

IN THE WORLD TRADE ORGANIZATION

*United States – Certain Measures on Steel and
Aluminium Products
(WT/DS552)*

**Norway's Closing Statement at the First Substantive
Meeting of the Panel with the Parties**

7 NOVEMBER 2019

1. Norway thanks the Panel, the Secretariat and our US colleagues for a productive discussion over the past two days.
2. One overriding issue has animated our discussion: the standard of review to be applied where a responding Member has invoked Article XXI(b) as an affirmative defence. This question is crucial: the United States has not demonstrated that its measures fall under one of the subparagraphs; and it has not submitted any explanation or evidence to substantiate its consideration that its measures are necessary for the protection of its essential security interests.
3. If, therefore, the Panel *disagrees* with the United States that the standard of review is that Article XXI(b) is “self-judging” – that is, if it finds that the standard of review is *anything greater* than total deference – the United States must lose. The United States has not submitted any explanation or evidence to substantiate that its measures meet the legal conditions in Article XXI(b), including the conditions in both the chapeau and the subparagraph it relies on. The United States made a similar observation about Russia’s failure, having “invoked” Article XXI(b) in *Russia – Traffic in Transit*, to “substantiate” its defence.¹ The United States explained to the DSB that a panel may not “make the case” for a Member that has invoked but declined to substantiate a defence under Article XXI(b).²
4. The United States’ interpretive argument on the standard of review under Article XXI(b) must fail. To succeed, the United States must prevail on two key interpretive issues. *First*, the Panel would have to agree with the United States that the phrase “which it considers” *applies* to all of the subsequent words in the provision – including the subparagraphs. *Second*, the Panel would *also* have to agree with the United States that the legal effect of this phrase is to render all the terms to which it applies *entirely self-judging*. Only then would the Panel’s review be reduced to total deference.
5. Earlier today, the Panel asked the parties about the consequence of accepting the United States’ first argument: that is, what is the consequence for a panel’s standard of review *if* the phrase “which it considers” applies to the subparagraphs, as the United States asserts. Norway does not subscribe to this interpretation. Nonetheless, Norway explained

¹ See Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, April 26, 2019, (**Exhibit NOR-83**), Section 8.A, pp. 14-15.

² See Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, April 26, 2019, (**Exhibit NOR-83**), Section 8.A, pp. 14-15 (emphasis added).

that, *even then*, a panel would still be required to exercise review over a respondent's invocation of Article XXI(b). Specifically, for the same reason that the phrase "which it considers" does not render the *chapeau* "self-judging", the application of that phrase to the subparagraphs would also not render the terms in the subparagraphs "self-judging". The panel would still be required to assess whether the respondent has undertaken the requisite consideration under *both* the *chapeau* and the *subparagraphs*, and given effect to each of the chosen terms. In that event also, the United States has not *substantiated* that its measure meets the legal conditions in Article XXI(b), including in this dispute settlement process.

6. For the purposes of this dispute, and the defence presented by the United States, the ultimate question for the Panel is simple: is the standard of review under Article XXI(b) anything greater than total deference? If the answer is yes – which it must be, to give effect to the terms of Article XXI(b) – then Norway must prevail, because the United States has declined to substantiate its defence.

7. Thank you again for your attention.