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IN THE WORLD TRADE ORGANIZATION

Before the Appellate Body

Indonesia – Importation of Horticultural Products, Animals and Animal Products

(AB-2017-2 / DS477 – DS478)

Oral Statement

by

Norway as a Third Participant

Hearing of the Appellate Body
Geneva

August 2017

Presiding Member, Members of the Division,

1. Norway welcomes this opportunity to make a brief statement as a Third Participant before the Appellate Body in this appeal. Norway did not present a written third party submission to the Appellate Body. Without taking any position on the facts of this dispute, I will therefore in this oral statement set out Norway's views on the allocation of the burden of proof under the second element of footnote 1 to Article 4.2 of the Agreement on Agriculture.

2. In its Appellant Submission, Indonesia submits that the Panel erred in determining that Indonesia bore the burden of proving the second element of footnote 1 to Article 4.2 of the Agreement on Agriculture.[1]

3. Under the Panel proceedings, the Panel disregarded Indonesia's request to invert the burden of proof under Article XX of the GATT 1994, for the purpose of footnote 1 of Article 4.2. The Panel emphasized that the burden of identifying and establishing affirmative defence under Article XX rests on the party asserting the defence, as is well established in WTO jurisprudence following the Appellate Body decision in *US – Wool Shirts and Blouses*.[2]

4. In its Appellate Submission Indonesia contends that the legal standards of Article XI:1 of the GATT 1944 and Article 4.2 of the Agreement on Agriculture are different. In Indonesia's view this also implies a different allocation of the burden of proof on the complainant. In Indonesia's opinion under Article XI:1 a Panel would only need to address whether there is a public policy exception that justifies the quantitative restriction if the respondent invokes Article XX. In contrast, under Article 4.2 the question of whether a specific measure is maintained under any of the public policy exceptions set out in Article XX of the GATT 1994, as set out under the second element of footnote 1, is one of two cumulative conditions that need to be fulfilled in order to establish a violation of the obligation under Article 4.2.

5. Norway does not agree with this understanding of the second element under footnote 1 of Article 4.2 of the Agreement on Agriculture. As stated in Norway's third party oral statement before the Panel in these proceedings, the panel in *Chile – Price Brands* 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*

[1] Indonesia's Appellate Submission, para. 65.
[2] Panel Report, DS477/478, Indonesia – Importation of horticultural Products, Animals and Animal Products para 7.34.

exceptions to the general obligations of GATT 1994".[3] In light of this, Norway interpreted footnote 1 of Article 4.2 as clarifications of the flexibilities that exist in Article 4.2 itself. Thus, measures covered by the exception provisions of the GATT 1994 are excluded from the scope of Article 4.2, in other words refraining from such measures is not part of the obligation under Article 4.2.[4] Therefore, in Norway's view, a complainant would not need to establish that a measure is not "maintained" under the exception provisions of the GATT 1994 in order to make a *prima facie* case of violation, because this is not a part of the obligation set forth in Article 4.2.

6. Regarding the allocation of the burden of proof, Norway notes that the main principle for the allocation of burden of proof in WTO dispute settlement is that *"the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence"*.[5]

7. In Norway's view, under Article 4.2, the complainant has to prove that the measure at issue violates the substantive obligation under this provision. This does not include the obligations under the GATT 1994 as mentioned in footnote 1, as these are not a part of the obligations under Article 4.2. However, the complainant may use footnote 1 as support in arguing that the measure at issue falls within the scope of Article 4.2.

8. Furthermore, in US – Wool Shirts and Blouses, the Appellate Body stated that *"if that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption"*.[6]

9. In order to rebut the complainant's presumption that a measure is in violation of the substantive obligation under Article 4.2 of the Agreement on Agriculture, the respondent may argue that the measure in question falls outside the scope of Article 4.2. The respondent may use the second element of footnote 1 to demonstrate that the measure in question is excluded from the scope of Article 4.2, by demonstrating that the measure in question is "maintained" under either the general or specific exceptions under GATT obligations. Hence, Norway agrees with Canada's statement in its third party written submission, that the burden of proof

[3] Panel Report, DS207, *Chile – Price Band System*, para. 7.71
[4] Norway's Third Party Statement before the Panel – DS477/478
[5] Appellate Body Report, DS33, *United States - Wool shirts and Blouses,* para. 14.
[6] Appellate Body Report, DS33, *United States - Wool shirts and Blouses,* para. 14.

for demonstrating that the specific measure is "maintained" under either the general or specific exceptions to GATT obligations, lies with the respondent.[7]

10. In addition, Norway would like to underline New Zealand's statement in its Appellate Submission that the legal standard under Article 4.2 of the Agreement on Agriculture, including footnote 1, has been considered multiple times by panels and the Appellate Body. In none of those disputes has a Panel or the Appellate Body found that a complainant is required to prove that a measure *"is not maintained under any of the public policy exceptions set out in Article XX of the GATT 1994"* in order to establish a violation of Article 4.2 of the Agreement on Agriculture.[8]

11. In conclusion, Norway considers that the burden of proof under the second element of footnote 1 under Article 4.2 of the Agreement on Agriculture lies with the respondent.

12. Thank you.

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[7] Canada's Third Party Written Submission, para. 19.
[8] New Zealand's Appellee Submission, para. 66.