

7. EUROPEAN COMMUNITIES – MEASURES PROHIBITING THE IMPORTATION AND MARKETING OF SEAL PRODUCTS

- A. REPORT OF THE APPELLATE BODY (WT/DS400/AB/R) AND REPORT OF THE PANEL (WT/DS400/R AND WT/DS400/R/ADD.1)
- B. REPORT OF THE APPELLATE BODY (WT/DS401/AB/R) AND REPORT OF THE PANEL (WT/DS401/R AND WT/DS401/R/ADD.1)

- Mr. Chairman, this dispute and the reports being adopted today raise a number of important systemic issues that should be of interest to Members.
- The United States was a third party in this dispute and appreciates some of the challenges faced by the Panel and the Appellate Body in producing their reports. Many of the issues involved and the claims and arguments of the parties were quite complex and nuanced, and we appreciate the hard work by both the panel and Appellate Body in grappling with those issues.
- One key issue addressed in the dispute was whether the measure at issue was a technical regulation. The Appellate Body's finding that the measure at issue is not a technical regulation is welcome and fully supported by the text of the TBT Agreement.
- The measure does not lay down product characteristics or a process or a production method that is related to product characteristics. Therefore, the measure does not come within the first sentence of the definition of a technical regulation as set out in Annex 1 of the TBT Agreement.
- Here, the measure concerned the characteristics of the type of hunt involved, not the characteristics of the product itself. Two identical final products with exactly the same characteristics would be treated differently based not on those characteristics, but on the fact that one product involved a certain type of hunt while the other involved a different type. Thus, we welcome the Appellate Body's analysis and its reversal of the Panel's finding.
- With respect to the non-discrimination claims under Articles I and III of the GATT 1994, the findings by the Panel and Appellate Body are more troubling.
- In particular, we are not fully persuaded by the Appellate Body's finding that the national treatment provisions of the TBT Agreement are to be interpreted differently from the national treatment provisions of the GATT 1994 in light of the fact that these two provisions contain identical wording.

- These findings appear to ensure that a measure could be found consistent with Article 2.1 of the TBT Agreement, yet inconsistent with the identically worded in GATT Article III:4.
- Indeed, these findings raise the very real possibility, as demonstrated in this dispute, that Article 2.1 of the TBT Agreement will become superfluous, and the legal approach developed in the recent TBT disputes will become just an historical footnote.
- The Appellate Body report seeks to respond to this concern in part by stating that “the European Union has not pointed to any concrete examples of a legitimate objective that could factor into an analysis under Article 2.1 of the TBT Agreement, but would not fall within the scope of Article XX of the GATT 1994.”
- However, there were such examples that were provided during the appeal. One such example is provided by the TBT Agreement text itself and that is – the preamble refers to “measures necessary to ensure the quality of” a Member’s exports. There is no parallel provision in Article XX of the GATT 1994.
- It is also difficult to understand how a “detrimental impact” on imports from one Member compared to another Member can by itself be sufficient to find that those imports are being treated less favorably. One would expect that any measure will affect some products differently from others. Yet that different treatment would not amount to discrimination unless one also looks at the reason why there was such a difference in treatment.
- On the other hand, with respect to the analysis under Article XX(a) of the GATT 1994, the Panel and Appellate Body carefully considered and addressed a number of difficult issues involving what is a public moral for purposes of that provision and what does it mean to protect a public moral.
- In that analysis, the Panel and the Appellate Body considered and declined to accept a number of arguments that would have significantly departed from the text of Article XX(a). Members need to have the ability to delineate their approach to public morals in accordance with the particular context of their own domestic system. The findings that are being adopted today affirm that ability and should be generally welcomed by Members.
- Finally, the United States would like to comment on an important systemic issue raised in the context of this appeal something that Canada has also raised. This was raised not by the report itself, but by the Appellate Body’s March 24, 2014, letter to the DSB Chair, in which it indicates that it “will not be able to circulate its reports within the 90-day timeframe provided for in the last sentence of Article 17.5 of the DSU.”

- While the 90-day deadline in the DSU text is categorical, Members have an understanding of the workload challenges faced by the Appellate Body, and have been willing to agree to receive a report after this deadline and provide in writing their commitment to treat the report as if it were circulated within the 90-day deadline when they have been meaningfully consulted with by the Division handling a particular appeal. Equally important, such consultation and agreement, when noted in the Appellate Body's communication and by the parties, provides transparency to the DSB in relation to the observance of the rules in the DSU.
- For these reasons, the Appellate Body regularly consulted with and obtained the agreement of Members to issue reports after 90 days between 1997 and 2011. We have been taking a close look at the facts earlier this week and have found that during those years, the Appellate Body obtained the parties agreement in 14 consecutive disputes – the first 14 disputes where the circulation of the report exceeded 90 days from the date of appeal.
- Unfortunately, it is our understanding that the Division hearing this appeal deviated from this well-established practice. It is regrettable that the agreement of the parties to circulate its reports after the 90-day deadline was not obtained and that transparency to the DSB was not provided. As Canada has mentioned, part of the rationale for delaying the report might be because the parties had suggested changing the date of the hearing, but this highlights the parties would have readily agreed to issuance of the report after the deadline.
- This deviation from past practice is extremely troubling, and we are concerned that it may repeat itself in the near future, in particular in light of the fact that the Appellate Body may face a higher than normal workload in the year to come. We hope that the Appellate Body and Members can engage in a dialogue on this issue in the weeks ahead to come to a solution that respects the mandatory deadline set out in the text of the DSU and provides the DSB with transparency with respect to the agreement of the parties and timing of the issuance of Appellate Body reports while at the same time ensuring that the Appellate Body has the time to produce high-quality reports. In this regard, we believe that the well-established practice until 2011 served WTO Members and the Appellate Body well.