IN THE WORLD TRADE ORGANISATION

Argentina – Measures Affecting the Importation of Goods

(AB-2014-9/WT/DS438, DS444, DS445)

Oral Statement
by
Norway as a Third Participant

Geneva
3 November 2014

Mr. Chairman, Members of the Division,

I. Introduction

1. Norway welcomes the opportunity to make a statement as a Third Participant before the Appellate Body in this appeal. We will not today address all the issues that are raised by the parties, but rather focus on one point of systemic importance, relating to Article VIII and Article XI:1 of the GATT 1994.

2. Argentina claims that the Panel erred in its interpretation of these two articles as they pertain to The Advance Sworn Import Declaration (*Declaración Jurada Anticipada de Importación,* DJAI) procedure.[1] Amongst the questions that arise from Argentina's appeal on this point, Norway will focus on the following two:

   - *First;* Is the scope of Article XI:1 limited by Article VIII? and
   - *Second;* Whether Article XI:1 properly interpreted requires a distinction to be made between the trade restrictive effect of different measures?

II. The scope of Article XI:1 is not limited by Article VIII

3. Argentina contends that Article VIII and Article XI:1 "must be interpreted as mutually exclusive in their respective spheres of application in order to ensure that Members are allowed to maintain the types of import formalities and requirements that Article VIII expressly contemplates".[2] The way Argentina sees it, "it cannot be the case that measures that are permitted under Article VIII are categorically prohibited three articles later".[3] Argentina thus submits that the scope of Article XI:1 must be limited by that of Article VIII. Norway disagrees with this.

4. As the Panel noted, the terms of Article XI:1 indicates that the provision "covers all measures that constitute import and export prohibitions or restrictions regardless of the means by which they are made effective" - except measures in the form of duties, taxes or other charges.[4] In addition, the Panel rightly found that Article XI:1 "does not distinguish among categories of import and export prohibitions or restrictions", but refers to such

[1] Argentina's Appellant Submission, part IV.
[2] Argentina's Appellant Submission, para. 205.
[3] Argentina's Appellant Submission, para. 221.
[4] Panel Report, para. 6.435.

measures in general.[5] Norway agrees with the Panel that Article XI:1 cannot be read as *a priori* excluding import procedures and formalities from its scope.[6] Such an interpretation would have required us to read into the provision words and limitations that are not there. This would not be in line with the principles of treaty interpretation that panels and the Appellate Body are guided by.

5. Furthermore, Argentina's assertion that Article VIII and Article XI:1 are mutually exclusive, presupposes conflict between the two provisions. Previous panels have observed that there is a presumption against conflict in international law, and especially in the WTO context, as "all WTO agreements were negotiated at the same time, by the same Members and in the same forum". Norway agrees with the Panel that rather than assuming that Article VIII and Article XI:1 are mutually exclusive, it should be assumed that they apply in a cumulative and harmonious manner.

6. A proper interpretation of Article VIII confirms our view that it is not in conflict with Article XI:1, but that the two provisions should be complied with simultaneously and harmoniously. Article VIII does not impose any specific legal obligations applicable to other measures than fees and charges and some penalties. Article VIII:1(c), that addresses one type of import formalities and requirements, does not include any mandatory language at all. Contrary to what Argentina asserts, it does not "expressly acknowledges the right of Members to maintain import formalities and requirements".[7] Instead, the wording in paragraph 1(c) is of a hortatory character, and does not indicate any discipline for import formalities and requirements, to which the Members must adhere.

7. Thus, if Article VIII and Article XI:1 were to be mutually exclusive, as Argentina claims, it would result in there being no WTO discipline for import formalities and requirements with a trade restrictive effect. In our view, such an interpretation would be at odds with the principle of effective and harmonious treaty interpretation.

[5] Panel Report, para. 6.435.
[6] Panel Report, para. 6.435.
[7] Argentina's Appellant Submission, para. 221.

III. Article XI:1 properly interpreted does not require a distinction to be made between the trade restrictive effect of different measures

7. Another line of argument by Argentina is that Article XI:1 does not apply to import formalities or restrictions that do not fulfill two specific conditions. The first condition requires that the trade restrictive effect of the import formality or requirement is distinguished from that of any substantive rule that the formality or requirement implements. The second condition calls for an assessment of the degree of the trade-restrictive effect of the import formality or requirement, something that would imply a different standard than for other measures.[8] Argentina frames these two conditions as constituting the proper analytical framework for distinguishing between the scope and disciplines of Article VIII, on the one hand, and the scope and disciplines of Article XI:1, on the other.[9]

8. This proposed analytical framework has no basis in the text of Article XI:1. As already observed, except for duties, taxes and other charges, Article XI:1 "covers all measures that constitute import and export prohibitions or restrictions". In addition, the provision does not distinguish between different categories import and export prohibitions and restrictions, but applies generally to such measures.[10]

9. Moreover, the framework does not find the necessary support in jurisprudence. The panel reports referred to in the Appellant Submission of Argentina[11], simply confirms a view that the challenged measure *itself* must have trade restrictive effects, and that such effects caused by other measures, including underlying measures, not necessarily should be attributed to it.[12]

[8] Argentina's Appellant Submission, para. 223.
[9] See e.g. Argentina's Appellant Submission, para. 206.
[10] Panel Report, para. 6.435
[11] Argentina's Appellant Submission, paras. 224-232.
[12] See Japan's Appellee Submission, para. 126, and the EU's Appellant Submission, para. 191.

III. Conclusion

10. To summarize, Norway is of the view that Article XI:1 covers all import and export prohibitions and restrictions, including import formalities and requirement that is also covered by Article VIII. Furthermore, neither the terms of Article XI:1 nor relevant jurisprudence confirm that Article XI:1 distinguishes between the trade restrictive effects of different measures, as suggested by Argentina.

Mr, Chairman, Members of the Division, this concludes Norway's statement here today.
Thank you for your attention.