

(As delivered)

**IN THE WORLD TRADE ORGANISATION  
Before the Appellate Body**

**(DS394, DS395, DS398 / AB-2011-5)**

**China – Measures Related to the Exportation of Various  
Raw Materials**

**Oral Statement**

**by**

**Norway as a Third Participant**

**Hearing of the Appellate Body**

**Geneva**

**7-9 November 2011**

Mr Chairman, Members of the Division,

1. Norway welcomes the opportunity to make a statement as a Third Participant before the Appellate Body in this appeal. Norway did not make a written submission to the Appellate Body, and will therefore briefly set out its views on one particular legal issue in this oral statement. The issue relates to whether the GATT 1994 Article XX may be invoked in relation to violations of paragraph 11.3 of China's Accession Protocol.
2. The wording in the chapeau of GATT Article XX explicitly refers back to the Agreement, by underlining that “nothing in this Agreement shall be construed to prevent the adoption or enforcement” of the specific measures listed in the provision.
3. The Appellate Body has nevertheless in some instances accepted that GATT Article XX may be invoked in relation to other WTO Agreements. Of special interest in this regard is *China – Publications and Audiovisual Products* where the Appellate Body held that GATT Article XX could be invoked in relation to paragraph 5.1 of Part I of China's Accession Protocol. In that dispute the Appellate Body interpreted the introductory phrase of paragraph 5.1 (“Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement...”) and found that

WTO Members' regulatory requirements may be WTO-consistent in one of two ways. First, they may simply not contravene any WTO obligation. Secondly, even if they contravene a WTO obligation, they may be justified under an applicable exception. The reference to “a manner consistent with the WTO Agreement” seems to us to encompass both types of WTO-consistency.<sup>1</sup>

4. On this basis and after careful examination of the issue, the Appellate Body concluded that China was allowed to “rely upon the introductory clause of paragraph 5.1 of its Accession Protocol and seek to justify” the contested measures under GATT art XX.<sup>2</sup>
5. Paragraph 11.3 of China's Accession Protocol does not include similar language as the introductory phrase relied on by the Appellate Body in the above mentioned dispute. The paragraph just states that “China shall eliminate all taxes and charges

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<sup>1</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, WT/DS363/AB/R, para 223.

<sup>2</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, WT/DS363/AB/R, para 233.

applied to exports, unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of GATT 1994”. There is nothing in the wording of this paragraph that points to, or in any way indicate, that the drafters meant to allow for justification under GATT Article XX.

6. In Norway’s view, the wording and the structure of the paragraph seems to indicate that the only exceptions from the obligation to eliminate all taxes and charges applied to exports are those expressly provided for in the paragraph itself. This is also in accordance with the customary rules for treaty interpretation as codified in the Vienna Convention on the Law of Treaties Article 31.
7. There are *two* exceptions mentioned in paragraph 11.3;
  - 1) taxes and charges specifically provided for in Annex 6; and
  - 2) taxes and charges applied in conformity with GATT Article VIII.

There is no mention of the exceptions in GATT Article XX.

8. China argues that context such as the reference to GATT Article VIII, the provisions of paragraph 170 of China’s Working Party Report, and the WTO Agreement confirms that China is allowed to invoke the justifications of Article XX.<sup>3</sup> We do not share this view.
9. On the contrary, we agree with the Panel that the drafters could have made it clear in the paragraph if they wanted to include a reference to GATT Article XX or equivalent exceptions. The omission by the drafters to include other exceptions than those expressly mentioned in paragraph 11.3, suggests that they did not intend to include the GATT Article XX exceptions.
10. Norway would like to point out that this was, *inter alia*, done in Ukraine’s Accession Protocol, where paragraph 2 includes a commitment by Ukraine not to increase export duties or apply measures of equivalent effect “unless justified under the exceptions of the GATT 1994”.<sup>4</sup>

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<sup>3</sup> China’s Appellant Submission paras. 204-208.

<sup>4</sup> Ukraine Protocol of Accession, WT/L/718 (13 February 2008), para 2, referring to para 512 in the Report of the Working Party on the Accession of Ukraine to the World Trade Organization (WT/ACC/UKR/152).

11. Norway believes the above demonstrates that the Panel was correct in its finding with regard to China not being allowed to apply the exceptions in GATT Article XX to justify measures that contradict paragraph 11.3 of its Accession Protocol.

Mr Chairman, Members of the Division,

12. This concludes Norway's statement here today. Thank you.

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