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IN THE WORLD TRADE ORGANISATION

Before the Appellate Body

(DS431, DS432, DS433 / AB-2014-4, AB-2014-5, AB-2014-6)

**China – Measures Related to the Exportation of Rare
Earths, Tungsten, and Molybdenum**

Oral Statement

by

Norway as a Third Participant

Hearing of the Appellate Body

Geneva

4-6 June 2014

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. In its appeal, China claims that violations of Paragraph 11.3 of its Accession Protocol should be subject to Article XX of the GATT 1994. For reasons set out below, Norway does not agree with China’s claim, but rather with the Panel’s assessment of this issue.
3. However, before discussing China’s arguments any further, Norway notes that the Appellate Body in *China – Raw Materials* – dealing with the same legal issue as the one in question – concluded that “a proper interpretation of Paragraph 11.3 of China’s Accession Protocol, does not make available to China the exceptions under Article XX of the GATT 1994”.¹ In previous case law, the Appellate Body has expressed the importance of “developing a coherent and predictable body of jurisprudence”.² Furthermore, the Appellate Body has set out that ensuring “security and predictability” in the dispute settlement system implies that, “absent cogent reasons, an adjudicating body will resolve the same legal question in the same way in a subsequent case”.³
4. In the case at hand, the Panel concluded that China’s arguments did not constitute “cogent reasons” for departing from the Appellate Body’s finding that the obligation in Paragraph 11.3 is not subject to Article XX of the GATT 1994.⁴ Norway agrees with this assessment. Nevertheless, we will in the following briefly address some of the specific arguments set out in China’s appeal.
5. China submits that “[f]aced with a specific accession commitment set forth by China’s *Accession Protocol*, the treaty interpreter’s initial task is to carefully analyze to which

¹ Appellate Body Reports, *China – Raw Materials*, WT/DS394/395/398/AB/R, para. 307.

² Appellate Body Report, *US – Stainless Steel (Mexico)*, WT/DS344/AB/R, para. 161. See also Appellate Body Report, *US – Continued Zeroing*, WT/DS350/AB/R, para 362.

³ Appellate Body Report, *US – Stainless Steel (Mexico)*, WT/DS344/AB/R, para. 160. See also Appellate Body Report, *US – Continued Zeroing*, WT/DS350/AB/R, para 362.

⁴ Panel Report, *China – Rare Earths*, WT/DS431/DS432/DS433, para 7.99.

of the covered agreements listed in Appendix 1 of the DSU the relevant protocol provision intrinsically relates. Once it has been determined to which of the covered agreements the protocol provision at issue intrinsically relates, that provision is to be treated as an integral part of the related covered agreement”.⁵ In China’s view, this approach follows from a proper interpretation of Article XII:1 of the WTO Agreement⁶ read in conjunction with Paragraph 1.2, second sentence, of China’s Accession Protocol. Norway concurs with the Panel that the interpretation of these provisions does not lead to such an approach.

6. Article XII:1 of the WTO Agreement deals with accessions, and states in its second sentence, that accessions “shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto”. According to the Panel, this means that an acceding state may not “pick and choose”, but must be subject to all of the Multilateral Trade Agreements, as well as the WTO Agreement.⁷ Norway agrees with this, and thus disagrees with China that the terms of Article XII:1, second sentence, “confirm that China’s *Accession Protocol* serves to specify [...] China’s rights and obligations” under the WTO Agreement and the Multilateral Trade Agreements.⁸ As we see it, there is nothing in Article XII:1 to support such an interpretation.
7. China also argues that the Panel failed to interpret Article XII:1 and Paragraph 1.2, second sentence of its Accession Protocol “holistically as required under the customary rules of treaty interpretation”.⁹ Furthermore, China argues that, even if it were correct to read Paragraph 1.2, second sentence in isolation, “the Panel erred in its interpretation of the terms employed therein”.¹⁰ Norway disagrees. In our view, the Panel undertook a thorough interpretation of the two provisions in question, as required by the DSU.
8. Paragraph 1.2, second sentence states that “[t]his Protocol [...] shall be an integral part of the WTO Agreement”. We believe the Panel correctly concluded that the term “WTO Agreement” in this provision means that China’s Accession Protocol is an

⁵ China’s Appellant Submission, WT/DS432/DS433, para. 51.

⁶ The term “WTO Agreement” refers in this submission to the Agreement Establishing the World Trade Organization.

⁷ Panel Report, *China – Rare Earths*, WT/DS431/DS432/DS433, para.7.91.

⁸ China’s Appellant Submission, WT/DS432/DS433, para. 84.

⁹ China’s Appellant Submission, WT/DS432/DS433, para. 87.

¹⁰ China’s Appellant Submission, WT/DS432/DS433, para. 88.

integral part of the Agreement Establishing the World Trade Organization.¹¹ Furthermore, we also believe the Panel correctly found that Paragraph 1.2, second sentence, could *not* be interpreted to mean that individual provisions of the Protocol are integral parts of the Multilateral Trade Agreements.¹² Like the Panel, Norway is of the opinion that individual provisions of an accession protocol could only be made an integral part of one or more of the Multilateral Trade Agreements if and where such language is contained in the individual provision itself, and not through an interpretation of Paragraph 1.2.¹³

Mr Chairman, Members of the Division,

9. In conclusion, Norway would like to reiterate that we believe the Panel was correct in its analysis on this issue and in concluding that the GATT 1994 Article XX may *not* be invoked in relation to violations of Paragraph 11.3 of China's Accession Protocol.

10. Thank you for your attention.

¹¹ Panel Report, *China – Rare Earths*, WT/DS431/DS432/DS433, paras. 7.89 and 7.93.

¹² Panel Report, *China – Rare Earths*, WT/DS431/DS432/DS433, paras. 7.89 and 7.93.

¹³ See Panel Report, *China – Rare Earths*, WT/DS431/DS432/DS433, para. 7.80.