World Trade Organisation

Panel Proceedings

India – Certain Measures Relating to Solar Cells and Modules (DS456)

Third Party Oral Statement
by
Norway
at the Third Party Session of the Panel

Geneva, 4 February 2015

Mr. Chair, 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 in this oral statement briefly set out its views on one legal issue; the applicability of the GATT Article III:8(a).[1]

2. The United States claims that the JNNSM Programme's domestic content requirements for solar cells and solar modules are contrary to India's obligations under the GATT Article III:4, and that the measures cannot be justified by the "government procurement" derogation under the GATT Article III:8(a). India disagrees with these claims.

3. According to the GATT Article III:8(a), Article III "shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale".

4. In *Canada – Renewable Energy/Feed-In Tariff Program*, the Appellate Body found that "the product of foreign origin allegedly being discriminated against must be in a competitive relationship with the product purchased", in order for the derogation of Article III:8(a) to apply.[2] In that case, the products discriminated against because of their origin were generation equipment, while the product procured was electricity. The Appellate Body thus found that these products were <u>not</u> in a competitive relationship with each other. Accordingly, the relevant measures were not covered by Article III:8(a).

5. On this basis, the United States asserts that solar cells and solar modules (the products discriminated against) are not in a competitive relationship with electricity (the

[1] The General Agreement on Tariffs and Trade 1994 ("the GATT").
[2] Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, *Canada – Masures Relating ot the Feed-In Tariff Program*, WT/DS412/AB/R, WT/DS426/AB/R, adopted 24 May 2013, para. 5.79.

products procured). The United States thus argues that the local content requirements relating to solar cells and solar modules of the JNNSM Programme are not covered by the derogation of Article III:8(a).[3]

6. Norway finds this line of argument to be persuasive. As the Appellate Body has held, the crucial question is whether the relevant products are in a competitive relationship with each other. Norway agrees with the European Union that India's arguments aim at distinguishing the present case from that of *Canada – Renewable Energy/Feed-In Tariff Program,* based on the whether the products discriminated against are directly used in the generation of power or not.[4] India, as Norway understands it, seems to argue that it is sufficient for the application of Article III:8(a) for the products to be somehow related to each other. This would however undermine the relevant criteria set out by the Appellate Body, which qualified the type of relationship relevant for the application of the provision. Some form of relationship connected to the production process is not enough; there needs to be a competitive relationship between the products in question. As stated by the European Union; a different interpretation would indeed open the doors for discrimination by proxy.[5]

Mr. Chair, Members of the Panel,

7. Having cited past Appellate Body practice, Norway would like to recall the role of precedents in the WTO dispute settlement system. The Appellate Body has underlined "that adopted panel and Appellate Body reports create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute. Following the Appellate Body's conclusions in earlier disputes is not only appropriate, it is what would be expected from panels, especially where the issues are the same. This is also in line with a key objective of the dispute settlement system to provide security and predictability to the multilateral

[3] United States' First Written Submission, paras. 78-79.
[4] European Union's Third Party Written Submission, paras. 37.
[5] European Union's Third Party Written Submission, para. 38.

trading system."[6] Norway would add that following previous reports also ensures fewer disputes and preserves both the system and the systemic function of the Appellate Body.

Mr. Chair, Members of the Panel,

8. This concludes Norway's statement here today. I thank you for your attention.

[6] Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology, WT/DS350/AB/R,* adopted 2 June 2009, para. 362 (emphasis added).