(AS DELIVERED)

IN THE WORLD TRADE ORGANISATION

United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products

Recourse to Article 21.5 of the DSU by Mexico

(AB-2015-6/DS381)

Oral Statement

by

Norway as a Third Participant

Geneva

21 September 2015

Mr. Presiding Member, Members of the Division,

I. INTRODUCTION

1. Norway welcomes the opportunity to make a statement as a Third Participant before the Appellate Body in this appeal. Today, Norway will address two issues: Firstly, the allocation of the burden of proof under Article 2.1 of the TBT Agreement; and secondly, the proper order of analysis under the chapeau of Article XX of the GATT 1994.

II. THE BURDEN OF PROOF UNDER ARTICLE 2.1 OF THE TBT AGREEMENT

2. Before the Panel, the Parties to the dispute agreed that the complainant bears the burden of proof to demonstrate *all* elements under Article 2.1 of the TBT Agreement. Thus, according to the Parties, it falls on the complainant both to demonstrate that the measure modifies the conditions of competition in the marketplace to the detriment of imported products, and that this detrimental impact reflects discrimination, and thus does not stem exclusively from a legitimate regulatory distinction. While recognizing that systemic reasons may favour another solution, the Panel chose to adopt the Parties' approach, given their agreement.[1] In its Appellant Submission, the United States reiterates its position on the allocation of burden of proof.[2] As I will explain, it is Norway's firm view that this is not the correct approach under Article 2.1.[3]

3. In WTO dispute settlement, the main principle for the allocation of burden of proof is that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence".[4] Furthermore, "if that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption".[5]

4. For example, in a dispute involving GATT 1994 Article III:4 and Article XX, the initial burden of proof rests on the complainant to show that the measure at issue modifies the

[1] Panel Report, *United States – Tuna II (Article 21.5 – Mexico)*, para. 7.59.
[2] United States' Appellant Submission, para. 72.
[3] See also Norway's response to Additional Panel Question to the Third Parties.
[4] Appellate Body Report, *United States - Wool shirts and Blouses,* p. 14.
[5] Appellate Body Report, *United States - Wool shirts and Blouses,* p. 14.

conditions of competition in the market of the regulating Member to the detriment of imported, as compared to like domestic products. However, when the complainant has shown that such detrimental impact exists, the burden shifts to the respondent, who may wish to justify this detrimental impact under Article XX by showing that there is a legitimate objective and that the measure is neither designed nor applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination.

5. Norway is of the opinion that the same burden of proof, and the same order of the shifting of the burden of proof, applies to Article 2.1 of the TBT Agreement. Even if Article 2.1 is formulated and structured somewhat differently than Article III:4 and Article XX of the GATT 1994, the legal standard in Article 2.1 embodies the *same balance* as that in the two GATT Articles. As the articles embody similar legal standards, there is no reason why the allocation of burden of proof should not be the same.

III. THE CHAPEAU OF ARTICLE XX OF THE GATT 1994

6. The United States claims that the Panel applied an incorrect legal analysis in examining whether the certification requirements and the tracking and verification requirements "discriminate" for the purposes of the chapeau of Article XX of the GATT 1994. One of the arguments by the United States in this context is that the Panel should have considered the question of whether there is discrimination between countries where the same conditions prevail, separately from the question of whether such discrimination is "arbitrary or unjustifiable".[6]

7. The Appellate Body clarified what is the proper order of analysis under the chapeau of Article XX in its report in *EC – Seal Products*. Here it was explained that "discrimination within the meaning of the chapeau of Article XX 'results … when countries in which the same conditions prevail are differently treated'".[7] The Appellate Body further set out that "[w]here this is the case, a panel should analyse whether the resulting discrimination is 'arbitrary or unjustifiable'".[8]

8. As described by the Appellate Body, the legal analysis under the chapeau consists of two steps; an investigation of whether discrimination exists, and an analysis of whether any such

[6] United States' Appellant Submission, para. 46.
[7] Appellate Body Report, *EC – Seal Products*, para. 5.303.
[8] Appellate Body Report, *EC – Seal Products*, para. 5.303.

discrimination is arbitrary or unjustifiable. The "arbitrary or unjustifiable"-examination must be the second step of the analysis, as it presupposes the existence of discrimination between countries where the same conditions prevail. Where such discrimination does not exist, a further examination of whether it is "arbitrary or unjustifiable" serves no meaningful purpose.

Mr, Presiding Member, Members of the Division,

9. This concludes Norway's statement here today. Thank you for your attention.