

World Trade Organization

Panel Proceedings

*China – Measures Related to the Exportation of Rare Earths,
Tungsten and Molybdenum
(DS431, DS432, DS433)*

Third Party Oral Statement

by

Norway

at the Third Party Session of the Panel

Geneva, 27 February 2012

Mr. Chairman, Members of the Panel,

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings. Norway did not present a written third party submission to the Panel, and will therefore briefly set out its views on one 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. This issue was raised by China in a request for a preliminary ruling, and is also among the questions posed by the Panel in advance of the first panel meeting.
2. The chapeau of the GATT 1994 Article XX explicitly refers back to the GATT itself, by underlining that "nothing in this Agreement shall be construed to prevent the adoption or enforcement" of the specific measures listed in the provision. However, in *China – Publications and Audiovisual Products*, 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.¹
3. Unlike paragraph 5.1, paragraph 11.3 of China's Accession Protocol does not include similar language as the introductory phrase relied on by the Appellate Body in *China – Publications and Audiovisual Products*. Paragraph 11.3 simply states that "China shall eliminate all taxes and charges 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 indicates, that the drafters meant to allow for justification under GATT Article XX.
4. Norway notes that the Appellate Body in *China - Raw Materials*, a case dealing with a similar legal issue as the one in question, concluded that China's export duties could not be justified by Article XX. In that case, the Appellate Body looked to Note to Annex 6 of China's Accession Protocol for a possible recourse to the

¹ Appellate Body Report, *China – Publications and Audiovisual Products*, WT/DS363/AB/R, para 233.

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provisions of Article XX to justify imposition of export duties on products not listed in Annex 6. The Appellate Body observed that they saw “nothing in the Note to Annex 6 suggesting that China could invoke Article XX of the GATT 1994 to justify the imposition of export duties that China had committed to eliminate under Paragraph 11.3 of China's Accession Protocol”.²

5. Norway is of the view that the wording and the structure of the paragraph appears 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.
6. We believe 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.
7. Finally, Norway acknowledges that Appellate Body Reports as adopted by the Dispute Settlement Body are only binding upon the parties with respect to the particular dispute in question. However, as noted by the Appellate Body in *US – Stainless Steel (Mexico)*, “this does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body Reports that have been adopted by the DSB”.³ Norway sees no reason for this Panel to divert from the Appellate Body’s conclusion in *China – Raw Materials* with respect to this question.
8. Thank you.

² Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R-WT/DS395/AB/R-WT/398/AB/R, para. 285.

³ Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, para. 158.