European Communities – Measures Prohibiting the Importation and Marketing of Seal Products
(DS400//401)
(AB-2014-1/AB-2014-2)

Third Participant Oral Statement of the United States of America

March 17, 2014

Mr. Chairman, members of the Division:

1. Thank you for this opportunity to present the views of the United States. In this statement, we will briefly address several important interpretative issues arising in this appeal:

(1) the definition of "technical regulation" under the TBT Agreement;[1]

(2) the concept of "less favourable treatment" under TBT Article 2.1 and Article III:4 of the GATT 1994;[2]

(3) assessing a measure's contribution to a legitimate regulatory objective under TBT Article 2.2;

(4) the difference between the "necessary" standard of GATT 1994 Article XX(a) and the "more trade-restrictive than necessary" standard of TBT Article 2.2;

(5) a Member's right to determine the content of its public morals concerns; and

(6) the analysis under the chapeau of GATT 1994 Article XX.

I. What Is a Technical Regulation?

2. The question of whether the EU Seal Regime is a technical regulation is an important threshold issue in this dispute. The EU measure bans the sale of all seal products (meaning any product "deriving or obtained" from seals) unless the products result from certain types of seal hunts or are brought into the EU for the personal use of travelers or their families.

3. A "technical regulation," in relevant part, either (a) sets out that a product possess or not possess a particular characteristic or (b) prescribes certain processes or production methods related to a product characteristic.[3]

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[1] The *Agreement on Technical Barriers to Trade*.

[2] The *General Agreement on Tariffs and Trade 1994*.

4. A measure that simply prohibits the sale of a product does not prescribe a product characteristic. The focus of technical regulations is to make sure that the product at issue is fit for its purpose. The purpose of a sales ban, however, is different—it is to prohibit sale of the product entirely. Thus bans and technical regulations are distinct types of measures that serve distinct purposes.

5. Additionally, the EU Seal Regime bans seal products based not on the characteristics of the products, but on the type of hunt that resulted in the seal product. A hunt is not a product, and therefore characteristics of a hunt are not characteristics of a product. Fur from a seal killed in a commercial hunt has the same characteristics as fur from an IC or MRM hunt. Consequently, the Regime would not appear to be a "technical regulation."

II. The Meaning of Less Favorable Treatment under Article III:4 of the GATT 1994

6. Articles III:4 of the GATT 1994 and 2.1 of the TBT Agreement set out Members' national treatment obligations, with the relevant language being identical: products of other Members "shall be accorded treatment no less favourable than that accorded to like products of national origin." However, the Panel interpreted the provisions as establishing different legal standards. That interpretation is inconsistent with the text of the provisions, particularly in light of the relationship between the GATT 1994 and the TBT Agreement.

7. Indeed, the Appellate Body has explained that the agreements "should be interpreted in a *coherent and consistent* manner."[4] Under the Panel's interpretation, however, some measures could be *consistent* with the TBT national treatment provision, but *inconsistent* with that of the

[3] *EC—Asbestos (AB)*, para. 69.

[4] *US—Clove Cigarettes (AB)*, para. 91 (emphasis added).

GATT 1994 – in particular, measures that result in a detrimental impact stemming exclusively from a legitimate regulatory distinction, but that pursue objectives not included in GATT 1994 Article XX even if they are considered legitimate under the TBT Agreement.

8. The Appellate Body has never interpreted Article III:4 in such a manner, which would mean that *any* detrimental impact on like imports is *per se* sufficient to support a finding of inconsistency. But detrimental impact is not enough; in every past dispute finding an Article III:4 inconsistency, the measure at issue either explicitly discriminated against imported products, or it established a system that, though facially neutral, discriminated against imported products *de facto*.

9. Finally, the Panel's approach would significantly restrict Members' ability to regulate in the public interest even where no discrimination exists. Before enacting any measure, Members would have to consider whether it might have an incidental detrimental impact on imports from any Member, even if such impact would stem exclusively from a legitimate regulatory distinction. Members would have to survey all current and potential trading partners of products affected by the measure and determine whether the products of those Members will, or *might in the future*, be adversely affected. This would make the impact on imports the overriding concern, even to the detriment of any number of legitimate objectives. This has never been the understanding of Article III:4 by GATT contracting parties or Members in over 60 years, and it would be quite surprising if Canada's and Norway's TBT regulations comport with this approach.

III. TBT Agreement Article 2.2

a. The Correct Approach to Assessing a Measure's Contribution to a "Legitimate Regulatory Objective"

10. In its appellant submission, Canada advocates an "all-or-nothing approach," under which the EU measure should be considered as failing to make *any* contribution to its objective because it does not *completely* prevent consumers from being exposed to seal products from inhumanely killed seals.[5]

11. But the TBT Agreement rejects this approach. Its preamble states that a Member shall not be prevented from taking measures necessary to achieve its legitimate regulatory objectives "at the levels it considers appropriate."[6] Indeed, the Appellate Body has recognized that the word "fulfill," as used in Article 2.2, refers to "the degree of contribution that [a] technical regulation makes toward the achievement of a legitimate objective" and *not* to the "complete" achievement of an objective.[7] A challenged measure is not inconsistent with Article 2.2 merely because it does not fulfill its legitimate objective completely.

12. And one must assess any proposed alternative to see if it would achieve the legitimate objective at the level the Member has chosen.

13. In this dispute, the exceptions to the ban indicate the level at which the EU has chosen to fulfill the Regime's public morals objectives. Any proposed alternative must fulfill these objectives at least at the same level.

b. The Improper Conflation of Article XX and Article 2.2

[5] Canada's Appellant Submission, paras. 162, 175, 308.

[6] TBT Agreement, Preamble, 6th recital.

[7] *US—Tuna II (Mexico) (AB)*, para. 315; *US—COOL (AB)*, para. 373.

14. Canada conflates the necessity test under GATT 1994 Article XX(a) with the "more trade-restrictive than necessary" analysis under TBT Article 2.2,[8] arguing that a relatively more trade-restrictive measure "may still be deemed necessary" if it makes a high level of contribution to its objective and the consequences of non-fulfillment are "very grave or serious."[9]

15. But Article 2.2 does not ask if the measure is necessary for the designated objective. Rather, it asks whether the trade-restrictiveness of the measure is greater than necessary.

16. Similarly, Norway conflates TBT Agreement Article 2.2 and the chapeau of GATT 1994 Article XX in arguing that Article 2.2 involves arbitrary or unjustifiable discrimination.[10] But Article 2.2 is not about discrimination, it is about whether a measure is more trade-restrictive than necessary.

IV. GATT 1994 Article XX

a. Members' Ability to Determine the Content of Their Public Morals Concerns under Article XX(a)

17. Canada argues that the EU is required to accord equal concern to all species of animal in order to have a valid "public morals" defense under Article XX(a).[11] But it is not Canada's (or the WTO's) prerogative to decide for the EU, or for any other Member, which public morals objectives are most important to that Member or to its citizens. Article XX(a) does not require some prescribed degree of consistency between public morals concerns in different situations. As the panels in *US—Gambling* and *China—Audiovisuals* stated, "Members should be given

[8] *See* Canada's Appellant Submission, paras. 319-320.

[9] *See* Canada's Appellant Submission, para. 320.

[10] *See*, *e.g.*, Norway's Appellant Submission, para. 546.

[11] *See*, *e.g.*, Canada Appellant Submission, paras. 395-96.

some scope to define and apply for themselves the concepts of 'public morals' and 'public order' in their respective territories, according to their own systems and scales of values."[12]

b. Legitimate Regulatory Distinctions Test vs. Arbitrary or Unjustifiable Discrimination

18. The Panel appears to have considered that its analysis under Article 2.1 with respect to whether any detrimental impact on imports stemmed exclusively from legitimate regulatory distinctions also answered the question under the chapeau to Article XX of whether the EU's measure was applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination. But the question under Article 2.1 is whether the measure discriminates, while the question under the chapeau is whether any discrimination is arbitrary or unjustifiable.

19. The analysis under Article 2.1 can end once discrimination is found. However, that is the starting point for the analysis under the chapeau, not the end point. This comports with the fact that Article XX is an exception to the same national treatment obligation in Article III:4 that is provided in Article 2.1. That is, Article XX only becomes relevant once discrimination has been found.

20. We are also concerned with complainants' use of *Brazil—Retreaded Tyres*. Understanding that report as considering that the reason for any difference in treatment must be limited to the relevant Article XX objective, rather than serving another legitimate objective, would undermine the ability of Members to balance all of their legitimate public policy considerations. The chapeau does not limit the justification for discrimination only to a justification based on the relevant Article XX objective rather than other legitimate, and non-protectionist, objectives.

[12] *US—Gambling (Panel)*, para. 6.461; *China—Publications and Audiovisual Products (Panel)*, para. 7.759.

21. We look forward to discussing these matters further with the Appellate Body and the participants and the other third participants.