World Trade Organization

Panel Proceedings

Indonesia – Importation of Horticultural Products, Animals and Animal Products

WT/DS477

WT/DS478

Third Party Oral Statement

by

Norway

at the Third Party Session of the Panel

Geneva, 2 February 2016

Mr. Chair, Members of the Panel,

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings. In this statement I will not repeat the arguments presented by Norway in its written submission, but rather take this opportunity to offer our observations on two other issues of relevance to this dispute: Firstly, I will address the availability of the GATT 1994 Article XX to Article 4.2 of the Agreement on Agriculture. Secondly, I will comment on the possible exercise of judicial economy in this dispute. Before concluding, I will very briefly touch upon one of the advance questions posed by the Panel.

2. I will begin by addressing the availability of GATT Article XX to Article 4.2 of the Agreement on Agriculture. From the outset, the chapeau of GATT Article XX explicitly refers back to the GATT itself, by underlining that "nothing in this Agreement shall be construed to prevent the adoption or enforcement" of the specific measures listed in the provision. However, the Appellate Body has held that Article XX could be invoked as a defence in relation to non-GATT provisions as well.[1]

3. Certain covered agreements contain a cross-reference to Article XX, such as the TRIMS Agreement, which explicitly incorporates the right to invoke all exceptions of the GATT 1994. In this regard, Norway notes that the panel in *Raw Materials* stated that "the legal basis for applying Article XX exceptions to TRIMs obligations is the text of the incorporation of the TRIMs Agreement, not the text of Article XX of the GATT 1994".[2] Other covered agreements include their own exceptions or provide for their own flexibilities, such as the GATS, TRIPS, the TBT Agreement and the SPS Agreement.

[1] See, e.g., Appellate Body Report, *China – Publications and Audiovisual Products,* WT/DS363/AB/R, para 233.
[2] Panel Report, *Raw Materials*, para. 7.153.

4. In its first written submission, Indonesia invokes Article XX of the GATT 1994 as an exception to the Agreement on Agriculture Article 4.2.[3] According to Indonesia, this interpretation was confirmed by the panel in *Chile – Price Band Systems*.

5. WTO case law provides limited guidance as regards the relationship between GATT Article XX and the Agreement on Agriculture. Norway would therefore welcome clarifications from the Panel on this issue. It is also a matter of importance as both Article XI of the GATT and Article 4.2 of the Agreement on Agriculture deal with quantitative restrictions.

6. We note that the Agreement on Agriculture contains neither general exceptions clauses nor a cross-reference to the GATT 1994 exceptions as in the TRIMS Agreement. We agree with Indonesia that footnote 1 to Article 4.2 provides guidance on the scope of the article. However, we do not necessarily read the footnote as providing for Article XX being a *legal basis* for an exception that a WTO Member may invoke *as such* to justify violations of Article 4.2. In *Chile – Price Bands*, the panel referred to footnote 1 of Article 4.2 as "excluding from the scope of Article 4.2 those measures which Members are allowed to maintain in accordance with the provisions in GATT 1994 laying down exceptions to the general obligations of GATT 1994"[4]. In light of this, it is in our view possible to interpret footnote 1 to clarify the flexibilities that exist in Article 4.2 itself. As measures covered by the exceptions provisions of the GATT 1994 are *excluded from the scope* of Article 4.2, refraining from such measures is not part of the obligation in Article 4.2. In other words, such measures would therefore not constitute a violation of Article 4.2.

7. Mr. Chair, I will now turn to Indonesia's request that the Panel should exercise judicial economy with respect to claims under Article XI:1 of GATT if it finds no violation of Article 4.2 of the Agreement on Agriculture.[5] The Appellate Body has noted that the principles of judicial economy "allows a panel to refrain from making

[3] Indonesia's First Written Submission, paras. 61-62.
[4] Panel Report, *Chile – Price Band Systems*, para. 7.71.
[5] Indonesia's First Written Submission, paras. 45-46.

multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute".[6] From a systemic perspective, we acknowledge that exercising judicial economy can also be a useful tool in addressing challenges related to the comprehensive delays and heavy workload that the WTO dispute settlement system is facing.

8. However, as stated by the Appellate Body, "[t]he principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and 'to secure a positive solution to a dispute'".[7] Hence, the doctrine of judicial economy does not permit a panel to refrain from addressing claims when this would lead to only a partial resolution of the matter. Such failure would constitute false exercise of judicial economy and an error of law.[8] Like Brazil in its third party submission, Norway points out that there is a difference in scope between the Article XI of the GATT 1994 and Article 4.2 of the Agreement on Agriculture "which may require a different assessment by a Panel".[9]

9. Before concluding, Mr. Chair, Norway would like to take the opportunity to comment on one of the advance questions posed by the Panel, namely the third question concerning paragraph 119 of Indonesia's first written submission. Our understanding is that Indonesia further elaborates on this in paragraph 138 of its first written submission. In this regard, Norway would simply like to refer to its third party written statement, which we have devoted to address this matter.

Mr. Chair, Members of the Panel,

10. This concludes Norway's statement here today. Thank you.

[6] Appellate Body Report, *Canada – Wheat Exports and Grain Exports*, para. 133.
[7] Appellate Body Report, *Australia – Salmon*, para. 223.
[8] Appellate Body Report, *Australia – Salmon*, para. 223; Appellate Body Report, *Canada – Wheat Exports and Grain Exports*, para. 133.
[9] Brazil's Third Party Submission, para. 6.