

IN THE WORLD TRADE ORGANIZATION

**Indonesia – Importation of Horticultural Products, Animals and Animal
Products**

WT/DS477

WT/DS478

Third Party Submission

by

Norway

Geneva

15 January 2016

Table of Contents

I.	INTRODUCTION	4
II.	THE GATT 1994 ARTICLE XI:1 AND FIXED LICENCE TERMS	4
III.	CONCLUSION.....	6

Table of cases cited in this submission

<i>Argentina – Import Measures</i>	Appellate Body Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R
<i>India - Autos</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS146/R, WT/DS175/R

I. INTRODUCTION

1. Norway welcomes the opportunity to be heard and to present its views as a third party in this dispute brought by New Zealand and the United States concerning the consistency with Article XI:1 of the General Agreement on Tariffs and Trade (the “GATT 1994”) of Indonesia’s import regime for horticultural products, animals and animal products.

2. In this written submission, 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 one of the legal issues raised: whether limiting the importation of horticultural products to the type, quantity, country of origin and port of entry listed in the import documents for a fixed term is consistent with Article XI:1 of the GATT 1994.

II. THE GATT 1994 ARTICLE XI:1 AND FIXED LICENCE TERMS

3. Article XI:1 of the GATT 1994 reads:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

4. There is apparently no disagreement between the Parties to the dispute that the term “restriction” in the GATT 1994 Article XI:1 must be interpreted as something that has a “*limiting effect*”, which has also been confirmed by numerous panels.¹ Furthermore, the Parties seem to agree that the only measures excluded from the scope of the provision are those that take the form of “duties, taxes, or other charges”.²

5. In its first written submission, Indonesia appears to perceive that the Complainants argue that importers may not identify their own terms of importation in their import licence in line with the GATT 1994 Article XI:1.³ According to Indonesia, such “self-imposed terms of importation” are not measures “instituted or maintained” by Indonesia, which is one of the requirements for something to qualify as a restriction within the meaning of Article XI:1.⁴

¹ See, e.g. Appellate Body Reports, *China - Raw Materials*, para. 319; *Argentina - Import Measures*, para. 5.217.

² New Zealand’s First Written Submission, para. 207; United States’ First Written Submission, para. 142; Indonesia’s First Written Submission, paras. 118-120.

³ Indonesia’s First Written Submission, para. 137.

⁴ Indonesia’s First Written Submission, para. 138.

Indonesia's argument appears to rely on the fact that the regime provides that importers initially define the terms by setting out in their import licence applications the specific type of products permitted to be imported, the country of origin of the products, and the port of entry through which the products will enter Indonesia. In Norway's view, this appears to be a misconstruction of the Complainants' arguments, and not pointing to the *measure* at issue.

6. As Norway reads the first written submissions of New Zealand and the United States respectively, their argument is that the fact that the licence terms, once defined by the importers, are *fixed*, and *may not be altered* during a semester that constitutes the restriction as any derogation from these terms is prohibited.⁵ In this regard, it is important to bear in mind that both Horticultural Product Import Recommendations (RIPs) and Import Approvals are issued with a validity period of six months. As stressed by the Complainants, previous panels have found that measures imposing the same kind of limits as those found in Indonesia's import regime violate GATT 1994 Article XI:1.⁶ E.g., the panel in *Colombia - Ports of Entry* concluded that restrictions limiting imports from Panama to two ports of entry in Colombia limit "competitive opportunities", and consequently had a limiting effect on imports arriving from Panama contrary to Article XI:1.⁷ Furthermore, in *India – Autos*, the panel found that a measure which in reality has the consequence that an importer would not be "free to import [as much] as he otherwise might" constituted a restriction.⁸ Hence, Norway agrees with the Complainants that the fact that the importers are prevented from responding to market fluctuations and other factors that normally affect importation during the validity periods, as well as taking into consideration factors related to importation that they did not predict at the start of the validity period, will have a limiting effect on trade. The measure challenged is therefore not *private parties determining import the terms of import licences*, as put by Indonesia,⁹ but rather the measure limiting what importers may import.

7. The importers being "free to alter their terms of importation from one license application to the next"¹⁰ does not change the fact that this limitation has a limiting effect in a set semester of six months. Moreover, one must also bear in mind that import opportunities as regards availability of products etc. may change from semester to another. It not given that

⁵ New Zealand's First Written Submission, para. 221; United States' First Written Submission, para. 161

⁶ New Zealand's First Written Submission, para. 227; United States' First Written Submission, paras. 165-166.

⁷ Panel Report, *Colombia - Ports of Entry*, para. 7.274.

⁸ Panel Report, *India – Autos*, para. 7.320.

⁹ Indonesia's First Written Submission, para. 138.

¹⁰ Indonesia's First Written Submission, para. 139.

what a company has the “desire and ability to export”¹¹ at one point in time would also be desired and available many months later. In any event, this will be a restriction on trade contrary to Article XI:1 of the GATT 1994.

III. CONCLUSION

8. Norway respectfully requests the Panel to take account of the considerations set out above when evaluating the claims set forth in this dispute.

¹¹ Panel Report, *India – Autos*, para. 7.268.