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 (WT/DS381)

Third Party Oral Statement

by

Norway

Geneva

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I. INTRODUCTION

Mr. Chairman, Members of the Panel,

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings.

2. In its written statement, Norway addressed certain aspects of the interpretation of Article III:4 of the GATT 1994. We will not repeat these arguments here. Rather, we would like to draw the Panel's attention to two issues of relevance to the interpretation of Article 2.1 of the *Agreement on Technical Barriers to Trade* (TBT Agreement).

3. The legal standard for establishing a violation of Article 2.1 of the TBT Agreement involves a finding of less favourable treatment, which again involves a two-step analysis. First, the complainant must establish that the technical regulation at issue modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products *vis-à-vis* the group of domestic or other foreign products.[1] Second, it must be shown that the detrimental impact on imported products does not stem exclusively from a legitimate regulatory distinction (LRD).[2] Both of the questions that we will comment upon today are related to the second step.

II. THE SCOPE OF THE ANALYSIS

4. The first question that we will address is: what is the scope of the Panel's analysis when determining whether the detrimental impact stems exclusively from a LRD. In the view of the Unites States, the scope should be confined to those aspects of the measure forming the regulatory distinction.[3] Norway agrees with Canada that the approach proposed by the United States is not in line with the standard articulated in the jurisprudence.[4]

5. In previous TBT cases, the Appellate Body has concluded that "a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing

[1] Appellate Body Report, *US – Clove Cigarettes*, para. 180.
[2] Appellate Body Report, *US – Clove Cigarettes*, paras. 181-182.
[3] United States' First Written Submission, paras. 191 and 222.
[4] Canada's Third Party Submission para. 10.

structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed".[5]

6. In other words, while the regulatory distinction that accounts for the detrimental impact naturally will be in focus of the examination, the panel must look further when undertaking its analysis. Indeed, in accordance with what the Appellate Body has articulated, rather than conducting a limited inquiry only into those parts of the measure constituting the regulatory distinction, the Panel must undertake a thorough assessment on a case-by-case basis of the different elements of the technical regulation. In its determination of whether the detrimental impact reflects discrimination in violation of Article 2.1, the panel must carefully consider the overall architecture of the technical regulation as designed and applied and the even-handedness of the measure as a whole.

III. THE TEST FOR DETERMINING WHETHER OR NOT THE DETRIMENTAL IMPACT STEMS EXCLUSIVELY FROM A LRD

7. The second issue, on which we would like to make a few comments, is related to which *test* should be applied when determining whether the detrimental impact stems exclusively from a LRD. In the so-called TBT Trilogy Cases, the Appellate Body has articulated that the relevant inquiry when making this determination, is whether the regulatory distinction is designed and applied in an even-handed manner, or whether it lacks even-handedness, for example because it is designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination.[6]

8. In its first written submission, Mexico acknowledges this, but in addition, submits that the panel in *EU – Seals* has set out the most recent elaboration of the test to be applied when analysing the legitimacy of the regulatory distinction. [7] That test included three steps; "step 1" addressing the rational connection between the distinction and the objective of the measure; "step 2" considering whether an otherwise rationally disconnected distinction can

[5] Appellate Body Report, *US – Clove Cigarettes*, para 182.
[6] Appellate Body Report, *US – Clove Cigarettes*, para. 182 and Appellate Body Report, *US – COOL*, para. 271.
[7] See Mexico's first written submission para. 240. The Appellate Body in *EU – Seals* found that the measure in that case was not a technical regulation and declared "moot and of no legal effect" the findings and conclusions of the Panel with respect to the TBT Agreement, including this particular test.

be justified by some other "rationale"; and "step 3" addressing whether the distinction is applied in an even-handed manner. [8]

9. In Norway's view, the three steps articulated by the panel in *EU – Seals* does not properly reflect the analytical framework developed in the previous TBT cases. In particular, the test by the panel in *EU – Seals* seems to be at odds with previous jurisprudence when setting up separate inquiries (steps 1 and 2) into the measure's policy objective or other justifications for the regulatory distinction. In the previous cases, the consideration of whether there is a rational connection between the policy objective and the regulatory distinction, or, in the absence of such rational connection, whether there are other cogent reasons explaining the regulatory distinction, has been an integral part of the even-handedness analysis. Indeed, this consideration played an important role in the even-handedness analysis both in *US – Clove Cigarettes* and *US – COOL*.

10. The analytical framework relied on by the Appellate Body in this regard, is not the same as the analysis used in the context of Article XX of the GATT 1994. The need to conduct independent analyses under these two provisions was recently confirmed by the Appellate Body in *EU – Seals*[9]. At the same time, however, the Appellate Body has underscored that there are "important parallels between the analyses" to be applied under Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994.[10] In light of this, the even-handedness analysis under Article 2.1 may be informed by the jurisprudence interpreting the term "arbitrary and unjustifiable discrimination" under the chapeau of Article XX. This supports our view that the assessment of the identified policy objectives, or other justifications for the distinction, must take place *as part* of the even-handedness analysis under Article 2.1 of the TBT Agreement.

11. Mr. Chairman, distinguished Members of the Panel, this concludes Norway's statement today.

Thank you for your attention.

[8] Panel Reports, *EU – Seals*, paras. 7.259 and 7.328.
[9] Appellate Body Reports, *EU – Seals*, para. 5.313.
[10] Appellate Body Reports, *EU – Seals*, para. 5.310.