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 Submission

by

Norway

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I. INTRODUCTION

1. Norway welcomes the opportunity to be heard and to present its views as a third party in this proceeding under Article 21.5 of the Dispute Settlement Understanding (DSU).

2. Norway will not address all of the issues upon which there is disagreement between the parties to the dispute. Rather, Norway will in this written submission confine itself to discuss certain aspects of the interpretation of Article III:4 of the GATT 1994.

II. GATT 1994 ARTICLE III:4

A. Introduction

3. GATT 1994 Article III:4 provides in relevant parts that

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

4. Mexico and the United States disagree on whether the Amended Tuna Measure[1] accords Mexican tuna products "treatment no less favourable than that accorded" like tuna products from the United States. With regard to the legal standard, the focus of the disagreement seems to be whether the underlying rationale – the basis – on which the member is regulating, must be part of the examination when assessing "less favourable treatment" under the GATT 1994 Article III:4[2], or if it is sufficient to demonstrate that the measure "has a detrimental impact on the competitive opportunities for imported […] products […] *vis-à-vis* domestic […] products".[3] Accordingly, the Parties seems to disagree on whether or not there is a need to assess if the detrimental impact "reflects discrimination against like imported products, including an "additional inquiry" as to whether the detriment is related to the foreign origin of the product"[4]

[1] The measure is described in the Parties' submissions, see i.a. Mexico's First Written Statement part II and United States' First Written Submission part II.A.
[2] United States' First Written Submission para. 304.
[3] Mexico's Second Written Submission para. 219.
[4] Mexico's Second Written Submission para. 219.

5. Norway takes no position on the facts of the dispute, but will in the following submit its views on the legal interpretation of what constitutes "less favourable treatment" under GATT 1994 Article III:4.

B. Less Favourable Treatment

6. There are several prior panel and Appellate Body reports in which the term "treatment no less favourable" in Article III:4 of the GATT 1994 has been interpreted. In *EU – Seals*, the Appellate Body held that "the following propositions are well established" as a result of these prior reports:

> First, the term "treatment no less favourable" requires effective equality of opportunities for imported products to compete with like domestic products. Second, a formal difference in treatment between imported and domestic like products are necessary, nor sufficient, to establish that imported products are accorded less favourable treatment than that accorded to like domestic products. Third, because Article III:4 is concerned with ensuring effective equality of competitive conditions for imported products, a determination of whether imported products are treated less favourably than like domestic products involves an assessment of the implications of the contested measure for the equality of competitive conditions between imported and domestic like products. If the outcome of this assessment is that the measure has a detrimental impact on the conditions of competition for like imported products, then such detrimental impact will amount to treatment that is "less favourable" within the meaning of Article III:4. Finally, for a measure to be found to modify the conditions of competition in the relevant market to the detriment of imported products, there must be a "genuine relationship" between the measure at issue and the adverse impact on the competitive opportunities for imported products.[5]

7. Article III:4 applies to both *de jure* and *de facto* discrimination.[6] In considering claims of *de facto* discrimination, a panel "must take into consideration 'the totality of facts and circumstances before it', and assess any 'implications' for competitive conditions

[5] Appellate Body Report, *EU – Seals*, para. 5.101 (footnotes omitted).
[6] See, e.g. Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.159.

'discernible from the design, structure, and expected operation of the measure'".[7] The assessment must be founded on a careful analysis of the contested measure and its implications in the marketplace.[8]

8. The Appellate Body has held that distinctions between imported and like domestic products may be drawn without necessarily according less favourable treatment to the imported products. However, there is a point at which the differential treatment of imported and like domestic products amounts to "treatment no less favourable" within the meaning of Article III:4. [9] According to the Appellate Body, that is when the regulatory differences distort the conditions of competition to the detriment of imported products. If that happens, "then the differential treatment will amount to treatment that is less favourable within the meaning of Article III:4."[10] A further inquiry into the rationale of, or the justification for, the regulatory differences is not required for a finding of a violation under GATT 1994 Article III:4.

9. It is worth noting, that the legal standard for assessing "treatment no less favourable" under Article III:4 of the GATT 1994 differs from the legal interpretation of the identical term in Article 2.1 of the *Agreement on Technical Barriers to Trade* (*TBT Agreement*). Under Article 2.1 of the *TBT Agreement*, there is a second step in the legal analysis, in addition to the examination of whether the contested measure modifies the conditions of competition in the relevant market to the detriment of imported products. The extra step involves an inquiry into whether the detrimental impact (where found) can be explained from stemming exclusively from a legitimate regulatory distinction. As explained above and, and as stated by the Appellate Body in *EU – Seals*, this second step, is not required under Article III:4 of the GATT 1994:

> We do not consider […] that for the purposes of an analysis under Article III:4, a panel is required to examine whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate distinction.[11]

10. The difference between the legal standards under GATT Article III:4 and Article 2.1 of the *TBT Agreement* is due to the "immediate contextual differences" between the *TBT Agreement* and the GATT 1994.[12] Under GATT 1994 Article III:4, any justifications for the

[7] Appellate Body Report, *US – COOL*, para 269 (footnotes omitted).
[8] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.
[9] Appellate Body Report, *EU – Seals*, para 5.109.
[10] Appellate Body Report, *Thailand Cigarettes (Phillippines)*, para. 128.
[11] Appellate Body Report, *EU – Seals*, para. 5.117.
[12] Appellate Body Report, EU – Seals, para. 5.125.

regulatory distinction giving rise to the detrimental impact may be considered pursuant to the exceptions set forth in this Agreement, notably under Article XX. The *TBT Agreement* does not contain a general exceptions clause similar to that of the GATT 1994. Instead, the sixth recital of the preamble of the *TBT Agreement* indicates that a Member has a right to adopt measures necessary to fulfil certain legitimate policy objectives, provided they are not applied in a manner that would constitute a means of arbitrary and unjustifiable discrimination or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the Agreement.[13] In this context, the Appellate Body has set out that, under Article 2.1, if a regulatory distinction has a detrimental impact on imports, a panel may assess its legitimacy under Article 2.1 itself.[14]

III. CONCLUSION

11. Norway respectfully requests the Panel to take account of the considerations set out above.

[13] Appellate Body Report, *US – Clove Cigarettes*, para. 109.
[14] Appellate Body Report, *US – Clove Cigarettes*, para. 109.