As delivered

**World Trade Organization**

**Panel Proceedings**

# *United States – Certain Measures Relating to the Renewable Energy Sector (DS510)*

## Third Party Oral Statement
## by
## Norway
## at the Third Party Session of the Panel

**Geneva**

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## I. INTRODUCTION

Mr Chair, Members of the Panel,

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings. Norway did not present a written third party submission to the Panel and does not take a specific position on the particular facts presented by the parties. Rather, Norway will in this oral statement focus on the legal standard under Article III:4 of the GATT 1994.

2. The measures at issue are the consistency of certain sub-federal schemes/programmes of the United States pertaining to the renewable energy sector. Subsidies (or other financial advantages) are granted to the relevant persons contingent upon the use of domestic goods over imported goods.

3. India claims that the measures at issue are inconsistent with the United States' national treatment obligation under Article III:4 of the GATT 1994 because they accord less favourable treatment to the imported products than to the like products originating in the relevant U.S. jurisdictions.

4. GATT Article III prohibits, generally speaking, Members from treating imported products less favourably than like domestic products once the imported product has entered the domestic market. Toward this end, "Article III obliges Members of the WTO to provide *equality of competitive conditions* for imported products in relation to domestic products".[1]

5. It is well established, more concretely, that the following three elements must be demonstrated to determine a breach of Article III:4:

   a) that the imported and domestic products at issue are "like products";

   b) that the measure at issue is a "law, regulation and requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; and

[1] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16 (emphasis added).

c) that the imported products are accorded "less favourable" treatment than that accorded to like domestic products.

Only the second and third elements are at issue in this dispute.

## II. WHETHER THE MEASURES AT ISSUE ARE "LAWS, REGULATIONS [OR] REQUIREMENTS AFFECTING THEIR INTERNAL SALE, OFFERING FOR SALE, PURCHASE, TRANSPORTATION, DISTRIBUTION OR USE".

Mr Chair, Members of the Panel,

6. The US contests that India has established that the measures at issue "affect" the "use" (or "purchase", "sale", etc.) of the products in question because, in its view, India has failed to establish that those measures have induced buyers to prefer energy products originating in the several involved U.S. jurisdictions. Norway understands the US to emphasise that the term "affecting" implies that a measure must actually alter market conditions for a violation to occur.[2]

7. The term "affecting" indicates a broad scope of application.[3] Also past panels and the Appellate Body have understood the term "affecting" in Article III:4 of the GATT 1994 to have a "'broad scope of application' in the specific context of the impact of domestic content requirements on private operators' choices and incentives".[4]

8. Furthermore, panels have repeatedly found that measures covered by Article III:4 of the GATT 1994 include "conditions that an enterprise accepts in order to receive an advantage", and the Appellate Body has confirmed that measures that "create an incentive" for use of domestic over imported goods can be considered to "affect" the internal sale, purchase, or use of those goods.[5]

9. Along the same lines, the panel in *Canada – Autos* maintained that "[t]he word 'affecting' in Article III:4 of the GATT has been interpreted to cover not only laws and regulations which directly govern the conditions of sale or purchase but also any

[2] For example, United States' First Written Submission, paras. 84, 87-88.
[3] Panel Report, *Canada – Autos*, para. 10.80 (emphasis added).
[4] Panel Report, *India Solar Cells*, para. 7.87.
[5] Panel Report, *India Solar Cells*, para. 7.87.

laws or regulations which *might* adversely modify the conditions of competition between domestic and imported products".[6]

10. The panel in *China – Publications and Audiovisual Products* stated, moreover, that "the word 'affecting' covers not only measures which directly regulate or govern the sale of domestic and imported like products, but also measures which create incentives or disincentives with respect to the sale, offering for sale, purchase, and use of an imported product [that] 'affect' those activities".[7]

11. WTO panels and the Appellate Body have, consequently, consistently opted for wide interpretations of the term "affecting". Under this term, measures that not only actually, but also *potentially* and/or *indirectly* affect trade have been subject to judicial review. It is well established in WTO jurisprudence that incentives to favour domestic products are inconsistent with Article III:4 of the GATT 1994.

12. A measure can thus be considered to be a measure affecting, i.e. having an effect on, the internal sale or use of imported products even if it is <u>not</u> shown that *under the current market circumstances* the measure has had an impact on the decisions of private parties to buy imported products. It can therefore not be required that a measure actually succeed in "affecting" the "sale, purchase, transportation, distribution, or use" of the product at issue, for a measure to be inconsistent with Article III:4.

13. Norway therefore concurs with other third parties[8] that have argued that, given the aim and nature of the measures at issue, inconsistency with Article III:4 of the GATT 1994 need not be based on actual market effect(s).

14. The Panel should therefore interpret the term "affecting" broadly, as encompassing any measure that "has an effect on" or "might" affect any aspect of the sale, purchase, transportation, distribution, or use of the products at issue. Whether an actual effect has indeed materialised from a measure may, to varying degrees, also depend on other, alternative and independent circumstances and conditions influencing the market.

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[6] Panel Report, *Canada – Autos*, para. 10.80 (citing GATT Panel Report, *Italy – Agricultural Machinery*, para. 12) (emphasis added).
[7] Panel Report, *China – Publications and Audiovisual Products*, para. 7.1450.
[8] The European Union's Written Submission, para. 23 and Japan's Written Submission, para. 7.

## III. WHETHER THE MEASURES AT ISSUE ACCORD IMPORTED PRODUCTS TREATMENT NO LESS FAVOURABLE THAN THAT ACCORDED TO LIKE DOMESTIC PRODUCTS.

Mr Chair, Members of the Panel,

15. The United States argues that a measure accords "less favourable" treatment to imported products within the meaning of Article III:4 if the measure "*modifies the conditions of competition* in the relevant market to the detriment of imported products"[9]. Furthermore, it argues a measure that does not "affect" the "use" of a product necessarily does not "modify the conditions of competition", and it will thus also fail to satisfy the requirement of "less favourable" treatment.[10] It is therefore, as Norway understands the US reasoning, necessary to assess the measure's "implications in the marketplace" to determine whether a measure accords "less favourable" treatment.[11]

16. In *US – Section 337 Tariff Act* the GATT panel interpreted "treatment no less favourable" as requiring "effective equality of opportunities"[12]. This interpretation has been confirmed consistently by WTO panels and the Appellate Body.

17. The Appellate Body found in *Dominican Republic – Import and Sale of Cigarettes* that a measure accords "less favourable" treatment when it "gives domestic like products a competitive advantage in the market over imported like products".[13]

18. In *US – FSC (Article 21.5 – EC)* the Appellate Body elaborated further on this standard by noting that an analysis under Article III:4 of the GATT 1994 "must be grounded in close scrutiny of the 'fundamental thrust and effect of the measure itself'. This examination cannot rest on simple assertion, but must be founded on a careful analysis of the contested measure and of its implications in the marketplace. At the same time, however, the examination need not be based on the *actual effects* of the contested measure in the marketplace".[14]

[9] Appelate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215 (emphasis added).
[10] United States' First Written Submission, para. 80.
[11] United States' First Written Submission, para. 81 (underlining added).
[12] GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.11.
[13] Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 93.
[14] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215 (original emphasis).

19. The Appellate Body explained, more specifically, in *Japan – Alcoholic Beverages II* and *Korea Alcoholic Beverages* that "it is irrelevant [to Article III inconsistency] that the 'trade effects' of the tax differential between imported and domestic products, as reflected in the volumes of imports, are *insignificant or even non-existent*".[15]

20. Following the same line of reasoning, the Appellate Body in *EC – Bananas III* outlawed an EC scheme that provided traders with an incentive to trade EC goods at the expense of imported like products, even in the absence of any tangible evidence suggesting that there was a quantified trade impact stemming from this measure.[16]

21. Therefore, Norway considers it unnecessary for a complaining Member to identify or produce actual data to substantiate a *prima facie* case that a measure modifies the conditions to the detriment of imported products, thereby providing "less favourable" treatment under Article III:4 of the GATT 1994.

22. Applying the same logic, Norway concurs with the view of other third parties, that data produced by a responding Member purporting to show that the measure did not modify the competitive conditions of the market, or that market participants did not avail themselves of the uncompetitive market conditions created by the measure, cannot rebut a claim of "less favourable" treatment.

## IV. CONCLUSION

Mr Chair, Members of the Panel,

23. This concludes Norway's statement here today. I thank you for your attention.

[15] Appellate Body Report, *Korea – Alcoholic Beverages*, para. 119 (quoting Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16 (emphasis added).
[16] Appellate Body Report, *EC – Bananas*, paras 213-214.