and purpose, focusing on the parties' disagreement as to whether the terms of the provision permit review of its invocation in proceedings under the DSU.

7.97. Pursuant to the security exceptions under Article XXI of the GATT 1994, "[n]othing in this Agreement shall be construed to require" a Member "to furnish any information" described under paragraph (a) or "to prevent" a Member "from taking any action" described under paragraphs (b) or (c) of that provision. The three paragraphs (a) to (c) are separated by semicolons followed by the word "or" and Article XXI concludes in a full stop at the end of paragraph (c). Paragraph (b) of Article XXI provides that the "action" that a Member is not prevented from taking is "any action which [the Member] considers necessary for the protection of its essential security interests", followed by three subparagraphs that are enumerated (i) to (iii).³⁷⁵ These subparagraphs are separated by semicolons and the word "or" appears after the semicolons at the end of paragraph (a) and subparagraph (iii) of Article XXI(b).³⁷⁶

7.98. In providing for "any action" that "[n]othing in this Agreement shall be construed ... to prevent", Article XXI(b) establishes an exception to obligations under other provisions of the GATT 1994. The "action" covered by this provision is one that a Member "considers necessary for the protection of its essential security interests". Dictionary definitions of the term "consider" include to "regard in a certain light or aspect, look upon as" or "think or take to be".³⁷⁷ Under Article XXI(b), a Member must consider that its action is "necessary for" a defined purpose, namely "the protection of its essential security interests". Dictionary definitions of "interest" include "the relation of being involved or concerned as regards potential detriment or (esp.) advantage".³⁷⁸ The relevant interests under Article XXI(b) pertain to "security", which may be defined as "the condition of being protected from or not exposed to danger".³⁷⁹ The description of these security interests as "essential" indicates the heightened significance of the security interests that Members are not prevented from taking

³⁷⁵ The parties have used different terminology to refer to the different parts of Article XXI, including "chapeau", "subparagraph", and "subparagraph ending". The Panel considers that such terminology is not determinative of the proper interpretation so long as it is consistently applied in describing the provision.

³⁷⁶ The French and Spanish texts are similarly structured with minor differences, including a colon at the end of paragraph (b) before the three subparagraphs. In addition, the Spanish text contains a colon after the opening terms of Article XXI before paragraph (a), and in the French text the conjunction "ou" appears at the beginning of paragraphs (b) and (c).

³⁷⁷ Shorter Oxford English Dictionary, 5th Edition (Oxford University Press, 2003), p. 493. See also *Le Petit Robert Dictionnaire de la Langue Francaise* (2000), p. 921 (defining "estimer" as "[a]voir une opinion sur" (to have an opinion on), "considérer" (to consider), "croire" (to believe), "regarder" (to regard), or "penser" (to think)); *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), p. 676 (defining "estimar" as "creer" (to believe) or "hacer aprecio y estimación de alguien o de algo" (make appreciation or estimation of someone or something)); and *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), (Exhibit USA-22), p. 485.

³⁷⁸ Shorter Oxford English Dictionary, 5th Edition (Oxford University Press, 2003), p. 1400 (also defining "interest" as "[a] thing that is of some importance to a person, company, state"). See also *Le Petit Robert Dictionnaire de la Langue Francaise* (2000), p. 1340 (defining "intérêt" as "[c]e qui importe, ce qui convient (en quelque domaine que ce soit)" (what matters or what suits in any domain)); *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), p. 874 (defining "interés" as "[i]nclinación del ánimo hacia un objeto, una persona, una narración, etc." (inclination of mind towards an object, a person, a narration, etc.)); and *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), (Exhibit USA-22), p. 1393.

³⁷⁹ Shorter Oxford English Dictionary, 5th Edition (Oxford University Press, 2003), p. 2734. See also *Le Petit Robert Dictionnaire de la Langue Francaise* (2000), p. 2310 (defining "sécurité" as "[s]ituation, état tranquille qui résulte de l'absence réelle de danger" (tranquil situation, state which results from the real absence of danger)); *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), p. 1385 (defining "seguridad" as "[c]ualidad de seguro" and "seguro" as "[l]ibre y exento de todo peligro, daño o riesgo" (free and exempt from all danger, damage or risk)); and *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), (Exhibit USA-22), p. 2754.

action to protect under Article XXI(b).³⁸⁰ As indicated by the possessive pronoun "its", the relevant "security interests" are those of the Member taking action under Article XXI(b).³⁸¹

7.99. Interpreting the terms of Article XXI(b) within the structure and context of the provision as a whole, the Panel notes the textual separation and indentation under Article XXI of the three paragraphs and a similar separation and indentation of the three subparagraphs under paragraph (b) of Article XXI. The introductory terms of Article XXI ("Nothing in this Agreement shall be construed") form the beginning of a sentence with three alternative endings to this sentence in each of the paragraphs (a) to (c). Under paragraph (b) of Article XXI, the enumerated subparagraphs (i) to (iii) are alternative endings to the sentence following the terms "any action which it considers necessary for the protection of its essential security interests". The punctuation and conjunctions linking these various parts of Article XXI serve the function of listing the alternative endings to the provision. These considerations indicate that Article XXI(b) forms part of, and provides in its own subparagraphs, a list of alternative endings to form a sentence. Therefore, Article XXI(b) is to be given meaning as a complete sentence with the enumerated subparagraphs (i) to (iii) representing alternative endings to the sentence that begins "Nothing in this Agreement shall be construed".

7.100. In continuation of the sentence formed under Article XXI(b), subparagraphs (i) and (ii) begin with the terms "relating to" and subparagraph (iii) begins with the terms "taken in time of". The terms "relating to" indicate a connection to the "materials" and "traffic" in subparagraphs (i) and (ii), respectively, while the terms "taken in time of" indicate a temporal relationship to the circumstances in subparagraph (iii). The Panel understands these opening terms in each subparagraph to qualify and describe the "action" referred to in Article XXI(b). This is confirmed in the French and Spanish versions of Article XXI(b) in which the corresponding terms ("*se rapportant*" and "*appliquées*" in French and "*relativas*" and "*aplicadas*" in Spanish) qualify nouns that are feminine and plural translations of "any action" ("*toutes mesures*" in French and "*todas las medidas*" in Spanish).³⁸² The relation of the opening terms of each subparagraph to the "action" in

³⁸⁰ Dictionary definitions of "essential" include "[t]hat is such in the absolute or highest sense" and "[a]ffecting the essence of anything; significant, important". See also *Le Petit Robert Dictionnaire de la Langue Française* (2000), p. 918 (defining "essentiel" as "[q]ui est absolument nécessaire" (absolutely necessary) or "[l]e plus important" (the most important)); *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), p. 655 (defining "esencial" as "[s]ustancial", "principal", or "notable"); and *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), (Exhibit USA-22), p. 852.

³⁸¹ The French and Spanish language versions similarly use the possessive pronouns "sa" and "su" respectively. See *Le Petit Robert Dictionnaire de la Langue Française* (2000), p. 2365 and *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), p. 1424.

³⁸² The Panel understands that the parties agree that the subparagraphs qualify and relate to the "action" in Article XXI(b), notwithstanding some disagreement as to the precise basis for this conclusion. The United States submits in this regard that, under "[t]he most natural reading" of Article XXI(b), subparagraphs (i) and (ii) relate to a Member's "essential security interests" whereas subparagraph (iii) modifies "action" that is "taken" by a Member. At the same time, the United States considers that "an interpretation that best reconciles the idiosyncratic Spanish text with the English and French texts" is one in which the "action" is modified by the terms following it and "all three subparagraph endings refer to 'any action which it considers'." (United States' response to Panel question Nos. 39 and 40; see also second written submission, paras. 29-31). Under this reading, the United States argues that the terms of the provision still form a "single relative clause" in which the phrase "which it considers" modifies the entirety of the subparagraphs. (United States' response to Panel question Nos. 41-43; United States' second written submission, paras. 97-98; United States' opening statement at the second meeting of the Panel, paras. 8-9). Norway contests the grammatical basis of the United States' argument on a "single relative clause" in Article XXI(b) and argues that the subparagraphs qualify the term "action". (See e.g. Norway's response to Panel question Nos. 40 and 90).

For the purposes of resolving the contested issues of interpretation under Article XXI(b) in this dispute, the Panel considers that it is sufficient to conclude that the term "action" is qualified by the subparagraphs, as supported by the textual analysis in this section and the concordance of plural and feminine terms in the French and Spanish versions of Article XXI(b). The Panel notes the United States' argument on the reconciliation of texts under Article 33 of the VCLT relates to its contentions regarding a "single relative clause" in Article XXI(b) and the "self-judging" nature of the provision, which the Panel addresses in this section in accordance with Article 3.2 of the DSU and its mandate to make such findings as will assist the DSB in making the recommendations or rulings provided for in the covered agreements. To the extent that the comparison of authentic texts discloses any difference in meaning under Article 33(4) of the VCLT, the Panel considers that the application of Articles 31 and 32 of the VCLT removes any such difference so as to resolve the contested issues of interpretation in this dispute. Accordingly, the Panel does not consider it necessary for the purposes of this dispute to address in further detail the parties' arguments on the reconciliation of authentic texts in relation to the contested issues of interpretation under Article XXI(b) and its application to the measures at issue in this dispute.

Article XXI(b) is further supported by their parallel positioning in the text and their common function of linking the remaining terms of each subparagraph to those in paragraph (b).

7.101. As a result, Article XXI(b) applies to actions "relating to" the "materials" and "traffic" described in subparagraphs (i) and (ii), respectively, and to actions "taken in time of" the circumstances referred to in subparagraph (iii). These subparagraphs provide alternative endings that are an integral part of complete sentences formed under Article XXI(b). Moreover, there is no textual indication that the sentence endings in the subparagraphs of Article XXI(b) are merely illustrative or that Article XXI(b) may apply to actions other than those described in the subparagraphs.³⁸³ These considerations indicate that the subparagraphs are exhaustive in establishing the circumstances in which a Member may take the "action which it considers necessary for the protection of its essential security interests" within the meaning of Article XXI(b).³⁸⁴

7.102. Regarding the discretion of Members taking "action" under Article XXI(b), the parties acknowledge the deference accorded to a Member's judgment for "any action which it considers necessary for the protection of its essential security interests".³⁸⁵ The terms "which it considers" denote the consideration or judgment of the Member taking action under Article XXI(b)³⁸⁶, which is further reinforced by providing that the Member shall not be prevented from taking "any" action within the terms of the provision.³⁸⁷ Regarding the extent of discretion accorded by the terms "which it considers", the parties disagree as to what precisely in Article XXI(b) is qualified by these terms and the implications of such qualification for the review of a Member's invocation of Article XXI(b) in dispute settlement proceedings. In particular, the parties dispute whether the three enumerated subparagraphs (i) to (iii) of Article XXI(b) are qualified by the terms "which it considers" and, relatedly, how to interpret those subparagraphs in accordance with the requirements of the DSU. A specific question in this regard is whether, as argued by the United States and contested by Norway³⁸⁸, the clause beginning with the relative pronoun "which" constitutes a "single relative clause" that includes the terms in subparagraphs (i) to (iii) of Article XXI(b).

7.103. The Panel notes that the United States submits certain reference materials on English grammar in support of its contention that the subparagraphs of Article XXI(b) form part of a "single relative clause" that is entirely reserved to the judgment of the Member taking action under the provision.³⁸⁹ Due to the grammatical dimension of the United States' arguments concerning the "single relative clause" in Article XXI(b), the Panel examines the grammatical construction of the provision in relation to the contested issue of whether the subparagraphs of Article XXI(b) are

³⁸³ The subparagraphs of Article XXI(b) of the GATT 1994 may be contrasted with other provisions of the covered agreements containing terms that explicitly indicate the illustrative nature of the provisions. (See e.g. Article 2.2 of the TBT Agreement ("such legitimate objectives are, *inter alia*, national security requirements ..."); Article 3.5 of the Anti-Dumping Agreement ("factors which may be relevant [for determining injury] include, *inter alia*, the volume and prices of imports ..."); Article 1.1(a)(1) of the SCM Agreement ("a direct transfer of funds (e.g. grants, loans and equity infusion)"); and Annex I to the SCM Agreement ("Illustrative List of Export Subsidies")).

³⁸⁴ The Panel notes the agreement of parties as to the exhaustive nature of subparagraphs of Article XXI(b), notwithstanding their disagreement on the implications of this for review in by a panel established under the DSU. (See Norway's response to Panel question No. 39; United States' response to Panel question Nos. 39 and 40). For example, the United States argues that the subparagraphs of Article XXI(b) "form an integral part of the provision in that they complete the sentence begun in the chapeau, establishing three exhaustive circumstances in which a Member may act". At the same time, the United States maintains that "[t]he fact that these circumstances are exhaustive, however, does not mean that the Member's invocation of Article XXI(b) is subject to review." (United States' response to Panel question Nos. 39 and 40).

³⁸⁵ Norway's response to Panel question No. 35; United States' response to Panel question No. 35.

³⁸⁶ The French and Spanish language versions of Article XXI(b) respectively use the phrases "*qu'elle estimera*" and "*que estime*", indicating the estimation or consideration of the Member taking action under that Article. See *Le Petit Robert Dictionnaire de la Langue Francaise* (2000), p. 824 and *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), p. 1270.

³⁸⁷ The terms corresponding to "any action" in Article XXI(b) in the French and Spanish versions are "*toutes mesures*" and "*todas las medidas*", which may be understood as all measures. See *Le Petit Robert Dictionnaire de la Langue Francaise* (2000), pp. 2551-2552; and *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), pp. 1485-1486.

³⁸⁸ Norway's response to Panel question No. 90.

³⁸⁹ The Panel notes that the parties' arguments concerning the grammar of Article XXI(b) focus on the English text of the provision, and the Panel accordingly focuses its assessment on the English text and the specific reference materials on English grammar submitted by the parties. The Panel does not make any determination as to the status or authority of such reference materials but rather refers to them as relevant to addressing the parties' arguments and describing the grammatical construction of Article XXI(b).

qualified by the terms "which it considers". The grammatical considerations raised by the parties reinforce the Panel's preceding textual analysis of Article XXI(b) and are addressed insofar as they may inform the assessment of the ordinary meaning of the terms in their context.

7.104. The grammatical analysis of Article XXI(b) for the purposes of this dispute particularly concerns the relationship between various phrases and clauses within the overall sentence structure of the provision.³⁹⁰ As noted above, Article XXI begins a sentence that is completed by the terms of paragraph (b) and the alternative endings in the subparagraphs thereunder. The opening terms of Article XXI form a clause beginning with the terms "Nothing in this Agreement" and ending with the terms "any action" in paragraph (b). This clause can be characterized as an independent clause in that it contains a subject ("Nothing") and predicate ("shall be construed to prevent any Member from taking any action") that can stand alone as a complete sentence.³⁹¹

7.105. Following this independent clause, the relative pronoun "which" in Article XXI(b) begins a relative clause that can be grammatically characterized as a dependent clause in the sense that it is a group of words with a subject and verb that, unlike an independent clause, cannot stand on its own as a complete sentence.³⁹² This relative clause is grammatically subordinate to the independent clause at the beginning of Article XXI that ends with the word "action" in paragraph (b), qualifying the noun "action" to describe the action that a Member may take notwithstanding the obligations under the GATT 1994.³⁹³ The pronoun "it" refers to the Member taking action under Article XXI(b) and is the subject of this relative clause. The verb "considers" is followed by an immediate object ("necessary") that is further modified by a prepositional phrase ("for the protection of") and noun phrase ("its essential security interests").³⁹⁴

7.106. Each of the subparagraphs of Article XXI(b) begins with a participle that forms the beginning of a participle phrase.³⁹⁵ Specifically, subparagraphs (i) and (ii) begin with the present participle "relating" and subparagraph (iii) begins with the past participle "taken". As these participles qualify the noun "action"³⁹⁶, the terms following each participle function as adjectives describing the "action"

³⁹⁰ A "clause" in this context has been defined as "a group of words containing both a subject and a predicate" that "functions as an element of a compound or complex sentence". A "phrase", by contrast, is "a brief expression that consists of two or more grammatically related words but that does not constitute a clause" (i.e. does not contain a noun and a verb). (*Merriam-Webster's Guide to Punctuation and Style* (Merriam-Webster, Incorporated, 1995), (Exhibit USA-95), pp. 231 and 233).

³⁹¹ See W. Strunk Jr. and E.B. White, *The Elements of Style*, 4th edn (Allyn and Bacon, 1999), (Exhibit USA-226), pp. 91 and 93 (an "independent clause" is "[a] group of words with a subject and verb that can stand alone as a sentence". A "predicate" refers to "[t]he verb and its related words in a clause or sentence" and "expresses what the subject does, experiences, or is"). According to the United States, through the language in this independent clause, "Article XXI(b) creates an exception to the obligations in the [GATT 1994]". (See United States' response to Panel question No. 90).

³⁹² S. Greenbaum, *English Grammar* (Oxford University Press, 1996), (Exhibit USA-93), p. 631 (a "relative clause" is used to "postmodify nouns" and is "introduced by a relative item" such as the relative pronoun "which"); R. Flesch and A.H. Lass, *The Classic Guide to Better Writing* (HarperPerennial, 1996), (Exhibit USA-94), p. 69 ("[w]ho and which are called relative pronouns and introduce relative clauses". Using these relative pronouns "[makes] an independent clause into a relative or dependent clause – a group of words that can't stand by itself") (emphasis omitted); and W. Strunk Jr. and E.B. White, *The Elements of Style*, 4th edn (Allyn and Bacon, 1999), (Exhibit USA-226), p. 91 (a "dependent clause" is "subordinate to an independent clause in a sentence" and begins with either a subordinating conjunction or a relative pronoun such as "which".) (emphasis omitted).

³⁹³ See e.g. S. Greenbaum, *English Grammar* (Oxford University Press, 1996), (Exhibit USA-93), p. 631 (a "relative clause" is used to "postmodify nouns"); *Merriam-Webster's Guide to Punctuation and Style* (Merriam-Webster, Incorporated, 1995), (Exhibit USA-95), p. 233 (a subordinate clause "cannot stand alone, and must be either preceded or followed by a main clause"); and W. Strunk Jr. and E.B. White, *The Elements of Style*, 4th edn (Allyn and Bacon, 1999), (Exhibit USA-226), p. 95 (a "subordinate clause" is a "clause dependant on the main clause in a sentence").

³⁹⁴ See *Merriam-Webster's Guide to Punctuation and Style* (Merriam-Webster, Incorporated, 1995), (Exhibit USA-95), p. 232 (a "noun phrase" consists of "a noun and its modifiers" whereas a "prepositional phrase" consist of "a preposition and its object"); W. Strunk Jr. and E.B. White, *The Elements of Style*, 4th edn (Allyn and Bacon, 1999), (Exhibit USA-226), p. 93 (a prepositional phrase is "[a] group of words consisting of a preposition, its object, and any of the object's modifiers").

³⁹⁵ See *Merriam-Webster's Guide to Punctuation and Style* (Merriam-Webster, Incorporated, 1995), (Exhibit USA-95), p. 232 (a "participial phrase includes a participle and functions as an adjective"); W. Strunk Jr. and E.B. White, *The Elements of Style*, 4th edn (Allyn and Bacon, 1999), (Exhibit USA-226), p. 93 (a "participial phrase" is "[a] present or past participle with accompanying modifiers, objects, or complements").

³⁹⁶ See para. 7.100 above.

under Article XXI(b) and thus can be characterized as participle or adjectival phrases qualifying that noun.³⁹⁷

7.107. The Panel does not consider that the grammatical construction of Article XXI(b) definitively resolves whether the subparagraphs are qualified by the phrase "which it considers" as part of a "single relative clause" in the manner contended by the United States. The adjectival phrases in the subparagraphs of Article XXI(b) could be regarded as continuations of the relative clause that begins with the relative pronoun "which" in the sense that they provide alternative endings to the sentence formed under the provision. However, this does not necessarily compel the conclusion that the subparagraphs form part of a "single relative clause" in the sense argued by the United States that, "[b]ecause the relative clause describing the action begins 'which it considers', the other elements of this clause are committed to the judgment of the Member taking the action."³⁹⁸ In support of its view that, under the ordinary meaning of the English text of Article XXI(b), subparagraphs (i) and (ii) modify the phrase "essential security interests"³⁹⁹, the United States refers to rules of English grammar according to which "an adjectival phrase normally follows the word it modifies or is otherwise placed as closely to the word it modifies".⁴⁰⁰ According to this argument, the adjectival phrases in the subparagraphs of Article XXI(b) would thus be part of the relative clause that begins with the word "which" and would modify the terms in that relative clause that appear closest to the subparagraphs.

7.108. The grammatical references cited by the United States do not indicate a categorical rule according to which the relative clause in Article XXI(b) that begins "which it considers" must contain and qualify any following adjectival phrase (i.e. those contained in the subparagraphs). Indeed, the United States acknowledges a deviation in Article XXI(b) from the general rule it cites as "the drafters departed from typical English usage" in subparagraph (iii) by placing the adjectival phrase in that subparagraph next to "essential security interests", rather than next to the term modified by that adjectival phrase ("action").⁴⁰¹ With respect to the interpretation of Article XXI(b), the qualification of the noun "action" in paragraph (b) by the participle phrases in the subparagraphs is not solely determined by rigid application of grammar but follows from the ordinary meaning of these terms, notwithstanding the existence of a relative clause in paragraph (b) between the noun "action" and textually discrete adjectival phrases qualifying that "action".

7.109. The foregoing considerations reflect the potential limitations of a purely grammatical analysis of the terms of Article XXI(b) and the significance of additional interpretive considerations in ascertaining the ordinary meaning of the terms in their context. In addressing the parties' dispute as to the interpretation of Article XXI(b) of the GATT 1994, the Panel is mindful of the principle of effective treaty interpretation according to which all terms of a treaty are to be given meaning and effect. Relatedly, the terms used in a treaty must not be reduced to redundancy or inutility.⁴⁰² The meaning and effect of the subparagraphs derives not only from considerations of grammatical qualification but also the specific terms used within the overall structure of the provision. Characterizing the subparagraphs as part of a "single relative clause", even if grammatically permissible, does not account for the ordinary meaning of actions "relating to" specified "materials" and "traffic" and to actions "taken in time of" specified circumstances. Nor does it account for the structure of Article XXI(b) and the textual separation of the subparagraphs into an enumerated list, which corresponds to the role of the subparagraphs as alternative sentence endings that collectively delimit the scope of Article XXI(b).

³⁹⁷ See *Merriam-Webster's Guide to Punctuation and Style* (Merriam-Webster, Incorporated, 1995), (Exhibit USA-95), pp. 232-233 ("[a] participle phrase includes a participle and functions as an adjective". An "adjective clause modifies a noun or pronoun and normally follows the word it modifies").

³⁹⁸ United States' response to Panel question No. 36.

³⁹⁹ See fn 382 above.

⁴⁰⁰ United States' response to Panel question No. 90 (referring to Exhibit USA-176, pp. 232-233 ("[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 modifying phrase is not placed close enough to the word or words that it modifies") and S. Benedict (ed.), *Harper's English Grammar* (Harper & Row, 1966), (Exhibit USA-96), p. 186 ("adjectives and adverbial phrases, like adjectives and adverbs themselves should be placed as closely as possible to the words they modify").

⁴⁰¹ United States' response to Panel question No. 90.

⁴⁰² See e.g. Appellate Body Reports, *US – Gasoline*, p. 23; *Japan – Alcoholic Beverages II*, p. 12; *India – Patents (US)*, para. 45.

7.110. The Panel notes the United States' argument that Article XXI(b) "should be read as a single clause and not as introducing separate conditions".⁴⁰³ Further, the United States cautions against an approach that would "atomize this single relative clause" because "[a]rtificially separating the words 'which it considers necessary' from the language that immediately follows and continues the clause – for the protection of – would erroneously interpret certain terms of Article XXI(b) in isolation."⁴⁰⁴ In the Panel's view, giving meaning and effect to the terms of the subparagraphs does not entail reading them in isolation from the other terms of Article XXI(b) or "introducing separate conditions" beyond what is reflected in the terms themselves.⁴⁰⁵ The terms of Article XXI(b) grant discretion to Members for actions that they "consider necessary for the protection of their essential security interests" while also enumerating circumstances and conditions under which that discretion may be exercised.⁴⁰⁶ The right to take action under Article XXI(b) thus consists of an express provision of deference to a Member's consideration that is complemented by subparagraphs that must be given meaning and effect according to the ordinary meaning of their terms.⁴⁰⁷

7.111. The Panel finds relevant context for the interpretive issues raised in this dispute in the provisions of the GATT 1994 concerning consultation and potential recourse in cases of nullification or impairment, as well as the rules and procedures of the DSU, noting that these agreements are both "integral parts of [the WTO] Agreement, binding on all Members".⁴⁰⁸ Article XXII of the GATT 1994 provides for consultation "with respect to any matter affecting the operation of this Agreement" and Article XXIII of the GATT 1994 addresses nullification or impairment of "any benefit accruing to [a Member] under this Agreement". The DSU elaborates upon these provisions⁴⁰⁹ and establishes the rules and procedures applicable to disputes concerning the covered agreements in Appendix 1 of the DSU. Neither the relevant provisions of the GATT 1994 nor the DSU make any explicit reference to Article XXI of the GATT 1994 or the potential review of its invocation in dispute settlement proceedings.⁴¹⁰ In the absence of any special or additional rule of dispute settlement concerning Article XXI(b) of the GATT 1994, any review of its invocation must be carried out in accordance with the DSU as a function of the terms of the provision interpreted in accordance with customary rules of interpretation of public international law.

7.112. The Panel finds further guidance in the object and purpose as expressed in the preamble of the WTO Agreement "to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations". In addition, the preambles of both the WTO Agreement and the GATT 1994 refer to the desire to contribute to the objectives of these agreements "by entering into reciprocal and mutually advantageous

⁴⁰³ United States' response to Panel question No. 40.

⁴⁰⁴ United States' response to Panel question No. 36; see also second written submission, para. 8.

⁴⁰⁵ The United States draws the Panel's attention to commentaries of the International Law Commission that, "[p]roperly limited and applied, the maxim [of effective treaty interpretation] 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." (United States' response to Panel question No. 47 citing Draft Articles on the Law of Treaties with commentaries, Yearbook of the International Law Commission, 1966, Vol. II, (Exhibit USA-23), p. 219). The Panel agrees that the rule of effectiveness requires that treaty interpretation neither expand nor diminish the actual terms used. In the present case, the Panel does not consider its interpretation to require any addition to the terms of Article XXI(b), as the effectiveness of the subparagraphs derives from their existing terms read within the overall structure of the provision. (See United States' response to Panel question No. 36, paras. 133-134 (arguing that the subparagraphs would require additional terms at the beginning of the subparagraphs to establish their separation from the relative clause beginning with "which it considers"))).

⁴⁰⁶ The Panel notes that the scope of the circumstances set out in the subparagraphs does not detract from a Member's consideration that action within the scope of the subparagraphs is necessary "for" a specific purpose and that the Member's action pertain to "its" interest. (See United States' response to Panel question No. 36).

⁴⁰⁷ In this sense, the United States' view that "the subparagraphs *guide a Member's exercise of its rights* under this provision" is compatible with the delimiting function served by the subparagraphs to define the circumstances and conditions under which action may be taken, "while reserving to the Member the judgment whether particular action is necessary to protect its essential security interests". (United States' first written submission, para. 33 (emphasis added); see also Response to Panel question No. 35).

⁴⁰⁸ Article II:2 of the WTO Agreement.

⁴⁰⁹ Pursuant to Article 3.2 of the DSU, "Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein."

⁴¹⁰ Appendix 2 of the DSU does not provide any special or additional rules applying to disputes in which Article XXI of the GATT 1994 is invoked.

arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations".⁴¹¹ In furtherance of these objectives, the WTO Agreement establishes a legal framework of rights and obligations that includes the rules and procedures applicable to disputes concerning the covered agreements in the DSU. The DSU "serves to preserve the rights and obligations of Members under the covered agreements"⁴¹² and "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under [the DSU] and the covered agreements".⁴¹³ The rules and procedures of the DSU are thus intended to maintain the balance between the rights and obligations of the Members⁴¹⁴ as embodied in the covered agreements and the relevant provisions thereof raised by the parties to proceedings under the DSU.

7.113. The provision of relevance to this dispute, Article XXI(b) of the GATT 1994, establishes a right to take action for the protection of a Member's essential security interests and explicitly enumerates conditions in the subparagraphs that are an integral part of that right. The absence of explicit provision or elaboration in Article XXI(b) of the GATT 1994 as to whether and how its invocation may be reviewed does not, in itself, preclude or otherwise determine the review of that provision in dispute settlement proceedings.⁴¹⁵ Rather, the scope and nature of such review derives from the terms of Article XXI(b) of the GATT 1994 and requirements of the DSU established under the WTO Agreement, which acknowledges *inter alia* the role of the WTO dispute settlement system in "providing security and predictability to the multilateral trading system".⁴¹⁶ If Article XXI(b) of the GATT 1994 is raised in dispute settlement proceedings, the DSU requires that it be addressed in accordance with the terms of the provision itself and within an objective assessment of the relevant measures and claims to make findings that will assist the DSB to make recommendations provided for in the covered agreements.

7.114. In addition to the relevant text, context, and object and purpose of the covered agreements, the parties have referred to various other materials regarding the interpretation of Article XXI(b) of the GATT 1994. These materials include: (a) negotiating history of Article XXI of the GATT 1947 and preparatory works of the Havana Charter for the International Trade Organization (ITO); (b) internal documents of the US delegation to the negotiation of the ITO draft charter and GATT 1947; (c) GATT Council Decisions under the GATT 1947; (d) views expressed by GATT contracting parties prior to the creation of the WTO; and (e) negotiating history of the Uruguay Round. Both parties contend that these materials provide support for their primary arguments on the terms of Article XXI(b) of the GATT 1994 and the rule of interpretation in Article 31(1) of the Vienna Convention.⁴¹⁷ In Appendix B to this Report, the Panel addresses the parties' arguments on the relevance of these materials to the interpretation of Article XXI(b) of the GATT 1994.

7.115. As detailed in Appendix B, these materials do not provide clear guidance regarding the contested issues in this dispute, particularly concerning the scope and nature of the review of a Member's invocation of Article XXI(b) of the GATT 1994 in proceedings under the DSU. In addition to questions on the precise legal status of these materials for purposes of treaty interpretation, the Panel does not find any clear indication in these materials of the "self-judging nature" or "non-justiciability" of Article XXI(b) of the GATT 1994 as contended by the United States.⁴¹⁸ Rather, the Panel finds these materials to support the general conclusion that the terms of Article XXI(b) of the GATT 1994 establish a right to take action for the protection of essential security interests in the conditions and circumstances described in the three subparagraphs.

7.116. In conclusion, the entirety of Article XXI(b) of the GATT 1994 is to be given meaning and effect in a manner that preserves the right and discretion of a Member to take action it considers necessary for the protection of its essential security interests under the conditions and circumstances described in subparagraphs (i) to (iii). The Panel does not consider that Article XXI(b) of the

⁴¹¹ The preamble of the GATT 1994 refers to "international commerce" instead of "international trade relations".

⁴¹² Article 3.2 of the DSU.

⁴¹³ Article 3.4 of the DSU.

⁴¹⁴ See Article 3.3 of the DSU.

⁴¹⁵ The Panel notes that the invocation of Article XX of the GATT 1994 titled "General Exceptions" has been reviewed in WTO dispute settlement proceedings notwithstanding the absence of an explicit provision in Article XX on whether and how its invocation may be reviewed.

⁴¹⁶ Article 3.2 of the DSU.

⁴¹⁷ Norway's response to Panel question No. 56; United States' response to Panel question No. 56.

⁴¹⁸ See United States' first written submission, paras. 46, 55, and 105.

GATT 1994 is "self-judging" or "non-justiciable" in the sense argued by the United States, nor that the provision contains a "single relative clause" that wholly reserves the conditions and circumstances of the subparagraphs to the judgment of the invoking Member. In light of this conclusion and in accordance with relevant requirements of the DSU, the Panel turns to assess the United States' invocation of Article XXI(b) of the GATT 1994 in relation to the measures at issue.

7.8.3 Assessment of the measures at issue

7.117. The Panel will assess whether the measures found to be inconsistent with Articles I:1, II:1, and XI:1 of the GATT 1994 were taken under the conditions and circumstances described in the subparagraphs of Article XXI(b) of the GATT 1994.⁴¹⁹

7.118. As an initial matter, the Panel notes the objections by the complainant to the manner and timeliness of the United States' defence under Article XXI(b)(iii), including concerns regarding due process and the Panel's independent assessment of the evidence and arguments on the record.⁴²⁰ The Panel considers that the parties' due process rights have been fully maintained in these proceedings, during which the Panel has endeavoured to provide ample time and opportunity to address any evidence or arguments raised by the other party.⁴²¹ Moreover, the Panel has engaged with such evidence and arguments in written questions and substantive meetings in order to fulfil its mandate under the DSU to make an objective assessment of the matter referred to the DSB and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.⁴²²

7.119. The United States has presented its specific arguments on the challenged measures subject to its interpretive argument that Article XXI(b) is entirely "self-judging" and imposes no requirement to explain or identify a relevant circumstance in subparagraphs (i) to (iii).⁴²³ Although the United States has focused its arguments on the interpretation of Article XXI(b) and the discretion accorded by its terms to Members, it has also submitted an extensive record of material relating to the measures at issue. Of particular note in this context are the Steel and Aluminium Reports of the USDOC and Presidential Proclamations setting out the legal basis under Section 232 for taking action on steel and aluminium products. As described below, the United States has also elaborated its position throughout the course of the proceedings concerning the measures at issue and, in particular, the existence of an "emergency in international relations" within the meaning of Article XXI(b)(iii) "in time of" which the measures were taken.

7.120. The United States' first written submission focused on the argument that Article XXI of the GATT 1994 is "self-judging" as a defence against WTO-inconsistencies and that its invocation by a Member is "non-justiciable" in WTO dispute settlement proceedings. Following the first substantive meeting, the United States argued that "publicly available information" concerning its measures "could be understood to relate most naturally to the circumstance described in Article XXI(b)(iii)".⁴²⁴ At the same time, the United States maintained its interpretive view that it is not necessary under Article XXI for any Member to provide details relating to its invocation of the exception, nor "to

⁴¹⁹ In light of the Panel's conclusion on the interpretation of Article XXI(b) and the arguments of the parties in this dispute, the Panel considers it appropriate to focus its assessment of the measures at issue on subparagraph (iii) and whether the measures were "taken in time of war or other emergency in international relations". The Panel notes that previous panels have assessed measures under Security Exceptions for "action which [a Member] considers necessary for the protection of its essential security interests" beginning with the relevant subparagraph of the provision at issue. (See Panel Reports, *Russa – Traffic in Transit*, paras. 7.108-7.109; *Saudi Arabia – IPRs*; para. 7.242).

⁴²⁰ See Norway's response to Panel question No. 71; comments after the second meeting of the Panel.

⁴²¹ For example, at the closing of the second substantive meeting, the Panel indicated that the parties would have an opportunity to provide written comments on any issue raised during the meeting, including arguments on Article XXI(b)(iii) made during closing statements. The parties were accordingly invited to provide written comments following the second substantive meeting and given an opportunity to make any additional comments in response. The Panel considers the procedural arrangements in this dispute, including the overall time given to the parties for written submissions and comments, to have afforded the parties adequate opportunity to be heard and to respond to arguments made by the other party as required for the protection of their due process rights. (See Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147).

⁴²² See e.g. Appellate Body Reports, *US – Shrimp*, para. 106; *EC and certain member states – Large Civil Aircraft*, para. 1317; *Australia – Tobacco Plain Packaging*, para. 6.244.

⁴²³ See e.g. United States' response to Panel question No. 92.

⁴²⁴ United States' second written submission, para. 35.

identify the relevant subparagraph ending to that provision that an invoking Member may consider most relevant".⁴²⁵

7.121. The United States subsequently elaborated its arguments regarding the measures at issue based on its interpretation of an "other emergency in international relations" as meaning "a situation of danger or conflict, concerning political or economic contact occurring between nations, which arises unexpectedly and requires urgent attention".⁴²⁶ In particular, the United States argued that "the extensive findings in the steel and aluminum reports are consistent with the United States considering the measures at issue to be taken 'in time of war or other emergency in international relations'".⁴²⁷ The United States cited various findings in the Steel and Aluminium Reports and argued that "the findings cited above relating to the threatened impairment of national security by steel and aluminum imports, and the global crisis circumstances under which such importations were occurring, are consistent with the United States considering that an 'other emergency in international relations' exists – that is, a situation of danger or conflict, concerning political or economic contact occurring between nations, which arises unexpectedly and requires urgent attention."⁴²⁸

7.122. In its closing statement at the second substantive meeting, the United States argued that, "even on the complainant's understanding of Article XXI(b) as *not* self-judging, ... [t]he record before the Panel demonstrates that the United States considers the measures at issue to be necessary for the protection of its essential security interests and taken 'in time of war or other emergency in international relations'".⁴²⁹ The United States referred to findings in the Steel Report on "whether an emergency related to steel excess capacity exists" to comment that, "in 2017, it emerged that global efforts to address the crises would be insufficient. While the DOC steel report noted that the excess capacity crisis is a global problem that steel-producing nations have committed to 'work together on possible solutions,' the report observed the limits of the global efforts, including the work of the Global Forum on Steel Excess Capacity."⁴³⁰ The United States argued that "what the DOC steel report conveys is that the United States was at a crucial point [and] that without immediate action, the steel industry could suffer damages that may be difficult to reverse and reach a point where it cannot maintain or increase production to address national emergencies."⁴³¹ The United States additionally argued that "[a]n industry facing 'fundamental changes' brought on by a 'production revolution' can certainly lead to unexpected developments, particularly when that industry is facing an 'acute' situation of global excess capacity that is the highest in the industry's history."⁴³²

7.123. The Panel notes that the United States has referred to appendices in the Steel and Aluminium Reports concerning global excess capacity in connection with the existence of an "emergency in international relations" under Article XXI(b)(iii).⁴³³ In addition, the United States has referred to the

⁴²⁵ United States' second written submission, para. 34. According to the United States, its invocation of Article XXI(b) indicated its consideration "that any or all of the three circumstances described in the subparagraphs are present", and whatever burden of proof attached to Article XXI(b) "is discharged once the Member indicates, in the context of dispute settlement, that it has made such a determination" that it "consider[s] one or more of the circumstances set forth in Article XXI(b) to be present". (United States' response to Panel question Nos. 50 and 52. See also United States' second written submission, para. 57.

⁴²⁶ See United States' response to Panel question No. 92.

⁴²⁷ United States' response to Panel question No. 92, para. 40.

⁴²⁸ United States' response to Panel question No. 92, para. 47.

⁴²⁹ United States' closing statement at the second meeting, para. 53. (emphasis original)

⁴³⁰ United States' closing statement at the second meeting, paras. 61-62.

⁴³¹ United States' closing statement at the second meeting, para. 64. The United States also argued that "the situation at issue did arise unexpectedly and remained an 'emergency in international relations' when the measures were taken. The confluence of events in 2017 made the emergency even more pressing to address for the United States." (United States' closing statement at the second meeting, para. 61).

⁴³² United States' closing statement at the second meeting, para. 65. The United States cited the following passages in G20, *Global Forum on Steel Excess Capacity Report* (30 November 2017), (Exhibit USA-72): "The situation of excess steelmaking capacity 'has become particularly acute since 2015'; 'the steel industry will have to adjust in response to fundamental changes in economic activity brought on by the 'next production revolution.'" (Ibid. p. 2); "In 2016, the global surplus in steelmaking capacity is estimated to have reached around 737 million metric tonnes, the highest level seen in the history of the steel industry. If the announced capacity expansions until 2020 take place, this excess capacity will further increase". (Ibid. p. 4).

⁴³³ See United States' response to Panel question No. 92, para. 43 (referring to Steel Report, (Exhibit NOR-1 and USA-7), Appendix L: "Global Excess Capacity in Steel Production" and its commentary on OECD analyses and the policy recommendations from the Global Forum on Steel Excess Capacity); United States' comments after the second meeting of the Panel, para. 11 (referring to Aluminium Report, (Exhibit NOR-2 and USA-8), Appendix E "Global Excess Aluminum Production").

G20 Global Steel Forum Report of 2017 noting that excess capacity is a "global challenge" which risks "the viability of an industry that produces a material which is vital for the functioning of economies and societies".⁴³⁴ The G20 Global Steel Forum Report of 2017 cited by the United States also describes the situation of excess steelmaking capacity as "particularly acute since 2015" and addresses the outlook of global steelmaking capacity.⁴³⁵ Further, the United States refers to remarks of the EU Commissioner for Trade at the OECD High-Level Symposium on Steel expressing concerns on steel overcapacity.⁴³⁶ The United States has also referred to a statement of the chairperson of the OECD Ministerial Council Meeting in 2018 that OECD members "share the view that severe excess capacity in key sectors such as steel and aluminium are serious concerns for the proper functioning of international trade, the creation of innovative technologies and the sustainable growth of the global economy" and "stress the urgent need to avoid excess capacity in ... sectors such as aluminium and high technology."⁴³⁷ The United States additionally refers to the Charlevoix G7 Summit Communiqué which "stressed the urgent need to avoid excess capacity" in the aluminium sector.⁴³⁸

7.124. The Panel will assess the evidence and arguments submitted in this dispute in accordance with the requirement under Article 11 of the DSU to make "an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". In addition to the interpretive conclusions reached above⁴³⁹, the Panel's assessment will be based on an interpretation of the terms of subparagraph (iii) of Article XXI(b) in accordance with Article 3.2 of the DSU and customary rules of interpretation of public international law. Based on this interpretation as well as the evidence and arguments submitted by the parties, the Panel will assess whether the "action[s] which [the United States] considers necessary for the protection of its essential security interests" were taken under the circumstances described in the subparagraphs of Article XXI(b)(iii) of the GATT 1994.

7.125. Under subparagraph (iii) of Article XXI(b), a Member may take action which it considers necessary for the protection of its essential security interests "in time of war or other emergency in international relations". Dictionary definitions of the term "emergency" include "[a] situation, esp. of danger or conflict, that arises unexpectedly and requires urgent attention", "a condition requiring immediate treatment", or a "pressing need".⁴⁴⁰ The relevant emergency within the meaning of subparagraph (iii) must be "in international relations". The term "relations" may be defined as "[t]he various ways by which a country, State, etc., maintains political or economic contact with another"⁴⁴¹, while the term "international" may be defined as "[e]xisting, occurring, or carried on between nations; pertaining to relations, communications, travel, etc., between nations".⁴⁴² The phrase "international relations" may thus be understood to mean interactions between nations or national governments.⁴⁴³ The terms of Article XXI(b)(iii) appear to distinguish the relevant emergency under that subparagraph from an emergency in purely domestic or national affairs and

⁴³⁴ United States' opening statement of the first meeting of the Panel, para. 54.

⁴³⁵ See G20, *Global Forum on Steel Excess Capacity Report* (30 November 2017), (Exhibit USA-72); United States' closing statement at the second meeting of the Panel, para. 65.

⁴³⁶ See Remarks dated 18 April 2016 of C. Malmström, "Way ahead for the global steel industry", OECD High-Level Symposium on Steel, (Exhibit USA-240); United States' closing statement at the second meeting of the Panel, para. 66.

⁴³⁷ United States' comments after the second meeting of the Panel, para. 14.

⁴³⁸ United States' comments after the second meeting of the Panel, para. 14.

⁴³⁹ See section 7.8.2 above.

⁴⁴⁰ Shorter Oxford English Dictionary, 5th Edition (Oxford University Press, 2003), p. 814. See also Norway's response to Panel question No. 51 (referring to Oxford English Dictionary, definition of "emergency", <https://www.oed.com/view/Entry/61130?redirectedFrom=emergency&print> (accessed 4 February 2020), (Exhibit NOR-125)); United States' response to Panel question No. 51 (referring to *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), (Exhibit USA-86), p. 806).

⁴⁴¹ Shorter Oxford English Dictionary, 5th Edition (Oxford University Press, 2003), p. 2520. See also United States' response to Panel question No. 92 (referring to *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), (Exhibit USA-222), p. 2534).

⁴⁴² Shorter Oxford English Dictionary, 5th Edition (Oxford University Press, 2003), p. 1404. See also United States' response to Panel question No. 92 (referring to *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), (Exhibit USA-222), p. 1397).

⁴⁴³ See also Oxford English Dictionary Online (Oxford University Press, March 2022) (defining "international relations" as "relations between nations, national governments, international organizations") and Black's Law Dictionary, 9th edn, B.A. Garner (ed.) (West Group 2009), p. 893 (defining "international relations" as "[g]lobal political interaction, primarily among sovereign nations").

indicate the "international" character of the emergency in time of which Members are not prevented from taking action under Article XXI(b).

7.126. The term "war" precedes the phrase "or other emergency in international relations" in subparagraph (iii) of Article XXI(b) and provides immediate context for its interpretation. Dictionary definitions of "war" include "[h]ostile contention by means of armed forces, carried on between nations, states, or rulers, or between parties in the same nation or state; the employment of armed forces against a foreign power, or against an opposing party in the state".⁴⁴⁴ Based on its ordinary meaning, "war" involves a state of conflict characterized by the use of force. This is further confirmed by the French and Spanish language versions of Article XXI(b)(iii), where the terms "*guerre*" and "*guerra*" similarly signify armed struggles or outbreak of hostilities.⁴⁴⁵

7.127. The Panel finds that the reference to "war" informs the meaning of "emergency in international relations" as part of the circumstances "in time of" which a Member may act under Article XXI(b) for the protection of its essential security interests. In particular, the Panel considers that an "emergency in international relations" within the meaning of Article XXI(b)(iii) must be, if not equally grave or severe, at least comparable in its gravity or severity to a "war" in terms of its impact on international relations. This understanding is supported by the French and Spanish language versions of Article XXI(b)(iii) of the GATT 1994, where the terms corresponding to "emergency in international relations" are "*grave tension internationale*" and "*grave tensión internacional*" respectively. The term "grave" in these languages may be understood as referring to international tensions that are of a critical or serious nature in terms of their impact on the conduct of international relations.

7.128. Further, under subparagraph (iii) of Article XXI(b), action for the protection of essential security interests must be "taken in time of" an emergency in international relations. As discussed above, the Panel understands these opening terms of subparagraph (iii) to qualify and describe the "action" referred to in Article XXI(b). The phrase "taken in time of" in subparagraph (iii) describes the temporal link between the action taken by a Member under Article XXI(b) and the "war or other emergency in international relations" in subparagraph (iii) of that Article.

7.129. The Panel also considers relevant the context provided by the subparagraphs of Article XXI(b) in conjunction with the terms used in paragraph (b) of Article XXI, which concerns actions taken by a Member for the protection of its "essential security interests". As discussed above, the description of these security interests as "essential" indicates the heightened significance of the security interests that Members are not prevented from taking action to protect pursuant to Article XXI(b). Actions taken by a Member for the protection of its essential security interests may concern "fissionable materials" under subparagraph (i), "traffic" involving certain military interests under subparagraph (ii), and "war or other emergency in international relations" under subparagraph (iii). The Panel is guided by the delimiting function of the subparagraphs in construing subparagraph (iii) to refer to circumstances of a certain gravity or severity in terms of their impact on the conduct of international relations, as part of the balance of rights and obligations reflected in the ordinary meaning of the terms of Article XXI(b), interpreted in their context and in light of the object and purpose of the GATT 1994 and WTO Agreement.⁴⁴⁶

7.130. With respect to the measures at issue, the Panel notes that the United States has referred in its arguments regarding Article XXI(b)(iii) to factors considered by the USDOC in the Steel and Aluminium Reports. These Reports reflect the domestic legislative basis and statutory terms of Section 232, particularly the factors to be considered in investigations by the USDOC and the reference to importation "in such quantities or under such circumstances" that the imports "threaten to impair the national security".⁴⁴⁷ The Panel notes that various factors relied upon by US authorities

⁴⁴⁴ Oxford English Dictionary Online (Oxford University Press, March 2022).

⁴⁴⁵ See Le Petit Robert Dictionnaire de la Langue Française (2000), p. 1183 (defining "*guerre*" as "[l]utte armée entre groupes sociaux" (armed struggle between social groups) or "[l]es questions militaires" (military matters)); *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), p. 795 (defining "*guerra*" as "[d]esavenencia y rompimiento de la paz entre dos o más potencias" (disagreement and breach of peace between two or more powers) or "[l]ucha armada entre dos o más naciones o entre bandos de una misma nación" (armed struggle between two or more nations or between sides of the same nation)).

⁴⁴⁶ See paras. 7.112 and 7.113 above.

⁴⁴⁷ The USDOC noted the non-exhaustive list of factors to be considered in connection with "national security" under Section 232 and the list of factors for the US Secretary of Commerce to consider in determining

are treated cumulatively in support of the determination to act under Section 232. Specifically, the Steel and Aluminium Reports identify "three factors" as the basis for finding with respect to steel and aluminium that "weakening of our internal economy may impair the national security", namely: (a) displacement of domestic steel/aluminium by excessive imports; (b) the consequent adverse impact on the economic welfare of the domestic steel/aluminium industry; and (c) the global excess capacity in steel and aluminium.⁴⁴⁸ The Panel notes that the first two factors focus predominantly on developments relating to the domestic situation of steel and aluminium industries in the United States⁴⁴⁹, while the third focuses on a global aspect of the situation.

7.131. The analysis and conclusions of the USDOC in the Steel and Aluminium Reports do not purport to identify or address the existence of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994. The determinations of US domestic authorities under Section 232 relate to a different legal standard and basis under US municipal law than the provisions of the covered agreements within the Panel's mandate under the DSU. Accordingly, the factors relied upon by the USDOC and conclusions in the Steel and Aluminium Reports are distinct from, and cannot be directly transposed to, the terms of Article XXI(b)(iii) of the GATT 1994 and the objective assessment required under Article 11 of the DSU. Therefore, the factors treated cumulatively by US domestic authorities under Section 232 may not be regarded as having commensurate relevance or weight in the Panel's objective assessment as to whether the measures were taken "in time of war or other emergency in international relations" under Article XXI(b)(iii) of the GATT 1994. The assessment of the Panel in this dispute concerns the United States' specific arguments in connection with the existence of an "emergency in international relations" under Article XXI(b)(iii) and, in particular, its references to an international situation of global excess capacity in steel and aluminium.⁴⁵⁰

7.132. The Panel observes that, in its arguments under Article XXI(b), the United States refers to this international situation – i.e. global excess capacity in steel and aluminium – in connection with the impact of imports on domestic producers of steel and aluminium, as reflected in the conclusions of the USDOC in the Steel and Aluminium Reports.⁴⁵¹ The United States refers to factors addressed by the USDOC in the Steel and Aluminium Reports as evidence that it "considers" the measures at issue to have been "taken in time" of an "emergency in international relations" within the meaning of Article XXI(b)(iii). In this regard, the Panel notes the United States' argument that "the extensive findings in the steel and aluminium reports are consistent with the United States considering the measures at issue to be taken 'in time of war or other emergency in international relations'."⁴⁵² The United States additionally argues that "the Panel should find [that] the United States has provided information that it considers the measure necessary for the protection of its essential security interests ... [and] that the United States has provided information that it considers the measure 'taken in time of war or other emergency in international relations', the circumstance in subparagraph ending (iii)".⁴⁵³

7.133. The Panel recalls its conclusion that the terms "which it considers" in Article XXI(b) do not qualify the subparagraphs to render them "self-judging" as argued by the United States.⁴⁵⁴ While the United States contends that it has "provided information that it considers" the measures at issue to fall under Article XXI(b)(iii), the review of such information in accordance with the DSU requires an objective ascertainment of factors relating to the relevant "emergency in international relations" under subparagraph (iii), as distinguished from factors pertaining to what is reserved to a Member's

if imports "threaten to impair the national security". (See Steel Report, (Exhibit NOR-1 and USA-7), pp. 13-15; Aluminium Report, (Exhibit NOR-2 and USA-8), pp. 12-14 (referring to Section 232(d))).

⁴⁴⁸ Steel Report, (Exhibit NOR-1 and USA-7), p. 16; Aluminium Report, (Exhibit NOR-2 and USA-8), p. 15.

⁴⁴⁹ See e.g. Steel Report, (Exhibit NOR-1 and USA-7), sections V.B.4-10 and V.C; Aluminium Report, (Exhibit NOR-2 and USA-8), sections VI.H and VI.C.

⁴⁵⁰ United States' response to Panel question No. 92, para. 43 (referring to Steel Report, (Exhibit NOR-1 and USA-7), Appendix L: "Global Excess Capacity in Steel Production" and its commentary on OECD analyses and the policy recommendations from the Global Forum on Steel Excess Capacity); United States' comments after the second meeting of the Panel, para. 11 (referring to Aluminium Report, (Exhibit NOR-2 and USA-8), Appendix E "Global Excess Aluminum Production"); see also United States' closing statement at the second meeting, paras. 61-62.

⁴⁵¹ See Steel Report, (Exhibit NOR-1 and USA-7), section VI; Aluminium Report, (Exhibit NOR-2 and USA-8), section VII.

⁴⁵² United States' response to Panel question No. 92, para. 40.

⁴⁵³ United States' closing statement at the second meeting, para. 54.

⁴⁵⁴ See para. 7.116 above.

consideration under paragraph (b) of Article XXI. The United States refers to factors that were cumulatively considered by domestic authorities in support of the determination to act under Section 232. As noted, these factors concern both the domestic situation of steel and aluminium industries as well as global excess capacity.

7.134. In the Panel's view, the factors raised by the United States on the impact of imports on domestic producers of steel and aluminium, including the consideration of US domestic authorities of "national security" under Section 232, pertain more to the "action which [the United States] considers necessary for the protection of its essential security interests" under paragraph (b) of Article XXI.⁴⁵⁵ However, in accordance with the ordinary meaning of its terms, subparagraph (iii) requires a distinct inquiry as to whether the actions were taken in time of an "emergency in international relations" based on an objective assessment of relevant evidence and arguments.

7.135. In this connection, the Panel notes the evidence submitted by the United States of international concerns regarding global excess capacity in steel and aluminium, including the discussion of such concerns in the Steel and Aluminium Reports. The statements at the international level referred to by the United States indicate that the issue of global excess capacity in steel and aluminium has been a topic of high-level discussion and expressions of concern in various international fora.⁴⁵⁶ As reflected in information provided by the United States in this dispute, the discussion of global excess capacity focuses on specific sectors and is evidence of the fact that the issue has been raised as a matter of international attention within the conduct of international relations of various countries. Notwithstanding such evidence of international engagement, the Panel recalls that an "emergency in international relations" under Article XXI(b)(iii) refers to situations of a certain gravity or severity and international tensions that are of a critical or serious nature in terms of their impact on the conduct of international relations.

7.136. Having carefully reviewed the relevant evidence and arguments submitted in this dispute, and particularly those submitted by the United States in relation to global excess capacity, the Panel is not persuaded that the situation to which the United States refers rises to the gravity or severity of tensions on the international plane so as to constitute an "emergency in international relations" during which a Member may act under Article XXI(b)(iii).⁴⁵⁷ For example, the G20 Global Steel Forum Report "focuses on the steel sector and provides concrete policy solutions to reduce steel excess capacity".⁴⁵⁸ In referring to excess steelmaking capacity as "a global challenge that has become particularly acute since 2015", the report highlights various efforts within the Global Steel Forum in light of trends in the sector as part of "[g]lobal cooperation to find solutions to tackle excess capacity in the steel market".⁴⁵⁹ Such evidence submitted by the United States in this dispute reflects international concern expressed in the context of cooperative efforts to address excess capacity in

⁴⁵⁵ See e.g. United States' closing statement at the second meeting, para. 19 (stating that "the measures challenged were on steel and aluminum (key sources for military vehicles, weapons, and systems for critical national infrastructure) that the United States has taken for national security purposes" and referring to "an industry that is vital to our national security and whose decline threatens to impair our national security"); response to Panel question No. 92(a). See also paras. 7.71, 7.76-7.79, and 7.86-7.87 above.

⁴⁵⁶ See e.g. G20, *Global Forum on Steel Excess Capacity Report* (30 November 2017), (Exhibit USA-72); Remarks dated 18 April 2016 of C. Malmström, "Way ahead for the global steel industry", OECD High-Level Symposium on Steel, (Exhibit USA-240); Charlevoix G7 Summit Communiqué (9 June 2018), (Exhibit USA-247).

⁴⁵⁷ The Panel notes in this regard that previous panels have found situations to constitute an "emergency in international relations" under Security Exceptions based on the particular evidence and circumstances at issue in those disputes. In a dispute under Article XXI(b)(iii) of the GATT 1994, such evidence included international recognition of the degree of deterioration of relations between two Members and a situation involving armed conflict during a certain time period. (See Panel Report, *Russa – Traffic in Transit*, paras. 7.122-7.123). In another dispute under Article 73(b)(iii) of the TRIPS Agreement (the corresponding provision to Article XXI(b)(iii) of the GATT 1994 in the TRIPS Agreement), such evidence included the severance of all diplomatic, consular, and economic relations between two Members. (See Panel Report, *Saudi Arabia – IPRs*; paras. 7.257-7.266).

⁴⁵⁸ G20, *Global Forum on Steel Excess Capacity Report* (30 November 2017), (Exhibit USA-72), p. 2.

⁴⁵⁹ G20, *Global Forum on Steel Excess Capacity Report* (30 November 2017), (Exhibit USA-72), pp. 2-3. The report describes the formal establishment of the Global Forum on Steel Excess Capacity and notes that "the OECD acts as the facilitator to the Global Forum". (Ibid. para. 6). The report further describes efforts to develop an "information-sharing mechanism" in a "tangible process [that] contributes to the collective trust and confidence that are necessary to find collective solutions to the challenge of excess capacity". (Ibid. paras. 7-8).

a specific sector.⁴⁶⁰ In the Panel's view, however, the gravity or severity of an "emergency in international relations" within the meaning of Article XXI(b)(iii), particularly regarding the impact on international relations of situations falling under that provision, has not been established based on the evidence and arguments submitted in this dispute. In reaching this conclusion, the Panel is mindful of its mandate in this dispute⁴⁶¹ as well as the balance of rights and obligations reflected in the terms of Article XXI of the GATT 1994 interpreted in accordance with the DSU.

7.8.4 Conclusion

7.137. In conclusion, the Panel does not find, based on the evidence and arguments submitted in this dispute, that the measures at issue were "taken in time of war or other emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994. Therefore, the Panel finds that the inconsistencies of the measures at issue with Articles I:1, II:1, and XI:1 of the GATT 1994 are not justified under Article XXI(b)(iii) of the GATT 1994.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

- a. Regarding Norway's claims under Article II of the GATT 1994, the additional duties of 25% on steel products and 10% on aluminium products do not accord the treatment provided for in the United States' Schedule, contrary to Article II:1(b) and Article II:1(a) of the GATT 1994.
- b. Regarding Norway's claims under Article I of the GATT 1994, the country exemptions for steel and aluminium products confer an advantage to products from Australia, Argentina, Brazil, and the Republic of Korea that has not been accorded immediately and unconditionally to like products from all other Members, in a manner inconsistent with Article I:1 of the GATT 1994.
- c. Regarding Norway's claims under Article XI:1 of the GATT 1994, by imposing import quotas on steel and aluminium products from Argentina, Brazil, and the Republic of Korea, the United States has instituted prohibitions or restrictions other than duties, taxes or other charges on the importation of those products of the territory of those Members, inconsistently with Article XI:1 of the GATT 1994.
- d. Regarding Norway's claims under Article X of the GATT 1994, the Panel does not consider it necessary to make findings on Norway's claims relating to the administration of the processes for excluding certain countries or products from measures that have already been found inconsistent with other obligations under the GATT 1994. The Panel therefore declines to make findings regarding the claims under Article X:3(a) of the GATT 1994.

⁴⁶⁰ The United States refers to other evidence that similarly reflects expressions of concern in the context of specific international initiatives. For example, the United States refers to remarks by the EU Commissioner for Trade at the OECD High-Level Symposium on Steel expressing concerns on steel overcapacity while noting ongoing interventions as well as recommendations for international cooperation. (Remarks dated 18 April 2016 of C. Malmström, "Way ahead for the global steel industry", OECD High-Level Symposium on Steel, (Exhibit USA-240)). The statement of the chairperson of the OECD Ministerial Council Meeting addressed multiple topics related to "[r]eshaping the foundations of multilateralism for more responsible, effective and inclusive outcomes", including a series of points reflecting the chairperson's understanding of the views of OECD members on "[i]nternational trade and investment for strong and inclusive growth". In this context, the chairperson of the OECD Ministerial Council Meeting referred to "the view that severe excess capacity in key sectors such as steel and aluminium are serious concerns" and, "[t]o address this critical concern", indicated an agreement "to enhance cooperation in the WTO and in other fora, as appropriate". (Statement of the Chair of the OECD Ministerial Council Meeting (2018), (Exhibit USA-246), p. 5). The Charlevoix G7 Summit Communiqué similarly addresses a number of topics of international engagement and international economic concerns, which includes G7 leaders "call[ing] on all members of the Global Forum on Steel Excess Capacity to fully and promptly implement its recommendations" while "stress[ing] the urgent need to avoid excess capacity in other sectors such as aluminium and high technology". (Charlevoix G7 Summit Communiqué (9 June 2018), (Exhibit USA-247), p. 2).

⁴⁶¹ See section 7.1 above.

- e. Regarding Norway's claims under the Agreement on Safeguards, the Panel finds that the relevant measures at issue were sought, taken, or maintained pursuant to a provision of the GATT 1994 other than Article XIX, namely Article XXI of the GATT 1994, within the meaning of Article 11.1(c) of the Agreement on Safeguards. The Panel therefore finds that the Agreement on Safeguards does not apply to the measures at issue.
- f. Regarding Article XXI of the GATT 1994, the Panel does not find that the measures at issue were "taken in time of war or other emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994. The Panel therefore finds that the inconsistencies of the measures at issue with Articles I:1, II:1, and XI:1 of the GATT 1994 are not justified under Article XXI(b)(iii) of the GATT 1994.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. The Panel concludes that, to the extent that the measures at issue are inconsistent with certain provisions of the GATT 1994, they have nullified or impaired benefits accruing to Norway under that Agreement.

8.3. Pursuant to Article 19.1 of the DSU, the Panel recommends that the United States bring its WTO-inconsistent measures into conformity with its obligations under the GATT 1994.
