(As Delivered)

IN THE WORLD TRADE ORGANISATION

Australia – Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging

(WT/DS435/441/458/467)

Third Party Oral Statement

by

Norway

Geneva, 3 June 2015

Chairperson, Members of the Panel,

A. Introduction

1. Norway thanks the Panel for the opportunity to present its views on the issues raised in these panel proceedings regarding Australia's tobacco plain packaging requirements.

2. As you will be aware, Norway has already submitted its arguments on a number of questions in its third party written submission. We will not repeat those arguments today, but rather take this opportunity to comment on other issues of relevance for these disputes. Thus, we begin by addressing some interpretative questions related to the TRIPS Agreement and the protection of public health. Then we turn to the TBT Agreement and certain interpretational issues relating to Article 2.2. Finally, we will give some comments on Article 2.5 of the TBT Agreement.

B. The TRIPS Agreement recognizes Members' right to adopt measures for the protection of public health

3. The Panel's task in this case is to examine whether the Australian plain packaging measure, adopted in order to protect public health, is compatible with Australia's WTO obligations. The examination involves an interpretation of provisions under the TRIPS Agreement that have never before been interpreted by panels and the Appellate Body. The result of the Panel's examination and interpretation may have significant implications for the regulatory space of WTO Members when it comes to public health.

4. It is Norway's view that the interpretative approach proposed by the complainants does not sufficiently take into account the guidance given for the interpretation of the TRIPS Agreement in the context of measures to protect public health. Indeed, we believe that the interpretation advanced by the complainants restrains the scope to protect public health, and as such goes against the objectives and fundamental principles of the TRIPS Agreement.

5. WTO provisions shall be interpreted in "good faith in accordance with the ordinary meaning to be given to the terms [..] in their context and in the light of its object and purpose". Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its articles shall be taken into account together with the context.[1]

6. When all the relevant interpretative factors are considered, it is clear that the TRIPS Agreement recognizes a right for Members to protect public health. Of particular relevance in this regard are Articles 7 and 8.1, as well as the *Declaration on the TRIPS Agreement and Public Health* (Doha Declaration on Public Health).

7. Article 7 ("Objectives") states that intellectual property rights should be protected and enforced in a manner "conducive to social and economic welfare". Furthermore, according to the fundamental principles set out in Article 8.1, Members may adopt measures necessary for the protection of public health, provided that such measures are consistent with the provisions of the TRIPS Agreement.

8. Both these articles must be considered as relevant context, clarifying the object and purpose of the TRIPS Agreement.[2] The Articles recognize that social welfare and the protection of public health are objectives of special importance for WTO Members. In particular, Article 8.1 expressly sets out that Members have regulatory space under the TRIPS Agreement to adopt public health measures consistent with the Agreement.

9. *The Doha Declaration on Public Health* is even clearer on the significance to be accorded to the protection of public health under the TRIPS Agreement. Paragraph 4 of the Declaration underscores that the TRIPS Agreement "does not or should not prevent Members from taking measures to protect public health". Moreover, it gives express interpretative guidance, affirming that "the Agreement can and should be

[1] The *Dispute Settlement Understanding* Article 3.2 sets out that the WTO Agreements shall be interpreted in accordance with the customary rules of interpretation of public international law. The Appellate Body has confirmed that the relevant rules of treaty interpretation in the *Vienna Convention on the Law of Treaties* (Articles 31-33) have the status as customary or general international law in this context.
[2] Doha Declaration on Public Health, para. 5(a).

interpreted and implemented in a manner supportive of WTO members' right to protect public health".

10. While the Declaration does not qualify as an authoritative interpretation under the Marrakesh Agreement, the Appellate Body has confirmed that a decision adopted by Members may on certain conditions, constitute a "subsequent agreement" within the terms of Article 31(3)(a) of the *Vienna Convention on the Law of Treaties*.[3]

11. *The Doha Declaration on Public Health* was adopted in 2001, and, thus, subsequent to the adoption of the TRIPS Agreement. The terms of paragraph 4 of the Declaration give explicit guidance to the interpretation of the TRIPS Agreement in relation to Members' right to protect public health, and clearly express a common understanding between Members on the interpretation of the Agreement in this regard.[4] Thus, paragraph 4 of the Declaration must be considered a "subsequent agreement" within the meaning of Article 31(3)(a) of the Vienna Convention.

12. In light of this, the Panel, in its interpretation of the TRIPS Agreement, should take the guidance in paragraph 4 of the Declaration into account, together with the direction given in Articles 7 and 8.1 of the Agreement. Thus, the relevant TRIPS provisions should be interpreted in a manner supportive of Members' rights to protect public health.

C. The TBT Agreement and the Members' right to adopt measures for the protection of public health

13. We now turn to the TBT Agreement. Article 2.2 of this Agreement explicitly provides that WTO Members may take measures necessary to protect human health, and it has been recognized that this interest is "both vital and important in the highest

[3] Appellate Body Report, *US - Clove Cigarettes,* para. 262.
[4] Appellate Body Report, *US - Clove Cigarettes*, para. 265-267.

degree".[5] WTO Members may thus take necessary measures for the protection of public health, subject to the criteria prescribed in the TBT Agreement.

14. Norway would like to take this opportunity to, first, make further remarks on how to assess the degree of contribution of the measure to the legitimate objective of protecting human health.

15. We recall that the degree of contribution may be determined on the basis of *the design, structure and operation* of the technical regulation, as well as from evidence relating to the *application* of the measure.[6]

16. In the *Brazil – Retreaded Tyres* case, the Appellate Body provided further guidance in relation to cases where it is difficult to isolate a measure's contribution to its objective in the short term. It was underlined that contribution could be established on the basis of whether the measure at issue, and I quote: "is apt to produce a material contribution to the achievement of its objective" – end of quote. Resort could in this regard be had to quantitative projections or qualitative reasoning.[7]

17. As to the methods for analysing the contribution of the measure, the Appellate Body has held that this is a function of the nature of the risk, the objective pursued and the level of protection sought, and that it also depends on the evidence existing at the time the analysis is made. It was further underlined that the Panel "should enjoy a certain latitude" in this regard.[8]

18. Thus, it transpires that the assessment of contribution, and the weight accorded to the relevant factors of measuring contribution, may vary from case to case, depending on the specifics of the case at issue. Consequently, the relative weight given to *inter*

[5] In the context of Article XX(b) of the GATT 1994, see Panel Report, *EC – Asbestos,* para. 172 (citing Appellate Body Report, *Korea – Various Measures on Beef*, para. 162); Appellate Body Report, *Brazil – Retreaded Tyres*, para. 144.
[6] Appellate Body Report, *US – Tuna II (Mexico)*, para. 317. See also Appellate Body Report, *US – COOL*, para. 373.
[7] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151. See also Appellate Body Report, *US – COOL (Article 21.5)* para. 5.209
[8] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145. See also Appellate Body Report, *US – COOL (Article 21.5)* para. 5.210.

alia the evidence relating to the application of the measure versus the design, structure and operation of the measure, could vary accordingly.

19. On this background, and in relation to the case at hand, Norway would like to reiterate that the impact of the plain packaging measure, as part of a comprehensive range of measures, will primarily occur in the longer term. Although the evidence presented by Australia indicates that the measure has already been effective, regard should be had to the fact that the *full* effects of the measure may manifest themselves gradually over several years.[9] Further, it should be taken into account that the aim of improving public health by reducing tobacco use, is best tackled with a comprehensive policy comprising several interacting measures.[10]

20. Before concluding our observations on the TBT Agreement, we would like to comment upon the possible implications of applying the rebuttable presumption under Article 2.5 of the TBT Agreement to the case at hand.

21. In Norway's view, the FCTC Guidelines to Articles 11 and 13 must be considered to be relevant international standards under Article 2.5. If the Panel were to agree with this observation, this would have a bearing on the Panel's assessment of Article 2.2.

22. The starting point under Article 2.2 is that the complainant bears the burden of proof in showing that a technical regulation creates an unnecessary obstacle to international trade. In this regard, the complainant is required to establish a *prima facie* case.[11]

23. However, in so far the criteria under Article 2.5 are satisfied, the plain packaging measure shall be "rebuttably presumed not to create an unnecessary obstacle to international trade". The point of departure would thus be that the technical regulation does *not* create an unnecessary obstacle to international trade.

[9] Australia's First Written Submission para. 670, with further references in fn. 887; Norway's Third Party Submission, paras. 112-113.
[10] Norway's Third Party Submission, para. 111.
[11] Appellate Body Report, *US- Tuna II* (Mexico), para. 323.

24. In this regard, we recall that the task of the treaty interpreter is to ascertain and give effect to a legally operative meaning for the terms of the treaty. The applicable fundamental principle of effectiveness is that a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility.[12]

25. In line with this, and interpreted in accordance with the effectiveness principle, the presumption seems to imply that a higher standard of proof is required in relation to the question of whether a measure is an unnecessary international trade obstacle under Article 2.2, as compared to the cases where the presumption in Article 2.5 is not applicable. We respectfully submit that the Panel takes these considerations into account if applying the rebuttable presumption to the case at hand.

Chairperson, Members of the Panel,

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

[12] See, *inter alia*, Appellate Body Report, *Canada – Dairy*, para. 133.