As delivered

IN THE WORLD TRADE ORGANIZATION

Before the Appellate Body

India – Certain Measures relating to Solar Cells and Solar Modules (AB-2016-3/DS456)

Oral Statement
by
Norway as a Third Party

Geneva
4-5 July 2016

Mr. Chairman, Members of the Division,

1. Norway welcomes the opportunity to make a statement before the Appellate Body in this appeal. Norway did not present a written third party submission to the Appellate Body, and will therefore in this oral statement set out its views on three legal issues; *firstly* the interpretation of "procurement" of "products purchased" in GATT Article III:8(a), *secondly* the competitive relationship-test in that same provision and, *thirdly,* briefly set out our views on the interpretation of the term "laws and regulations" in GATT Article XX(d).

2. GATT Article III:8(a) provides for an exception to the national treatment obligation in GATT Article III, stating that Article III "shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale".

3. In its appeal, India seems to separate the concepts of "purchase" and "procurement" in GATT Article III:8(a) as two different grounds on which the exception from the national treatment obligation may apply. In doing this, India argues that the exception may apply in a situation where there is no actual purchase of goods.[1]

4. Norway disagrees with this interpretation. As held by the Appellate Body in *Canada - FIT* and the panel in this case, "procurement" means the process pursuant to which a government purchases products.[2] For the exception in Article III:8(a) to apply, both conditions must be fulfilled. Accordingly, Article III:8(a) does not provide for an exception from the national treatment obligation unless there is an actual purchase.

5. Next, I will turn to the assessment of the relationship between "products purchased" and the products discriminated against. In *Canada – FIT*, the Appellate Body found that "the product of foreign origin allegedly being discriminated against must be in a competitive relationship with the product purchased", in order for the derogation of Article III:8(a) to apply. In that case, the products discriminated against because of their origin were

[1] India`s Appellate Submission, paragraph 22.
[2] Appellate Body Report 2013-1, Canada — Certain Measures Affecting the Renewable Energy Generation Sector (*Canada – FIT)*, paragraph 5.59.

generation equipment, while the product procured was electricity. The Appellate Body thus found that these products were not in a competitive relationship with each other. Accordingly, the relevant measures were not covered by Article III:8(a).[3] In its report, the panel in this case held that it could not see that this case differs from *Canada – FIT* in any relevant respect, and concluded that the exception in Article III:8(a) was not applicable.

6. India, on the other hand, argues that this would be an unduly restrictive interpretation of Article III:8(a) and that the competitive relationship test is not the only test that can be used to determine the application of Article III:8(a). India holds that solar cells and modules may be characterized as input to solar power generation and argues that the Appellate Body in *Canada – FIT,* paragraph 5.63, left open the possibility of a separate analysis.[4]

7. Norway does not concur with this interpretation of the Appellate Body`s reasoning. Rather, Norway understands the Appellate Body`s reasoning on this point to be that an *input* may be relevant in the assessment of what constitutes *the like product* for a competitive relationship analysis. As always, the relevant test is whether the products purchased are in a competitive relationship with the products discriminated against.

8. Moreover, we are concerned about the potential diluting of the national treatment obligation if the scope of the procurement exception in Article III:8(a) is interpreted as India suggests. Such an interpretation could, as the European Union points out with numerous examples in its written observations, extend protectionism through the supply chain.[5]

9. Lastly, Norway would like to comment briefly on the interpretation of GATT Article XX(d). The US, referring to the Panel Report, argues in its appellee submission that only rules that are "legally enforceable" are "laws and regulations" within the meaning of Article XX(d).[6] In this respect, Norway recalls that the diversity of the legal systems of WTO Members is very wide. Like the European Union, we are not convinced that the

[3] Appellate Body Report 2013-1, paragraphs 5.63 and 5.79.
[4] India`s Appellant Submission, paragraphs 9-17.
[5] EU Third Party Submission, paragraphs 31-33.
[6] US Appellee Submission, paragraph 157. Panel Report in DS416/DS426 Canada — Certain Measures Affecting the Renewable Energy Generation Sector *(Canada – FIT)*, paragraph 7.311.

term "laws and regulations" should cover only legally enforceable rules, especially if this term is understood to the effect that rules must be enforceable against individuals. Thus, we would advocate a cautious approach to this interpretative issue.

10. Thank you.