

***TURKEY – CERTAIN MEASURES CONCERNING THE PRODUCTION,  
IMPORTATION AND MARKETING OF PHARMACEUTICAL PRODUCTS***

**(DS583)**

**THIRD PARTY ORAL STATEMENT  
OF THE UNITED STATES OF AMERICA**

**April 21, 2021**

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**TABLE OF REPORTS**

<i>Brazil – Retreaded Tyres (AB)</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007
<i>EC – Seal Products (AB)</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014
<i>Korea – Various Measures on Beef (AB)</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
<i>US – Gambling (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005
<i>US – Gasoline (AB)</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996

## I. INTRODUCTION

Mr. Chairperson, Members of the Panel:

1. The United States appreciates the opportunity to appear before you today by virtual session and provide our views as a third party in this dispute. The United States makes this oral statement because of its systemic interest in the correct interpretation of Article XX of the GATT.

2. Turkey asserts, among other things, that its localization requirement for reimbursements for pharmaceuticals is justified under the general exceptions in Article XX(b) and (d).<sup>1</sup> In regards to its defense under Article XX(b), Turkey states that the localization measure is “designed to ensure an uninterrupted access to safe, effective and affordable medicines for all patients in Turkey which falls within the range of policies to protect human life and health.”<sup>2</sup> Turkey further states that “[t]he fact that the localisation measure is concerned with ensuring adequate access to medicines and thus pursues an objective of protecting human life and health is confirmed by the design and structure of that measure as well as by the authorities responsible for its implementation.”<sup>3</sup> In the alternative, Turkey states that the localization measure is justified under Article XX(d) “because the measure is necessary to secure compliance with the laws and regulations requiring Turkey to ensure accessible, effective and financially sustainable healthcare.”<sup>4</sup>

3. In response, the European Union contends that Turkey’s localization requirement is not justified under Article XX(b) because it “is not designed to achieve the public health objective

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<sup>1</sup> See Turkey’s first written submission, paras. 414–570.

<sup>2</sup> See *id.* at para. 441.

<sup>3</sup> *Id.* at para. 451.

<sup>4</sup> *Id.* at para. 504.

alleged *ex post facto* by Turkey in its first written submission, but rather to pursue Turkey’s economic development and industry policy goals, and is very trade restrictive.”<sup>5</sup> The European Union goes on to assert that the requirement is not necessary because “Turkey has not shown that the Localisation Requirement makes a contribution to that objective and, in any event, there are adequate alternatives that are less trade-restrictive or, indeed, not trade-restrictive at all.”<sup>6</sup>

Similarly, the European Union contends that Turkey’s localization requirement is not justified under Article XX(d), including because Turkey has failed to identify laws and regulations that require Turkey “to ensure the financial sustainability of Turkey’s healthcare system with the requisite degree of specificity and normativity.”<sup>7</sup>

4. The parties and third parties have provided submissions to and answers to questions from the Panel on issues regarding the proper interpretation of Article XX, and the United States confines its statement today to certain key issues of that interpretation.

5. First, the text of Article XX establishes that for a measure to qualify under an Article XX general exception, the measure at issue: (1) must satisfy one of the Article XX subparagraphs; and (2) be applied consistently with the requirements of the chapeau.<sup>8</sup>

6. Therefore, to establish that measures are preliminarily justified under Article XX(b), Turkey must establish, consistent with the text of that provision: (1) that the measure’s objective is “to protect human, animal or plant life or health”; and (2) that the measure is “necessary” to

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<sup>5</sup> European Union’s second written submission, para. 143.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at para. 202.

<sup>8</sup> *EC – Seal Products (AB)*, para. 5.297; *US – Gasoline (AB)*, pp. 22–23; *US – Gambling (AB)*, para. 282; *Korea – Various Measures on Beef (AB)*, para. 157.

the achievement of its objective.<sup>9</sup> For Article XX(d), Turkey must establish two elements set out in its text: (1) that the measure is designed to “secure compliance” with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994; and (2) that the measures are “necessary to secure compliance.”<sup>10</sup>

7. The text of Article XX(b) does not make justification of a measure contingent on meeting other obligations of the covered agreements, including other exceptions listed in Article XX. The text of Article XX(d) similarly does not rely on meeting other obligations. The chapeau to Article XX makes clear that “nothing in this Agreement shall be construed to prevent the adoption of or enforcement by any contracting party of measures” that meet one of the exceptions in Article XX.

8. Respondents frequently invoke multiple subparagraphs of Article XX, as Turkey did in this dispute by invoking Article XX(b) and (d). The fact that one provision or exception could be invoked with regard to the same factual circumstances by a Member does not mean that another exception is no longer available.

9. In relation to a challenged measure, it is for the responding Member to invoke Article XX and establish that the measure at issue satisfies an exception under Article XX.<sup>11</sup> Nothing in the language of Article XX(b) and (d) suggests that a responding Member can raise Article XX but avoid meeting its burden of argument due to the nature of the asserted objective or necessity to achieve that objective, no matter the seriousness of the asserted concern.

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<sup>9</sup> *Brazil – Retreaded Tyres (AB)*, paras. 144–145; *see also EC – Seal Products (AB)*, para. 5.169 (finding that, to make out a defense under Article XX(a), the responding Member had to show: (1) “that it has adopted or enforced a measure ‘to protect public morals;’” and, (2) that the measure is “‘necessary’ to protect such public morals”).

<sup>10</sup> *Korea – Various Measures on Beef (AB)*, para. 157.

<sup>11</sup> *E.g., Brazil – Retreaded Tyres (AB)*, paras. 144–145.

10. In its third party submission, Canada asserts that in assessing the structure and operation of Turkey’s localization requirement “to assess the relationship between the measure at issue and the policy objective” for the analysis under Article XX(b), the Panel “should take into account the Members’ characterization of the objective, but it is not bound by this, and may form its own characterization of the objective based on all the evidence put forward.”<sup>12</sup>

11. The United States observes that it is for the responding Member to identify the objective that motivates a given measure. By invoking an Article XX general exception, the responding Member is indicating that, despite the apparent inconsistency of a measure with another WTO commitment, there is a basis in Article XX to justify the measure. If the Member did not identify the general exception at issue, it would simply not have asserted that there is any Article XX basis to justify the inconsistent measure.

12. If a complainant wishes to challenge the genuineness of a respondent’s professed objective, it can do so by demonstrating that the measure fails to contribute toward the alleged objective, and that less trade restrictive options are available to meet the objective in question. It is not for the respondent, or the Panel, to recharacterize or determine for itself the objective of the measure at issue.

13. On Canada’s approach, there would not be a reason to conceive of Article XX as an “affirmative defense,” which is not a GATT term, to be asserted by the responding Member. This is because if a panel “may form its own characterization of the objective based on all the evidence put forward,” then this characterization by a panel is part of the panel’s “objective assessment” under DSU Article 11. And if the panel should make an “objective assessment” of

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<sup>12</sup> Canada’s third party submission, para. 44 (citing *EC – Seal Products (AB)*, para. 5.144).

the objective of the measure, so too should the complaining party as part of bringing forward its affirmative case.

14. Further, if a panel “may form its own characterization of the objective based on all the evidence put forward,” then a responding Member arguably would not need to assert *any* general exception under Article XX. That is, even with silence by a responding Member, a panel could examine the measure to determine whether it has the objective of one of the subparagraphs of Article XX. If the panel were to so conclude, the panel would need to ensure that the relevant subparagraph could not be established “based on all the evidence put forward.” If the panel failed to make that assessment, the panel would not have ensured that (in the terms of Article XX) nothing in the Agreement had been construed to prevent the application of a measure satisfying Article XX.

15. The United States does not consider this to be a correct result under Article XX. Rather, Article XX becomes relevant if there is an apparent inconsistency of a measure with another WTO commitment. The responding Member is free to invoke an Article XX general exception to indicate its belief that there is a basis in Article XX to justify the measure. But if the Member chooses not to identify any general exception, it also chooses not to assert an Article XX basis for the otherwise inconsistent measure.

16. This concludes the U.S. oral statement. The United States thanks the Panel for consideration of its views.