IN THE WORLD TRADE ORGANIZATION

Before the Appellate Body

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

(AB-2012-1 / DS406)

Third Participant Submission

by

Norway

Geneva

26 January 2012

Table of Contents

Table of cases cited in this submission

Short Title	Full Case Title and Citation
Panel Report	Panel Report in *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, circulated 2 September 2011.
Chile – Alcoholic Beverages	Appellate Body Report in *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R and WT/DS110/AB/R, adopted 12 January 2000.
Dominican Republic - Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005.
EC - Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, adopted 5 April 2001.
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997.
Japan – Alcoholic Beverages	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted 1 November 1996.
Mexico – Soft Drinks	Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006.
US – COOL	Panel Report, *United States – Certain Country of Origin Labelling*, WT/DS384/R and WT/DS/386/R, circulated 18 November 2011.
US – FSC (21.5)	Appellate Body Report, *Unites States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/RW, adopted 29 January 2002.
US - Tuna	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, circulated 15 September 2011.

I. INTRODUCTION

1. Norway welcomes this opportunity to be heard and to present its views as a third participant before the Appellate Body in this appeal by the United States against the findings and conclusions of the Panel in *United States – Measures Affecting the Production and Sale of Clove Cigarettes.*[1]

2. Norway will not address all of the issues before the Appellate Body in this appeal. Norway will confine itself to discuss the following interpretative issues:

   - The Panel's terms of reference with regard to the product scope of the Panel's analysis.

   - Less favourable treatment.

3. Before turning to the legal arguments, Norway wishes to stress that it strongly supports the objective of reducing youth smoking. Norway has introduced a number of measures both to reduce youth smoking, as well as smoking in general. Moreover, Norwegian health authorities are in the process of further revising Norwegian tobacco legislation with the same purpose. 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 General Agreement on Tariffs and Trade 1994 (the "GATT 1994") and the Agreement on Technical Barriers to Trade (the "TBT Agreement").

II. THE PRODUCT SCOPE OF THE PANEL'S ANALYSIS

4. The Panel found that its terms of reference as regards the product scope of the "like products" were limited to the products listed in the request for the establishment of a panel by Indonesia. The United States has appealed this finding, under Article 2.1, whereby it argues that the exclusion of regular cigarettes from the analysis constituted a legal error.

5. Norway agrees with the United States' argument that the Panel's terms of reference are not limited by the products listed in a panel request. Norway supports the United States in arguing that the terms of reference "define which measures and which claims a panel may

[1] Panel Report, WT/DS406/R.

consider" and that they "do not define the scope of relevant products to analyze with respect to a discrimination claim, nor do they limit which defenses a responding party may invoke".[2]

6. The Panel itself acknowledged that Article 6.2 of the DSU does not mention the need in the panel request to specify the products concerned.[3] Irrespective of this, the Panel argues that in instances such as the present one, "the identification of the specific products at issue in a panel request pertains to the claim at issue".[4] Moreover, the Panel states that "Article 2.1 of the *TBT Agreement* defines the national treatment obligation it embodies in direct reference to the imported product and the like domestic product; both concepts serve to orient the determination of the scope of such an obligation. Therefore, the identification of those two types of products in the panel request rather pertains to the realm of "providing a brief summary of the legal basis to the complaint" than purely to argumentation."[5]

7. Norway is not convinced by the Panel's reasoning, and believes that the Panel was not correct when finding that its terms of reference as regards the product scope of the "like products" were limited to the products listed in the panel request. As discussed below, the product scope of the likeness analysis may influence the outcome of a discrimination claim. A panel should, therefore, be entitled to define the product scope of its own analysis to determine whether there is discrimination, without being subject to limitations chosen by the complainant, for whatever reason, in its panel request.

8. Norway closes on this issue by noting that it is not aware of any GATT or WTO dispute in which the panel or the Appellate Body required that the "benchmark" like product(s), used to determine the existence of discrimination, be identified in a panel request.

[3] Panel Report, para. 7.137.
[4] Panel Report, para. 7.139.
[5] Ibid.

II. "LESS FAVOURABLE TREATMENT"

A. Introduction

9. The United States appeals, on several grounds, the Panel's finding that the challenged measure affords less favourable treatment to imported products than domestic products. Below, Norway sets out its views regarding the relevant comparison (B) and the issue of factors unrelated to the origin of the goods (C).

B. The relevant comparison

10. The United States argues that the Panel wrongly limited its comparison of imported and domestic cigarettes to just *some* imported like products (Indonesian clove cigarettes) and *some* domestic like products (domestic menthol cigarettes). Instead, the United States contends that the Panel should have compared the treatment of *all* imported like products from all sources with that of *all* domestic like products.[6]

11. The United States notes that the Panel remarked that WTO jurisprudence appears to reject the view that "less favourable treatment" can be established when only some imported products and some like domestic products are considered.[7] Nonetheless, the Panel has chosen to compare the treatment of only one imported product to only one domestic product.[8] The reasoning given by the Panel is that Article 2.1 of the TBT Agreement speaks of "products imported from the territory of any Member", rather than "any other Member", "Members" or "other Members". Hence, according to the Panel, under the TBT Agreement Article 2.1, it is sufficient to compare the products from Indonesia with one like product from the United States, without taking into account other like products.[9]

12. Norway agrees with the United States that this conclusion by the Panel appears to be contrary to prior panel and Appellate Body reports. The Panel compared *one* like product (i.e. clove cigarettes), from *one* source (i.e. Indonesia), to *one* like domestic product in the United States (i.e. menthol cigarettes). Thus, with respect to the *product scope*, the Panel seems to have confined its analysis to examining the relative treatment of just one like

[6] United States' Appellant Submission, para. 74.
[7] United States' Appellant Submission, paras. 82-83 and Panel Report, paras. 7.269 and 7.273.
[8] Panel Report, para. 7.274 ff.
[9] Panel Report, para. 7.275.

imported product and one like domestic product, without considering the treatment of other like products; and, with respect to the *foreign sources of imports*, the Panel confined its analysis to examining the relative treatment of imports from just one WTO Member, without considering the treatment of imported like products from other sources. Instead, the Panel should have compared the impact of the measure on *all* like imported products, from *all* WTO Members, with its impact on *all* like domestic products.

13. Hence, in Norway's view the panel in *US – Tuna* was correct in confirming the Appellate Body in *EC – Asbestos* when establishing 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.[10]

C. Factors unrelated to the origin of the goods

14. The United States further argues that the Panel was correct in its adoption of the legal standard when determining whether any detrimental effect to the competitive conditions for clove cigarettes, as compared to like domestic products, is related to their origin.[11] However, according to the United States, the Panel failed to apply this standard correctly. The Panel as well as the United States appear to rely on the Appellate Body's statement in *Dominican Republic – Cigarettes*:

> … the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is *explained by factors or circumstances unrelated to the foreign origin of the product*, such as the market share of the importer in this case.[12]

15. Nevertheless, the United States challenges the Panel's finding that the detrimental effect on imported products could not be explained by factors unrelated to the foreign origin of the goods.[13] In particular, the United States argues that the Panel failed to give sufficient weight to factors such as public health and other regulatory objectives that motivated the exception for menthol cigarettes.[14] The United States appears to consider that, because its measure distinguishes between cigarettes on the basis of an origin-neutral criterion

[10] Panel Report, *US – Tuna* para. 7.295 and Appellate Body Report, *EC – Asbestos*, para. 100.
[11] United States' Appellant Submission, para. 101.
[12] Appellate Body Report, *Dominican Republic – Cigarettes*, para. 96 (emphasis added).
[13] United States' Appellant Submission, paras. 101 ff.
[14] United States' Appellant Submission, para. 103.

derived from a legitimate regulatory purpose , its measure is WTO-consistent. Norway disagrees with this assertion.

16. The panel in *US – COOL* articulated *de facto* discrimination as analysis which:

> (...) entails assessing how a measure with language that is not discriminatory on its face plays out in actual circumstances. In the context of Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement, assessing whether a measure has actual discriminatory effects cannot be dissociated from the circumstances prevailing in the market at issue. Indeed, taking into account the circumstances in which the measure in question is applied is essential for an objective assessment of a claim of *de facto* discrimination.[15]

17. Thus, establishing *de facto* discrimination implies an analysis of whether a facially origin-neutral measure operates "in actual circumstances" to give rise to "discriminatory effects" in terms of its detrimental impact on imported products.

18. In assessing whether there is *de facto* discrimination, panels and the Appellate Body have examined the "design, structure and expected operation of the measure".[16] 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***".[17] In *Dominican Republic – Cigarettes*, the circumstance unrelated to the foreign origin of the product was that imported cigarettes had a very small market share.[18] As a result, the per-unit cost of a fixed-fee bond was greater for imports that were sold in much smaller quantities.[19] As Indonesia points out, the unit cost as well as the less favourable treatment could presumably be eliminated in that case if the market share increased.[20] Thus, the element unrelated to the foreign origin related to *factual* circumstances in the marketplace. This *external factual* element (i.e. market share) – which was not a feature of the challenged measure itself or the result of the measure's objectives – explained the disproportionate detrimental impact of the measure on imported products.

19. In contrast, the argument in *US – Clove Cigarettes* is somewhat different. The United States has banned the sale of all cigarettes with an additive that confers a characterising

[15] Panel Report, *US – COOL*, para. 7.397 (emphasis original, underlining added).
[16] Appellate Body Report, *Thailand – Cigarettes*, para. 130; see also, e.g. Appellate Body Report, *US – FSC (21.5)*, para. 215.
[17] Appellate Body Report, *Japan – Alcoholic Beverages*, p. 28.
[18] Appellate Body Report, *Dominican Republic – Cigarettes*, para. 96.
[19] Appellate Body Report, *Dominican Republic – Cigarettes*, para. 96.
[20] Indonesia's Appellee Submission, para. 176.

flavour, but has granted an exception for menthol cigarettes. It argues that this exception is not explained by the domestic origin of menthol cigarettes but by the negative public health consequences that would ensue if it banned menthol cigarettes. According to the United States, it would not be desirable to prohibit menthol cigarettes, which are regularly smoked by more than 25 percent of US smokers, both youth and adult, because of the enormous risk such a ban would pose to the health care system as well as the potential development of a black market and smuggling. Clove cigarettes, on the other hand, have a tiny market share and are mainly used as experimental cigarettes for youth, which – the argument goes – makes it acceptable to ban them.

20. In Norway's view, the United States appears to stretch the Appellate Body's statement in *Dominican Republic – Cigarettes* too far, to circumstances different from those under consideration in that case. The disproportionate detrimental effect of the US measure on like imported products is intrinsically linked to the features of the measure itself, and ultimately the limited US objectives in allowing the sale of certain like cigarettes containing additives. Hence, the disproportionate impact on imports is not attributable to an *external factual* element but to the United States.

21. More generally, the policy objectives of a measure, including the objectives of any exceptions (e.g. public health), should not determine whether a measure is *de facto* discriminatory. Rather, the issue of whether a measure affords imports less favourable treatment turns on whether the like imported products are predominantly subject to less favourable treatment, whereas like domestic products are predominantly subject to more favourable treatment. If there is such *de facto* discrimination, consideration of whether a measure's policy objectives justify that discrimination belongs more properly to the analysis under an applicable exception, in which the drafters have delineated, in detail, the legal criteria that must be satisfied to permit, for example, discrimination against imports.

22. Norway is aware that, in this dispute, the United States has not advanced any argument regarding the potential applicability of Article XX of the GATT 1994 to measures that are inconsistent with Article 2.1 of the *TBT Agreement*.[21] In Norway's view, the proper interpretation of the words "less favourable treatment" in Article 2.1 should not depend on

[21] Panel Report, paras. 7.296, 7.308 .

whether a respondent has advanced an argument that its WTO-inconsistent measure is justified by an exception in view of its stated objectives (e.g. public health).

23. In addition, without prejudice to the question whether Article XX of the GATT 1994 may justify measures that are inconsistent with Article 2.1 of the *TBT Agreement*, Norway considers that the proper interpretation of the words "less favourable treatment" in Article 2.1 should *not* affect the meaning of those words in provisions of the GATT 1994, and other covered agreements, for which an exception, such as Article XX, is available.

III. CONCLUSION

24. Norway respectfully asks the Appellate Body to take account of the considerations set out above when making its findings in this appeal.