IN THE WORLD TRADE ORGANIZATION

United States – Certain Measures on Steel and Aluminium Products

WT/DS547

Third Party Submission

by

Norway

Geneva
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Table of cases cited in this submission

Short Title	Full Case Title and Citation
EC – Seal Products	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, adopted 18 June 2014.
Russia – Traffic in Transit	Panel Report, *Russia - Measures concerning Traffic in Transit*, WT/DS512/R, adopted 26 April 2019.
Thailand – Cigarettes	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011.
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R, adopted 20 May 1996.
US – Wool Shirts and Blouses	Appellate Body Report, *United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997.

I. INTRODUCTION

1. Norway welcomes the opportunity to present its views as a third party in this case concerning a disagreement between India and the United States ("the US"), regarding the conformity with the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and of the Agreement on Safeguards ("the Safeguards Agreement") of certain measures on steel and aluminium products imposed by the US, including on products from India, pursuant to "Presidential Proclamation 9704" and "Presidential Proclamation 9705" of 8 March 2018. India claims that the US has violated several obligations under the GATT 1994 and the Safeguards Agreement.

2. In its first written submission, the US invokes the security exception laid down in Article XXI(b) of the GATT 1994. The US does not present a full defence on the merits of Article XXI(b), and does not even identify the particular sub-paragraph of Article XXI(b) under which that defence would be lodged. It argues instead that this provision is not "justiciable", and that the Panel should "limit its report to the DSB to a recognition that the United States has invoked GATT 1994 Article XXI(b)".[1]

3. This dispute raises issues of systemic importance with regard to the interpretation and applicability of the Safeguards Agreement and the GATT 1994. Norway, as a co-complainant, has also brought a case against the US measures referred to above, i.e., dispute *DS552 United States – Certain Measures on Steel and Aluminium Products.* Norway's third party submission is confined to the following points: *first*, the "justiciability" of Article XXI of the GATT 1994 (Section II); *second*, the order of analysis the Panel should apply (Section III); and, *third*, the burden of proof under Article XXI of the GATT 1994 (Section IV).

II. THE "JUSTICIABILITY" OF ARTICLE XXI OF THE GATT 1994

4. In this section, Norway will offer some brief comments on whether the invocation of the security exception in Article XXI of the GATT 1994 as a defence by a Member means that the dispute is "non-justiciable".

[1] The United States' first written submission, para.9.

5. The US *accepts* that the Panel has jurisdiction over this dispute, in the sense that the DSB has established the Panel to examine the matter set out in the panel request.[2] However, the US asserts that the Panel cannot undertake any meaningful review of the US actions that are purportedly justified under Article XXI(b),[3] because, based on its terms, "whether and what circumstance action is necessary to protect its essential interests" is entirely "self-judging", by virtue of the phrase "which it considers".[4]

6. In sum, the United States argues that Article XXI(b) establishes a right – to take GATT-inconsistent security measures – with no scope whatsoever for a panel to review the obligations and conditions that qualify that right. Thus, the dispute is subject to the Panel's *jurisdiction*, but the Panel may not undertake an objective review, by virtue of the phrase "which it considers".

7. Norway strongly disagrees with this argument by the US. If mere invocation of Article XXI(b) would render a claim non-justiciable, this would allow easy circumvention of WTO obligations. If a respondent could effectively bar a panel, that the US acknowledges enjoys jurisdiction, from undertaking objective review by mere invocation of a security exception, this would give "carte blanche" for WTO Members to unilaterally set aside the rules that the legitimacy of the rule-based system rests on. A respondent could invoke a variety of protectionist interests under the guise of national security, and thereby avoid scrutiny of its WTO-inconsistent measures altogether. Such a measure could violate any of the Member's WTO obligations, and a WTO panel would be barred from making any findings of inconsistency. An interpretation of Article XXI(b), which had this effect, would render all the obligations in the GATT 1994 effectively unenforceable.

8. Moreover, if the intentions of the negotiators were for the panel to have no authority to assess a Member's invocation of a security exception provision, one would also have expected such an important and significant matter be expressly provided for.[5]

[2] The United States' first written submission, para. 181.
[3] The United States' first written submission, para. 181.
[4] The United States' first written submission, para. 3.
[5] The "justiciability" of the security exceptions is also supported by the GATT Council Decision Concerning Article XXI of the General Agreement, 30 November 1982, L/5426, which states that "[w]hen action is taken under Article XXI, all [Members] affected by such action retain their full rights under the General Agreement", without carving out rights under Articles XXII and XXIII.

III. ORDER OF ANALYSIS

9. Article XXI(b) operates to justify certain GATT-inconsistent action, using the same language as Article XX: "nothing in this Agreement shall be construed to prevent any Member from taking any action which…". Hence, Article XXI(b) is, just like Article XX, an affirmative defence to a violation of the GATT 1994. Under Article XX, panels and the Appellate Body have, without exception, addressed first whether the complainant has made out its claims of WTO-inconsistency; and second whether the respondent has made out its affirmative defence that the measures are justified. This is because an affirmative defence is only relevant where a panel has found a violation. If there is no violation, then the relevant exceptions provision has no operative role; there is nothing to justify in the first place. Logically, therefore, where a respondent invokes Article XXI(b), the panel should first confirm whether there is a violation; and second whether the violation is justified.

10. Moreover, it is well-accepted, from jurisprudence under Article XX of the GATT 1994, that it is the WTO-inconsistent aspect of the measure – and not the measure as a whole – which must be justified.[6] Of course, a panel cannot identify the WTO-inconsistent aspects of a measure that would require justification, until it has addressed the claims. Hence, in our view, it is clear that the same reasoning must apply with respect to the other exceptions provisions applicable under the GATT 1994. By contrast, if a panel were obliged to address Article XXI(b) before addressing the claims, it would also have to assess whether the measures are justified in a vacuum, without yet having determined which aspects of the measures are WTO-inconsistent.[7]

IV. BURDEN OF PROOF

11. Norway will, under this section, share its views on the burden of proof when a security exception is invoked.

12. As explained above in Section III, Article XXI(b) of the GATT 1994 is an affirmative defence, just like Article XX. The Appellate Body has found that the burden for establishing limited exceptions in the GATT 1994 lies with the party asserting the defence.[8] Hence, a

[6] Appellate Body Report, *US – Gasoline*, pp. 13-14; Appellate Body Report, *Thailand – Cigarettes*, para. 177; Appellate Body Reports, *EC – Seal Products*, para. 5.185.
[7] In our view, the panel in *Russia – Traffic in Transit* erred by departing from the accepted order of analysis under "exceptions provisions" in the GATT 1994.
[8] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

respondent invoking an affirmative defence must bear the burden of proving that the applicable conditions are met. If the respondent does not take on that burden, beyond invoking an exception, a panel should not proceed to consider the merits of the exception.

13. Consequently, if the complainant establishes that a measure imposed by the respondent is inconsistent with the provisions of the GATT 1994, and the respondent does not make a *prima facie* case that those measures are justified under Article XXI, the panel must, as a matter of law, rule in favour of the complainant. In our view, the panel in *Russia – Traffic in Transit* failed, in effect, to treat Article XXI(b) of the GATT 1994 as an affirmative defence. The respondent in that dispute argued only that the security exception is not "justiciable", and did not adduce evidence and argument on the merits. In those circumstances, the panel should have found that the respondent did not make its case, and found in favour of the complainant.

V. CONCLUSION

14. Having regard to the above considerations, Norway is of the view that Article XXI(b) is "justiciable". Further, when assessing the merits under Article XXI(b), the order of analysis should be such that the Panel *first* assesses the claims of violation, and *second*, the justification under Article XXI(b). Hence, an assessment of whether the measures are justified under Article XXI(b) before assessing whether the measures violated the covered agreement, is not an appropriate order of analysis.

15. Moreover, Article XXI(b) is properly understood as an affirmative defence: it justifies violations of the GATT 1994, under certain conditions, and the respondent bears the burden of demonstrating that these conditions are met.

16. If a respondent invoking Article XXI(b) limits its arguments to the "justiciability" of the provision, and does not adduce arguments, the panel must, by default, find that the measures are not justified.

17. Norway respectfully requests the Panel to take account of the above considerations.

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