World Trade Organization

Panel Proceedings

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

Recourse to Article 21.5 of the DSU by the United States

Second Recourse to Article 21.5 of the DSU by Mexico

WT/DS381

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

Geneva, 25 January 2017

Mr Chair, Members of the Panels,

1. Norway welcomes this opportunity to present its views on the issues raised in these proceedings. Norway did not present a written third party submission to the Panels. Without taking any position on the facts of this dispute, I will therefore in this oral statement set out Norway's views on two issues of relevance to the interpretation of Article 2.1 of the TBT Agreement.

2. The legal standard for establishing a violation of the TBT Agreement Article 2.1 involves a finding of less favourable treatment, which in turn entails 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.[2] I will first briefly comment on the second step of this analysis.

3. The Appellate Body has articulated that the relevant inquiry when considering if the detrimental impact stems exclusively from a legitimate regulatory distinction 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.[3]

4. In the original proceedings in this dispute, the Appellate Body accepted the notion of "calibration". The Appellate Body has clarified that this is not a separate test, but rather a part of the assessment when considering if a measure is "even-handed".[4] In this particular dispute, a calibration analysis includes an examination of whether different conditions for access to a "dolphin-safe" label are "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean.

[1] Appellate Body Report, *US – Clove Cigarettes*, para. 180.
[2] Appellate Body Report, *US – Clove Cigarettes*, paras. 181-182.
[3] Appellate Body Report, *US – Clove Cigarettes*, para. 182 and Appellate Body Report, *US – COOL*, para. 271.
[4] Appellate Body Report, *US – Tuna II (Article 21.5 - Mexico)*, para 7.98.

Contrary to what Mexico argues in its First Written Submission,[5] Norway agrees with other third parties that the calibration test should not include an assessment of accuracy of certification, reporting and/or record-keeping related to the labelling conditions.[6] We note that this was not a part of the test applied by the Appellate Body in the original proceedings of this dispute.

5. I will now turn to the burden of proof, which is commented on by both parties in these proceedings in their submissions to the Panels. While Mexico refers to the United States having the burden of proof with regard to Article XX of the GATT 1994, Mexico appears silent on the burden of proof with respect to Article 2.1 of the TBT Agreement. The United States, on the other hand, repeatedly states that the United States has the burden of proof with respect to the matter brought by the United States, and that Mexico has the burden of proof with respect to the matter brought by Mexico. In addition, the United States refers to the Appellate Body's statement that "the party that asserts a fact is responsible for providing proof thereof".[7]

6. Norway chooses to refrain from speculating in what the United States might imply is the consequence of them having initiated Article 21.5 proceedings in a dispute where they were originally the respondent with regard to the burden of proof. However, we would like to point out that, 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".[8] 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".[9] The Appellate Body, in the first Article 21.5 proceedings of this dispute, confirmed its

[5] Mexico's First Written Submission, para. 218 ff.
[6] Australia's Third Party Submission, European Union's Third Party Submission.
7 United States' Second Written Submission, para. 11 and United States' Third Written Submission, both referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 283.
[8] Appellate Body Report, *United States - Wool shirts and Blouses,* p. 14.
[9] Appellate Body Report, *United States - Wool shirts and Blouses,* p. 14.

statement in the original proceedings that this principle also applies to Article 2.1 of the TBT Agreement.

7. As explained by the Appellate Body:

> Under Article 2.1, this means that a complainant must show that, under the technical regulation at issue, the treatment accorded to imported products is less favourable than that accorded to like domestic products or like products originating in any other country. [...] If, however, the respondent shows that the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction, it follows that the challenged measure is not inconsistent with Article 2.1.[10]

8. The Appellate Body's use of the terms «complainant» and «respondent» must be seen in its context. In this regard, we refer to the reiteration by the Appellate Body that "Article 21.5 proceedings do not occur in isolation from the original proceedings, but that both proceedings form part of a continuum of events".[11] The continuum of event means, in Norway's view, that who are considered to be the complainant and the respondent respectively with regard to the burden of proof in relation to Article 2.1 of the TBT Agreement are the same as in the original proceedings. In other words, this does not shift depending on who initiated Article 21.5 proceedings.

9. Hence, it is clear that in this particular dispute, it rests upon Mexico to demonstrate that the first step of the legal standard for establishing a violation of Article 2.1 is fulfilled – i.e. 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.[12] If such detrimental impact is demonstrated, it rests upon the United States to show that the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction.

[10] Appellate Body Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.32.
[11] Appellate Body Report, *US – Tuna II (Article 21.5 – Mexico)*, paras. 5.9 and 7.64, referring to previous Appellate Body Reports.
[12] Appellate Body Report, *US – Clove Cigarettes*, para. 180.

Mr Chair, Members of the Panels,

10. This concludes Norway's statement. Thank you.