

IN THE WORLD TRADE ORGANISATION

WT/DS438/444/445

Argentina –Measures Affecting the Importation of Goods

Third Party Submission

by

Norway

Geneva

28 August 2013

Table of Contents

I.	INTRODUCTION	1
II.	PUBLICATION REQUIREMENTS	1
	A. Introduction.....	1
	B. Interpretation of Article X:1 of the GATT 1994 and Articles 1.4(a) and 3.3 of the ILP Agreement.....	2
	a) Introduction.....	2
	b) The manner in which publication must take place.....	3
	c) Requirements as to the content of the publication	4
III.	CONCLUSION.....	6

Table of cases cited in this submission

Short Title	Full Case Title and Citation
<i>EC - IT Products</i>	<i>Panel Reports, European Communities and its Member States — Tariff Treatment of Certain Information Technology Products, WT/DS375/R, WT/DS376/R, WT/DS377/R</i>
<i>China - Raw Materials</i>	<i>Panel Reports, Measures Related to the Exportation of Various Raw Materials, WT/DS394/R, WT/DS395/R, WT/DS398/R</i>
<i>Dominican Republic - Import and Sale of Cigarettes</i>	<i>Panel Report, Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes, WT/DS302/R</i>
<i>Thailand - Cigarettes (Philippines)</i>	<i>Panel Report, Thailand - Cigarettes (Philippines), WT/DS371/R</i>

I. INTRODUCTION

1. Norway welcomes this opportunity to be heard and to present its views as a third party in this case concerning a disagreement between the European Union, the United States and Japan, as complainants, and Argentina, regarding the conformity with the covered agreements of certain measures imposed by Argentina on the importation of goods.
2. Norway will not address all of the issues upon which there is disagreement between the parties to the dispute. Rather, Norway will confine itself to discuss the interpretation of the transparency obligations contained in Article X:1 of the GATT 1994 and Articles 1.4(a) and 3.3 of the *Agreement on Import Licencing Procedures (ILP Agreement)*.
3. In its first written submission, Argentina has requested the panel to issue a preliminary ruling relating to the so-called Restrictive Trade Related Requirements (RTRRs). In a communication from the panel on 9 August 2013, the third parties were invited to comment on Argentina's request for a preliminary ruling in their written submission. For the sake of good order, Norway would like to convey that it has no comments to the request for a preliminary ruling.

II. PUBLICATION REQUIREMENTS

A. Introduction

4. A transparent regulatory framework is a prerequisite for international trade in general and the importation of goods in particular. Without the possibility to gain access to relevant information regarding the requirements applicable to the importation of goods, traders are left without predictability and the appropriate due process guaranties. This is recognized both by the interpretation by panels of Article X:1 of the GATT 1994 as well as in the preamble of the *ILP Agreement*.¹
5. The transparency obligations in Article X:1 of the GATT 1994 and Articles 1.4(a) and 3.3 of the *ILP Agreement* lay down Members' obligations to publish the requirements applicable to the importation of goods. Among others, the complainants argue that

¹ *EC – IT Products*, para. 7.1085, regarding Article X:1 of the GATT 1994. *ILP Agreement*, preamble ninth indent.

Argentina has failed to fulfill its publication obligations because it has not published sufficient information for traders to know the application procedures and the basis for granting an advance import affidavit.² Furthermore, the complainants hold that Argentina has failed to publish a number of restrictive trade related requirements. In the following, Norway will discuss certain aspects of the relevant obligations.

B. Interpretation of Article X:1 of the GATT 1994 and Articles 1.4(a) and 3.3 of the ILP Agreement

a) Introduction

6. Article X:1 of the GATT 1994, first sentence, provides that:

Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. (emphasis added)

7. Article 1.4(a) of the *ILP Agreement* provides among others that:

The rules and all information concerning procedures for the submission of applications, including the eligibility of persons, firms and institutions to make such applications, the administrative body(ies) to be approached, and the lists of products subject to the licensing requirement shall be published, in the sources notified to the Committee on Import Licensing provided for in Article 4 (referred to in this Agreement as “the Committee”), in such a manner as to enable governments³ and traders to become acquainted with them. (emphasis added)

8. Article 3.3 of the *ILP Agreement* provides that:

In the case of licensing requirements for purposes other than the implementation of quantitative restrictions, Members shall publish sufficient information for other Members and traders to know the basis for granting and/or allocating licences. (emphasis added)

² *Declaraciones Juradas Anticipadas de Importación*, DJAI.

³ Footnote in the *ILP Agreement*: “For the purpose of this Agreement, the term “governments” is deemed to include the competent authorities of the European Communities.”

9. The wording of Article X:1 of the GATT 1994 and Article 1.4(a) of the *ILP Agreement* both provide that the concerned information “shall be published ... in such a manner as to enable governments and traders to become acquainted with them”. Article 3.3 of the *ILP Agreement* has a slightly different wording, as this provision require Members to “publish sufficient information for other Members and traders to know the basis for granting and/or allocating licences”.
10. Although the wording of these three provisions are not identical, the publication requirements entailed therein share common features as to the manner in which publication must take place and the information the publication must contain. Therefore the interpretation of these aspects of the provisions will be discussed together in the following.

b) The manner in which publication must take place

11. Article X:1 of the GATT 1994 and Article 1.4(a) of the *ILP Agreement* contain an obligation on Members, saying that the covered information “shall be published”, whereas according to Article 3.3 of the *ILP Agreement*, Members “shall publish” the covered information. Prior panels have examined the meaning of this term in the context of the publication provision of Article X:1 of the GATT 1994. Although no panel has interpreted the meaning of the publication requirement in Articles 1.4(a) and 3.3, the guidance given on the interpretation of Article X:1 of the GATT 1994 must in our view have relevance also for the interpretation on the manner in which publication must take place according to the two provisions on publication in the *ILP Agreement*.
12. The provisions raise questions as to the manner in which publication must take place. In *EC – IT Products*, regarding Article X:1 of the GATT 1994, the panel said that:
- “In our view, if measures are to be published "in such a manner as to enable governments and traders to become acquainted with them", it follows that they must be generally available through an appropriate medium rather than simply making them publicly available.”
13. In the footnote to this quote, the panel further elaborates on its view:

“In other words, if a "medium" makes measures generally available to the public in such a manner as to "enable governments and traders to become acquainted with them", we consider that such medium should be regarded as "appropriate" and that publishing on that medium would fall within "published" as used in Article X:1.”⁴

14. We understand this to mean that access to information upon request would not fulfill the publication requirement. Rather, information must be actively provided using an appropriate medium.⁵

c) Requirements as to the content of the publication

15. Article X:1 of the GATT 1994 and Article 1.4(a) of the *ILP Agreement* contain an obligation on Members, saying that the covered information shall be published “in such a manner as to enable governments and traders to become acquainted with them”. In accordance with Article 3.3 of the *ILP Agreement*, Members “shall publish sufficient information for other Members and traders to know the basis for granting and/or allocating licences”.

16. A common thread in these three Articles is that publication must contain information that provides traders with a *full* picture of the relevant regulations. In Norway’s view, the publication requirements must be understood to contain an obligation to make public the process importers must follow in order to import goods, including the different steps in these proceedings and the authorities involved. Furthermore, the conditions for allowing or denying importation of goods must be published, including the method used by the authorities to determine whether the conditions are met. This includes information on any exceptions and changes to the rules. Article 1.4(a) of the *ILP Agreement* states explicitly that “Any exception, derogations or changes in or from the rules concerning licensing procedures or the list of products subject to import licensing shall also be published in the same manner and within the same time periods as specified above.”

17. The requirements in Articles 1.4(a) and 3.3 of the *ILP Agreement* have not been interpreted by panels. However, the guidance given on the interpretation of Article X:1 of

⁴ *EC – IT Products*, para. 7.1084.

⁵ Article 1.4(a) of the *ILP Agreement* gives further instructions on the media in which publication must take place, stating that information “shall be published, in the sources notified to the Committee on Import Licensing”.

the GATT 1994 must in our view also be relevant for the interpretation on the content of the publication requirement in the two provisions on publication in the *ILP Agreement*.

18. The panel in *EC – IT Products* interpreted the phrase, “in such a manner as to enable governments and traders to become acquainted with them,” as follows:

“not any manner of publication that would satisfy the requirement, but only those that would give power to or supply governments and traders with knowledge of the particular measures that is “adequate” so that traders and Governments may become “familiar” with them, or “known” to them in a “more or less complete” way.”⁶

19. In this case, the panel concluded that the European Commission’s posting of the minutes of the Customs Code Committee on the Comitology website did not fulfill this requirement, and commented, “In particular, we note that there is nothing in the minutes, or the draft CNENs attached, that would supply traders and governments with adequate knowledge of measures that are or would be applied in trading with the EC member States.”⁷ (emphasis added)

20. Similarly, in *China – Raw Materials*, China failed to publish the fact that it had not set an export quota for zinc. The panel stated that;

“Concerning the requirement to publish promptly the relevant measures, in this case, the omission to set a quota for zinc, the Panel observes that China has not denied that it has not published the quota, or lack thereof, for zinc. Additionally the failure to publish the quota has had a practical result as interested exporters did not know that effectively, they were unable to export zinc. The Panel considers that under its Article X:1 obligations, China should have published its decision not to make “effective the quota on zinc by setting a particular quota amount available for exports” in such a manner as to enable governments and traders to become acquainted with that decision”⁸ (emphasis added)

21. In *Dominican Republic — Import and Sale of Cigarettes*, the Panel also focused on the type of information the publication must contain:

“the Dominican Republic should have either published the information related to the Central Bank average-price surveys of cigarettes or, alternatively, publish its decision

⁶ *EC – IT Products*, para. 7.1086.

⁷ *EC – IT Products*, para. 7.1087.

⁸ *China – Raw Materials*, para. 7.806.

to not conduct these surveys and to resort to an alternative method, in such a manner as to enable governments and traders to become acquainted with the method it would use in order to determine the tax base for the Selective Consumption Tax on cigarettes.”⁹ (emphasis added)

22. In *Thailand — Cigarettes (Philippines)*, the Panel considered a claim regarding failure to publish the methodology for determining MRSPs (which is an element of the tax rate for cigarettes), and held that:

“The listing of the components consisting of the MRSP would not enable importers to become acquainted with the detailed rules pertaining to the general methodology within the meaning of Article X:1. We are of the view that for importers to become acquainted with the methodology for determining the MRSP, it is important for them to become familiar with, for instance, how the information they provide is processed. Also, they need to be informed on how Thai Excise determines the marketing costs where the information provided by importers is not accepted.”¹⁰ (emphasis added)

23. These cases illustrate that Members must publish comprehensive and unambiguous information regarding the applicable rules on the importation of goods. This points back to the purpose underlying the publication requirement in all three provisions, namely to ensure a transparent regulatory framework for the benefit of all traders.

III. CONCLUSION

24. Norway respectfully requests the Panel to take account of the considerations set out above in interpreting the relevant provisions of the covered agreements.

⁹ *Dominican Republic - Import and Sale of Cigarettes*, para. 7.414.

¹⁰ *Thailand - Cigarettes (Philippines)*, para. 7.789.