As delivered

IN THE WORLD TRADE ORGANIZATION

United States — Certain Tax Credits Under the Inflation Reduction Act
WT/DS523

Third Party Oral Statement
by
Norway

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EC – Seal Products	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, adopted 18 June 2014.
Russia – Traffic in Transit	Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R and Add.1, adopted 26 April 2019.
Saudi Arabia - IPRs	Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/R and Add.1, circulated to WTO Members 16 June 2020.
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US – Steel and Aluminium Products	Panel Report, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS544/R, Add.1 and Suppl.1, circulated to WTO Members 9 December 2022, appealed 26 January 2023 Panel Report, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS552/R, Add.1 and Suppl.1, circulated to WTO Members 9 December 2022, appealed 26 January 2023 Panel Report, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS556/R, Add.1 and Suppl.1, circulated to WTO Members 9 December 2022, appealed 26 January 2023 Panel Report, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS564/R, Add.1 and Suppl.1, circulated to WTO Members 9 December 2022, appealed 26 January 2023

I. INTRODUCTION

Madam Chair, Members of the Panel,

1. Norway welcomes the opportunity to present its views as a third party in this dispute. This dispute raises, *inter alia*, issues of systemic importance with regard to the interpretation and applicability of the security exception of Article XXI of the GATT 1994, which will be the focus of Norway's statement.

2. As the work of the Dispute Settlement Mechanism directly concerns the upholding of the rules based international order, we also find it appropriate and pertinent to address the situation in Ukraine.

3. Norway condemns in the strongest possible terms the Russian Federation's illegal war of aggression against Ukraine. Norway demands Russia to end its hostilities and withdraw its forces immediately and unconditionally from Ukraine's internationally recognised territory.

4. Turning to the present dispute, Norway did not present a written third party submission to the Panel, and without taking a position on the facts of this dispute, Norway will confine its statement to the following points: first, the applicability of Article XXI of the GATT 1994 to the *SCM Agreement*; second, the interpretation of Article XXI; and third, the order of analysis the Panel should apply. For the avoidance of doubt, Norway will not contest the United States' assertion that Article XXI of the GATT 1994 is applicable to the *TRIMS Agreement*.

II. INAPPLICABILITY OF ARTICLE XXI TO THE SCM AGREEMENT

5. At the outset, it is important to recall that Article XXI of the GATT 1994 offers a potential justification for violations of the GATT 1994 alone, as made clear by the opening words of the provision, "Nothing in *this* Agreement shall…".[1] On its face, it does not justify a violation of an agreement other than the one referenced by the demonstrative "this", *i.e.*, the GATT 1994.

6. When Members intended a GATT 1994 exception to apply to another covered agreement, they included express language to that effect, as they did in the *TRIMS Agreement*,

[1] Emphasis added.

the *Import Licensing Agreement* and the *Trade Facilitation Agreement*.[2] However, no such language renders Article XXI of the GATT 1994 available as a justification for a violation of the *SCM Agreement*; the *SCM Agreement* contains no express reference to Article XXI of the GATT 1994.

7. The United States asserts that the *SCM Agreement* "includes numerous references to the GATT 1994", most notably in Article 32.1 of the *SCM Agreement* where it is stated: "No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement".[3] However, as also pointed out by Brazil in their third party submission,[4] taking an action against a subsidy of another Member is a different situation than the one at hand, where it is the United States who has adopted a national subsidy. In other words, Article 32.1 determines how Members may respond to another Member's subsidies, not the other way around.

8. The United States also asserts that, as the Marrakesh Agreement is an umbrella, Article XXI of the GATT 1994 applies to all the multilateral agreements on trade in goods listed in Annex 1 (including the *SCM Agreement*).[5] If the US view were permitted, the words "this Agreement" in Article XXI would serve no purpose, and the explicit incorporation of the GATT 1994 exceptions in certain other goods agreements would be redundant.

III. INTERPRETATION OF ARTICLE XXI

9. The United States asserts that, properly interpreted, Article XXI is self-judging.[6] Norway disagrees. While Norway accepts that Article XXI confers discretion on Members to protect their essential security interests, this discretion is not unlimited. In particular, properly interpreted, (i) the three subparagraphs set out objectively verifiable circumstances which a respondent must demonstrate; and (ii) the words "it considers" accord the respondent some, but not unlimited, discretion with respect to the choice of the "action" to which the *chapeau* refers. A Member invoking Article XXI(b) carries the burden to prove the elements of the defence in both the *chapeau* and, at least, one subparagraph. The panels in *Russia – Traffic in*

[2] TRIMS Agreement, Article 3; Import Licensing Agreement, Article 1.10; Trade Facilitation Agreement, Article 24.7.
[3] The United States' first written submission, para. 147.
[4] Brazil's third party written submission, para. 24.
[5] The United States' first written submission, para. 164.
[6] The United States' first written submission, Section IV. A.

Transit, US – Steel and Aluminium Products and *US — Origin Marking (Hong Kong, China)* all share Norway's view.[7]

a. Analysis under subparagraph (iii)

10. The three subparagraphs under Article XXI(b) set out "objective fact[s]" that are "amenable to objective determination".[8] In other words, the respondent must demonstrate with evidence, and the Panel must assess, the existence of the facts referenced in the subparagraphs in an objective manner. Specifically, under subparagraph (iii), the existence of a "war or other emergency in international relations" needs to be demonstrated objectively.

11. The United States argues that the self-judging nature of Article XXI(b) is established by the phrase "which it considers" in the *chapeau,* in its context, and in the light of the treaty's object and purpose.[9] Furthermore, the United States argues that this interpretation is confirmed by the Uruguay Round negotiating history.[10] As a result, United States asserts that the respondent is free to decide for itself if the requirements in one or more of the subparagraphs are met. The United States has not substantiated their interpretive assertion, but in a footnote they refer to the interpretive arguments put forth by the United States in their First Written Submission in *United States – Origin Marking (Hong Kong, China) (Panel) (US-71).* In any event, the United States' interpretation is erroneous.

12. The verb "consider" qualifies the terms of the *chapeau*; it does not qualify any words in the three subparagraphs. This flows from an interpretation of the words of Article XXI(b), in line with the rules of English grammar, and in a manner that ensures consistency among the various language versions.

13. Properly interpreted, each of the three subparagraphs qualifies the word "action", and <u>not</u> the words "essential security interests". This follows from the text, context, object and purpose, and negotiating history of Article XXI(b).

[7] See Panel Report, *Russia – Traffic in Transit,* paras 7.102-7.103; Panel Report, *US – Steel and Aluminium Products (China)* para. 7.128; Panel Report, *US – Steel and Aluminium Products (Norway)* para. 7.116; Panel Report, *US – Steel and Aluminium Products (Switzerland)* para. 7.146; Panel Report, *US – Steel and Aluminium Products (Turkey)* para. 7.143; and Panel Report, *US — Origin Marking (Hong Kong, China)* para. 7.185.
[8] Panel Report, *Saudi Arabia – Protection of Intellectual Property Rights,* para. 7.244; Panel Report, *Russia – Traffic in Transit,* para. 7.712. See also the European Union's third party submission, paras 62-63.
[9] The United States' first written submission, para. 47.
[10] Ibid.

14. In particular, the US view is irreconcilable with the Spanish version of the text, in which the term "relativas" (relating) can only qualify the word "medidas" ("action"); and, the *chapeau* / subparagraphs are broken by a comma.

15. The *Vienna Convention* requires that treaty terms be given their "ordinary meaning". There is nothing "ordinary" about a meaning premised on the United States' arguments that entail inconsistency and incoherence, which even the United States in their written submission in *US — Origin Marking (Hong Kong, China)* called "less in line with rules of grammar and conventions".[11] Instead of this strained interpretation, the ordinary meaning dictates that each of the subparagraphs modifies the same noun – "action" – which ensures interpretive consistency and coherence. The subparagraphs are not qualified by other words in the *chapeau*. When accounting for all the words in the text, the Spanish version confirms the English and French versions: the subparagraphs modify the noun "action".

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

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

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

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

18. In light of these considerations, it should be clear that the assessment of whether the Member's action is taken in time of war or other emergency in international relations cannot

[11] See the United States' first written submission, para. 163, in *US — Origin Marking (Hong Kong, China)*.

be modified by the phrase "which it considers". Thus, there is no basis for arguing that the subparagraph is self-judging.

19. Norway also notes that the United States has not indicated which particular subparagraph they consider applicable as a justification of its measure, and as a consequence they have not presented the reasons why one of the particular subparagraphs would be applicable. It follows from the reasons stated that a Member cannot invoke Article XXI(b) without indicating the subparagraph which justifies the measure and without proving the elements of the defence pertaining to that subparagraph. If the US view were permitted, the subparagraphs would serve no purpose.

20. Further, what matters under subparagraph (iii) – which seems to be the relevant alternative the Panel should assess in this matter – is whether an emergency has, objectively, been shown to exist, on the facts. This is a matter for objective determination by the Panel.

b. Analysis under the *chapeau*

21. If the Panel finds that the requirements of subparagraph (iii) are met, the respondent must demonstrate, under the *chapeau*, that it "considers" the "action" "necessary for the protection of its essential security interests".

22. Although the words "which it considers", in the *chapeau*, establish a degree of deference, the standard of review is not *total deference*. Rather, as past panels have established, the terms of the *chapeau* require a respondent to substantiate a plausible basis in support of its consideration. Specifically, a respondent must:

> *First*, articulate "its essential security interests", so as to allow a panel to assess whether the asserted "interests" rise to the level of "essential" "security" interests;[12]
>
> *Second*, set out, with argument and evidence, a plausible basis on "which it considers" there to be a "clear and objective" relationship between the "action" and the protection of the articulated essential security interest, such that the measure is apt to make a "material contribution" to the objective at stake.[13]

[12] Panel Report, *Russia – Traffic in Transit*, para. 7.131; Panel Report, *Saudi Arabia – Protection of Intellectual Property Rights*, para. 7.247.
[13] Panel Report, *Russia – Traffic in Transit*, para. 7.139; Panel Report, *Saudi Arabia – Protection of Intellectual Property Rights*, para. 7.252.

23. By arguing that a panel must afford an invoking Member total deference without providing any explanation or evidence to support its argument, the United States deprives the terms of the *chapeau* of their meaning. The *chapeau* comprises a series of words and phrases, each of which must be given their own meaning, with each constraining a respondent's action. These are: "action", "which it considers", "necessary", "for the protection of" and "essential security interests". As Norway has explained, the treaty interpreter cannot interpret two of these words ("it considers") in a way that deprives the others of their meaning.

IV. ORDER OF ANALYSIS

24. The United States argues that Article XXI does not contain any requirement that a Member invoking the essential security exception must justify its invocation because of the "self-judging nature of Article XXI(b)".[14] Thus, in the United States' view, the Panel should make no other finding with respect to the "FEOC exclusionary rule" than "to note in the Panel's report that the United States has invoked its essential security interests".[15] Norway disagrees with this view.

25. Article XXI(b) operates to justify certain GATT-inconsistent actions, using the same language as Article XX: "nothing in this Agreement shall be construed to prevent any Member from taking any action which…". Hence, Article XXI(b) is, just like Article XX, an affirmative defence to a violation of the GATT 1994. Under Article XX, panels and the Appellate Body have, without exception, addressed first whether the complainant has made out its claims of WTO-inconsistency; and second whether the respondent has made out its affirmative defence that the measures are justified. This is because an affirmative defence is only relevant where a panel has found a violation. If there is no violation, then the relevant exceptions provision has no operative role; there is nothing to justify in the first place. Logically, therefore, where a respondent invokes Article XXI(b), the panel should first confirm whether there is a violation; and second whether the violation is justified.

26. Moreover, it is well-accepted, from jurisprudence under Article XX of the GATT 1994, that it is the WTO-inconsistent aspect of the measure – and not the measure as a whole – which must be justified.[16] Of course, a panel cannot identify the WTO-inconsistent aspects

[14] The United States' first written submission, para. 52.
[15] Ibid.
[16] Appellate Body Report, *US – Gasoline*, pp. 13-14; Appellate Body Report, *Thailand – Cigarettes*, para. 177; Appellate Body Reports, *EC – Seal Products*, para. 5.185.

of a measure that would require justification, until it has addressed the claims. Hence, in our view, it is clear that the same reasoning must apply with respect to the other exceptions provisions applicable under the GATT 1994. By contrast, if a panel were obliged to address Article XXI(b) before addressing the claims, it would also have to assess whether the measures are justified in a vacuum, without yet having determined which aspects of the measures are WTO-inconsistent.[17]

V. CONCLUSION

27. This concludes Norway's statement. Thank you.

[17] In our view, the panel in *Russia – Traffic in Transit* erred by departing from the accepted order of analysis under "exceptions provisions" in the GATT 1994.