(As delivered)

IN THE WORLD TRADE ORGANIZATION

Before the Appellate Body

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

(AB-2017-9 / DS381)

Oral Statement

by

Norway as a Third Participant

Hearing of the Appellate Body
Geneva

30 July 2018

Presiding Member, Members of the Division,

1. Norway welcomes this opportunity to make a statement as a Third Participant before the Appellate Body in this appeal.

1. Without taking any position on the facts of these disputes, we will briefly offer some views on an issue 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. Second, it must be shown that the detrimental impact on imported products does not stem exclusively from a legitimate regulatory distinction. I will 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.

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". 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. The Panels in this dispute did not agree with Mexico's argument that the calibration test should not include an assessment of accuracy of certification, reporting and/or record-keeping related to the labelling conditions. On the contrary, the Panels concluded that "the risk of inaccurate labelling does not form part of the 'risk profiles' of different fisheries".[1] This finding has been appealed by Mexico,

[1] Panel Report, para. 7.127.

who argues that the Panel erred, and that "in the circumstances of the tuna measure, label accuracy was a necessary factor in the calibration test and the overall assessment of even-handedness".[2] Norway notes that this was not a part of the test applied by the Appellate Body in the original proceedings of this dispute.

5. Before concluding, Norway would like to offer a few remarks on the issue of partially open hearings. This is in reference to the possibility that the Appellate Body will accept Mexico's request that it reviews the Panels' decision to conduct a partially open meeting of the Parties without the consent of both Parties.[3] As we commented to the Panels in this dispute, Norway is of the view that there is nothing in the DSU preventing a panel from adopting such procedures. We particularly note that Article 12.1 of the DSU states that "Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute".

6. As pointed out by the Panels, both the Appellate Body as well as numerous panels and other WTO adjudicators have adopted procedures to allow for open hearing after consulting the parties. We agree with the Panels in this dispute that "[i]f a WTO adjudicator has the power to accede to a request to fully open a hearing or meeting with the parties, then *a fortiori* it must in principle also have the power to go less far, including by opening only parts of a meeting with the parties".[4] Moreover, we agree with the Panels' assessment that they "in principle [had] the power to authorize the United States to disclose statements of its own positions (but not those of Mexico or a non-disclosing third party) to the public through a partially open panel meeting, even if Mexico oppose[d] the United States' request". [5]

Presiding Member, Members of the Division,

7. This concludes Norway's statement here today. Thank you.

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[2] Mexico's Appellant Submission, para. 122.
[3] Mexico's Appellant Submission, para. 332 ff.
[4] Panel Report, para. 7.16.
[5] Panel Report, para. 7.23.