(As delivered)

IN THE WORLD TRADE ORGANIZATION

Before the Appellate Body

United States – Measures Affecting the Production and Sale of Clove Cigarettes

(AB-2012-1 / DS406)

Oral Statement
by
Norway as a Third Participant

Hearing of the Appellate Body
Geneva

9-10 February 2012

Mr Chairman, Members of the Division,

1. Norway welcomes this opportunity to make a brief statement as a Third Participant before the Appellate Body in this appeal. In this opening statement I will not repeat the arguments presented by Norway in its written submission, but just highlight a few points that we, in light of the written submissions by other Third Participants, believe are important to stress. These relate to the determination of "less favourable treatment", as well as the legal value of the Doha Ministerial Decision when interpreting Article 2.12 of the TBT Agreement.

2. Regarding the products to be compared when determining "less favourable treatment", Norway notes that the Appellate Body in *EC – Asbestos* established that the starting point for the analysis - i.e. the comparison how the group of domestic like products and the group of like imports are treated - should be the entire group of products identified as like products. This approach was confirmed by the panel in *US – Tuna*. In Norway's view, this jurisprudence is not compatible with comparing only *one* like domestic product with *one* like foreign product, leaving other like products aside. The term "any Member" in Article 2.1 of the TBT Agreement, which the Panel relied on, does not change this. In Norway's opinion, it could lead to random results if the term "any" in this provision is interpreted as allowing flexibility for the panel in each case to choose whether to focus on one Member, some Members or all Members when comparing the treatment of like products.

3. The concept of *de facto* discrimination could easily be undermined if the policy objectives of a measure are used to determine whether a measure is *de facto* discriminatory. In Norway's view, a determination of *de facto* discrimination based on the objectives is an unfortunate combination of two different assessments. A more appropriate approach would be to first assess whether there is *de facto* discrimination. Then, if existence of such discrimination has been established, one should complete an assessment of whether the measure can be justified due to the objectives of the technical regulation. However, this justification must be sought under applicable provisions permitting exceptions.

4. Concerning the United States' appeal of the Panel's findings that the United States had acted inconsistently with Article 2.12 of the TBT Agreement, Norway welcomes clarifications by the Appellate Body in this regard. The question of the status of Ministerial Decisions, especially with regard to interpretation of the WTO agreements, has

important systemic implications. The text in paragraph 5.2 of the Doha Ministerial Decision was agreed by all WTO Members in a Ministerial Conference, the highest ranking body in the WTO. Furthermore, the decision was preceded by a process in the WTO General Council. On this background, Norway is of the view that paragraph 5.2 should be given sufficient interpretative weight.

Mr Chairman, Members of the Division,

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

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