World Trade Organisation

Panel Proceedings

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

(DS406)

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

Geneva, 14 December 2010

Mr. Chairman, 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 will therefore briefly set out its views on two legal issues in this oral statement related to key systemic questions arising under the TBT Agreement.[1] These issues are: (i) the interpretation of the term "like products" under Article 2.1 of the TBT Agreement, and (ii) the existence of "de facto" discrimination under Article 2.1 of the TBT Agreement.

2. Before turning to the legal arguments, let me state that Norway supports the objective of reducing youth smoking. This case does not, however, revolve around that objective *as such*, but concerns the *means* chosen by the United States to fulfil that objective and, in particular, whether those means – and their design and effects - conform to the obligations of the United States under the GATT and the TBT Agreement.

A. The four general likeness criteria apply to the interpretation of the term "like product" under Article 2.1 of the TBT Agreement.

3. The Family Smoking Prevention and Tobacco Control Act of 2009 (the "Act"),[2] in its "special rule for cigarettes", bans certain cigarettes which are characterised as "flavored".[3] The stated objective[4] of the Act is to protect the public health, including by reducing the number of children and adolescents who smoke cigarettes. However, as we all know, the United States did not ban all flavoured cigarettes, but excluded menthol cigarettes, which are produced in the United States and are apparently highly popular there with both youth and adult smokers.

[1] Agreement on Technical Barriers to Trade ("the TBT Agreement"),
[2] Exhibit IND-1 to Indonesia's First Written Submission ("FWS").
[3] Indonesia FWS, para. 1.
[4] See report by the House of Representatives, Exhibit IND-2 to Indonesia's First Written Submission. Section 907.

4. It does not seem to be disputed that the "special rule for cigarettes" is a "technical regulation" covered by the TBT Agreement, as it lays down product characteristics of cigarettes,[5] regulating the kinds of additives that may be included in cigarettes. The question is thus whether the Special Rule is inconsistent with Article 2.1 of the TBT Agreement because it results in treatment that is "less favourable" to imported clove cigarettes than that accorded to the domestic like products.

5. Article 2.1 of the TBT Agreement provides that:

> *Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.*[6]

6. The first issue that arises under Article 2.1 of the TBT Agreement is whether clove cigarettes from Indonesia are "like" the cigarettes produced in the United States.

7. In these proceedings, several Members have referred to the scarcity of WTO jurisprudence related to Article 2.1. Norway, however, considers that the legal standards developed under Article III, including Article III:4, are highly relevant in interpreting the term "like products" in Article 2.1 of the TBT Agreement.

8. Norway starts by recalling that "the 'general principle' in Article III seeks to prevent Members from applying internal taxes and regulations in a manner which affects the competitive relationship, in the marketplace, *between the domestic and imported products involved*, 'so as to afford protection to domestic production.'"[7] In other words, the national treatment obligation seeks to ensure that government regulation does not interfere with consumers' choices between competing products. In that regard, the Appellate Body also noted in that same appeal that "the term

[5] Cf. point 1 of Annex 1 to the TBT Agreement.
[6] Emphasis added.
[7] EC – Asbestos, Appellate Body Report, para. 98. Original emphasis.

'like products' is concerned with competitive relationships between and among products ... in the marketplace."[8]

9. Together with Indonesia, Brazil, the EU, and Turkey, Norway considers that the four criteria laid down by the Working Party on *Border Tax Adjustments*, which were adopted by the Appellate Body in *EC - Asbestos*, provide a useful framework for analysing the "likeness" of particular products under Article 2.1 of the TBT Agreement, and that the competitive relationship between the products in question is an important factor to be considered by this Panel.

10. Norway notes that the United States does not seem to contest the usage of these criteria when establishing likeness. Rather, the United States seems to argue that a technical regulation -- *even* though it almost by definition applies to products or groups of products that are "like"[9] -- should be considered to apply to distinct products based on the regulatory "purposes of the regulation".[10]

11. Norway disagrees with the United States in this respect. Norway considers that "the regulatory purposes" of a technical regulation relate to the justification for the measure, and do not "stretch or squeeze" the like product determination under Article 2.1 of the TBT Agreement.

12. Although Norway takes no position on the facts of the dispute, it does wish to comment on the Panel's assessment of the four likeness criteria. In *EC – Asbestos*, the Appellate Body noted that the scope of the word "like" in Article III:4 of the GATT 1994 is broader than the scope of the word "like" in Article III:2.[11] This is because Article III:2 applies to like products, as well as directly competitive or substitutable, whereas Article III:4 applies solely to like products.[12] Although the Appellate Body did not decide if the overall product scope of each provision was

[8] EC – Asbestos, Appellate Body Report, paras. 99 and 103.
[9] United States, FWS, para. 217.
[10] United States, FWS, paras. 214 – 217.
[11] EC – Asbestos, Appellate Body Report, para. 99.
[12] EC – Asbestos, Appellate Body Report, para. 99.

identical, it noted that its interpretation prevented Members from using fiscal and non-fiscal regulation to protect domestic products. In Norway's view, the overall product scope of Article 2.1 should be akin to the overall product scope of both Articles III:2 and III:4. Hence, the word "like" should be interpreted in a similar manner to its interpretation in Article III:4.

13. In that regard, Norway notes that it is accepted that products need not be identical to constitute "like" products under Article III:4, just as they need not be identical to constitute "directly competitive or substitutable" products under Article III:2. Rather, the evidence regarding the different likeness criteria must be assessed as a whole to determine if the products are "like".

14. In this dispute, the Parties disagree on whether clove cigarettes are "like" domestic cigarettes. For example, the United States has highlighted certain alleged physical differences between the products and contends that, because the products are physically different, a higher burden is placed on Indonesia.[13] It cites to *EC – Asbestos*, in which the Appellate Body found that there was a "*highly significant* physical difference" between the fibres at issue.[14]

15. Norway considers that the Panel must assess the nature and significance of the physical similarities and the differences between the cigarettes at issue. Products may have the necessary competitive relationship to be covered by Article III, notwithstanding physical differences between them.

B. "De facto" discrimination under Article 2.1 of the TBT Agreement

16. It is for this Panel, based on the criteria referred to above, to determine whether the products at issue in this dispute are like products. Assuming that they are like products, the next question is whether Indonesian clove cigarettes are treated less

[13] United States FWS, paras. 162 – 177. *See also* United States FWS, paras. 217 and 219.
[14] EC – Asbestos, Appellate Body Report, para. 114.

favourably than cigarettes (including those flavoured with menthol) produced in the United States.

17. Norway is concerned by the legal standard for assessing less favourable treatment set out by the United States.[15] The United States contends that:

> Measures that do not treat products differently based on origin, and *for which the effects resulting from the measure are not a result of the origin of the product*, are not measures that afford protection to domestic production.[16]

18. The United States appears to consider that, because its measure distinguishes between cigarettes on the basis of an "objective" criterion that is not origin-based, its measure is WTO-consistent. However, in a dispute involving a facially neutral measure, a panel must look beyond an apparent objective distinction to establish if there is *de facto* discrimination against imported goods.

19. In assessing whether there is *de facto* discrimination, panels and the Appellate Body have examined the design, structure and operation of the measure.[17] The Appellate Body has also said that "[i]t is irrelevant that protectionism was not an *intended objective*"; the issue is "how the measure in question is *applied*".[18] In other disputes, panels and the Appellate Body have found *de facto* discrimination if domestically produced products tended to be subject to more favourable treatment than like imported products.[19]

20. The United States relies on *Chile – Alcoholic Beverages*. In that dispute, the Appellate Body's examination of Chile's taxation of alcoholic beverages "tends to reveal that the application of" the measure protected like domestic products.[20] Against that background, the Appellate Body examined whether this apparent *de*

[15] United States FWS, paras. 196 – 212 and 220.
[16] United States FWS, para. 205.
[17] *See, e.g.*, U.S. – FSC (21.5), Appellate Body Report, para. 215.
[18] Japan – Alcoholic Beverages, Appellate Body Report, p. 28.
[19] Chile – Alcoholic Beverages, Appellate Body Report, paras. 51 – 53; *see also, e.g.*, Mexico – Soft Drinks, Panel Report, paras. 8.119 – 8.121.
[20] Chile – Alcoholic Beverages, Appellate Body Report, para. 66.

facto discrimination could be explained by other factors. It found that there were certain "anomalies" in the measure and that Chile could not reconcile the measure's stated objectives with its "protective application".[21]

21. In the present case, the parties to the dispute agree that the U.S. technical regulation does not *de jure* provide for different treatment of products based on nationality. The Parties also seem to agree that the measure bans flavoured cigarettes that were largely not produced in the United States when the ban was introduced, whereas it allows tobacco- and menthol-flavoured cigarettes that are produced in large quantities in the United States and that were imported in negligible quantities. As Norway understands it, a large proportion of the cigarettes produced domestically when the ban was introduced were not affected by the ban, whereas a large proportion of Indonesia's trade with the United States was affected by the ban.

22. Such a disparate effect is an important factor that Norway considers the Panel should take into account when addressing whether the contested measure gives rise to *de facto* discrimination under Article 2.1. of the TBT Agreement.

23. The United States appears to argue that it has banned *some* cigarettes that appeal to youth smokers but has not banned *all* of them, because doing so would have other negative public health effects, in particular a high demand for assistance in giving up smoking and an increase in black market sales.[22] Thus, the United States has banned clove and other flavoured cigarettes, but has not banned "*any type of cigarette favored by a large portion of U.S. smokers*", such as tobacco- and menthol-flavoured cigarettes.[23]

24. Norway is troubled by this argument. As Norway understands, consumption of *all* the cigarettes at issue seems to present similar risks for public health. Moreover, menthol-flavoured cigarettes are amongst the most popular cigarettes with youth

[21] Chile – Alcoholic Beverages, Appellate Body Report, para. 71.
[22] United States FWS, paras. 23-27, and 209.
[23] United States FWS, para. 24.

smokers – much more popular than clove cigarettes. Yet, they are excluded from the ban.

25. Thus, it appears that the United States has adopted a general ban on flavoured cigarettes; however, it has carved out exceptions for tobacco- and menthol-flavoured cigarettes that seem to undermine the ban and its objectives. Through the ban and exceptions, the United States seems to have chosen winners and losers among different types of cigarettes sold in the U.S. market: some cigarettes are banned to promote public health, and other more popular cigarettes are permitted, apparently also to promote public health.

26. Norway considers that the Panel should scrutinise closely such apparent "anomalies"[24] in the design, structure, and operation of a measure to establish whether the combination of the general ban and the exceptions favours domestic over imported products.

Thank you.

[24] Chile – Alcoholic Beverages, Appellate Body Report, para. 71.