(As delivered)

IN THE WORLD TRADE ORGANIZATION

United States — Origin Marking Requirement
WT/DS597

Third Party Oral Statement
by
Norway

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Table of cases cited in this submission

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.
Thailand – Cigarettes	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011.
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline,* WT/DS2/R, adopted 20 May 1996.

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 issues of systemic importance with regard to the interpretation and applicability of the security exception of Article XXI of the GATT 1994.

2. 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 Agreement of Rules of Origin and the TBT Agreement respectively; second, the interpretation of Article XXI; and third, the order of analysis the Panel should apply.

II. INAPPLICABILITY OF ARTICLE XXI TO THE AGREEMENT ON RULES OF ORIGIN AND THE TBT AGREEMENT

3. 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.

4. 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 Import Licensing Agreement, the TRIMS 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 neither the Agreement on Rules of Origin nor the TBT Agreement.

5. The United States 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.[3] If the US view were permitted, the words "this Agreement" in Article XXI would

[1] Emphasis added.
[2] Import Licensing Agreement, Article 1.10; TRIMS Agreement, Article 3; Trade Facilitation Agreement, Article 24.7.
[3] The United States' first written submission, para. 269.

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

6. The United States asserts that, properly interpreted, Article XXI is self-judging.[4] 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 sub-paragraphs 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 only two panels to have adjudicated the security exception share Norway's view.

a. Analysis under sub-paragraph (iii)

7. The three sub-paragraphs under Article XXI(b) set out "objective fact[s]" that are "amenable to objective determination".[5] In other words, the respondent must demonstrate with evidence, and the Panel must assess, the existence of the facts referenced in the sub-paragraphs in an objective manner. Specifically, under sub-paragraph (iii), the existence of a "war or other emergency in international relations" needs to be demonstrated objectively.

8. The United States argues that the subparagraphs are modified by the phrase "which it considers" in the *chapeau* and, as a result, the respondent is free to decide for itself if the subparagraphs are met.[6] The United States errs.

9. The verb "consider" qualifies the terms of the *chapeau*; it does not qualify any words in the three sub-paragraphs. 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.

10. 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

[4] The United States' first written submission, Section A.
[5] Panel Report, *Saudi Arabia – Protection of Intellectual Property Rights*, para. 7.244; Panel Report, *Russia – Traffic in Transit*, para. 7.712.
[6] The United States' first written submission, para. 48.

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

11. The United States acknowledges this interpretation of the Spanish version of Article XXI.[7] However, rather than to interpret the three equally authentic language versions of the GATT 1994 in a coherent and consistent manner, the United States opts to reject the Spanish version and construes its interpretation of the English and French versions in a way that serves their purpose.

12. The *Vienna Convention* requires that treaty terms be given their "ordinary meaning". There is nothing "ordinary" about a meaning premised on US arguments that entail inconsistency and incoherence, which even the United States calls "less in line with rules of grammar and conventions".[8] 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".

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

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

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

14. 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.

[7] The United States' first written submission, para. 165.
[8] The United States' first written submission, para. 163.

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.

15. As pointed out by Switzerland in its written third party submission, even the United States acknowledges that subparagraph (iii) relates to the term "action" in the chapeau.[9] Consequently, it is undisputed that the assessment of whether the Member's action is taken in time of war or other emergency in international relations cannot be modified by the phrase "which it considers". Thus, there is no basis for arguing that the sub-paragraph is self-judging.

16. In sum, what matters under sub-paragraph (iii) is whether an emergency has, objectively, been shown to exist, on the facts. This is a matter for objective determination by the Panel, and not a question of what the United States "considers".

b. Analysis under the *chapeau*

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

18. 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;[10]
>
> *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.[11]

19. 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

[9] Switzerland's third party submission, para. 12, referring to the United States' first written submission, para. 45.
[10] Panel Report, *Russia – Traffic in Transit*, para. 7.131; Panel Report, *Saudi Arabia – Protection of Intellectual Property Rights*, para. 7.247.
[11] Panel Report, *Russia – Traffic in Transit*, para. 7.139; Panel Report, *Saudi Arabia – Protection of Intellectual Property Rights*, para. 7.252.

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

20. The United States argues that the Panel should begin its analysis by "addressing the invocation by the United States of Article XXI(b)".[12] In support, the United States refers to what it calls the "self-judging nature of that provision" and that the Panel should make no other finding in its report than to note its understanding of Article XXI and the United States' invocation of the provision.[13] Norway disagrees with this view.

21. Article XXI(b) operates to justify certain GATT-inconsistent action, 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.

22. 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.[14] Of course, a panel cannot identify the WTO-inconsistent aspects 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

[12] The United States' first written submission, para. 328.
[13] Ibid.
[14] Appellate Body Report, *US – Gasoline*, pp. 13-14; Appellate Body Report, *Thailand – Cigarettes*, para. 177; Appellate Body Reports, *EC – Seal Products*, para. 5.185.

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.[15]

V. CONCLUSION

23. Norway respectfully requests the Panel to take account of the considerations set out above when evaluating the claims set forth in this dispute.

24. Thank you.

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[15] 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.