

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

(WT/DS400, WT/DS401)

**THIRD PARTY SUBMISSION OF
THE UNITED STATES OF AMERICA**

January 25, 2013

I. Introduction

1. The United States makes this third party submission to provide the Panel with its view of the proper legal interpretation of Article XX(a) of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”). The United States also comments briefly on the preliminary ruling request of the EU.

II. GATT 1994: Article XX(a)

2. At this stage, the United States limits its comments on the general exceptions of Article XX of the GATT 1994 to a discussion of the legal parameters that should guide the consideration of the EU’s affirmative defense.

3. As an initial matter, the United States agrees that Article XX requires a “two-tier” analysis: first, as to whether the challenged measure falls within the scope of one of the exceptions listed at Article XX(a)-(j); and second, as to whether the measure satisfies the requirements of the chapeau.¹

4. With respect to the first “tier” of the analysis, the proper elements to consider are: first, whether the measure protects public morals; and second, whether the measure is “necessary” to do so.² This calls for determining whether the measure in question: (1) has the objective of protecting, (2) a value that is a public moral in the respondent’s community or nation.³ When considering a respondent’s claim that the measure is designed to protect a value that is a public moral, one must consider the concept of “public morals” as defined and applied by the responding Member “according to their own systems and scales of values.”⁴ That is, a panel is not to substitute its own judgment as to what a “public moral” is, but rather is to determine what a public moral is in the responding Member’s system. Nevertheless, while the focus must be on the responding Member’s system and scale of values, what Members other than the responding Member consider to be public morals can offer confirmation of a panel’s determination as to what constitutes a public moral within the system of the responding Member.⁵

¹ EU First Written Submission, para. 566; *see also*, Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996 (“*US – Gasoline (AB)*”), p. 22.

² EU First Written Submission, para. 567; *see also* Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001 (“*Korea – Beef (AB)*”), para. 157; Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, and Corr.1 (“*US – Gambling (AB)*”), para. 295.

³ *US – Gambling (AB)*, para. 304.

⁴ Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by the Appellate Body Report, WT/DS285/AB/R (“*US – Gambling (Panel)*”), para. 6.461.

⁵ *See, US – Gambling (Panel)*, para. 6.471 (discussing gambling measures in Israel and the Philippines); *see also*, EU First Written Submission, paras. 75-76 (discussing animal welfare measures in Australia, Belarus, Croatia, Chinese Taipei, Israel, Kazakhstan, Mexico, Russia, Slovenia, and the United States).

5. If the Panel determines the EU seal regime is designed to protect a public moral, it is then necessary to consider whether the measures are “necessary” to protect public morals. With regard to determining necessity, the Appellate Body has set forth a process consisting of a number of possible lines of inquiry – the relative importance of the values furthered by the measure, the contribution of the measure to the objective, the restrictive impact of the measure – and the consideration of alternative measures. The Appellate Body has stated that “[i]t is on the basis of this ‘weighing and balancing’ and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is ‘necessary’ or, alternatively, whether another, WTO-consistent measure is ‘reasonably available’.”⁶

6. In pursuing each of these lines of inquiry, certain clarifications of the proper legal standard are required. First, with regard to the relative importance of the value furthered by the measure, the EU quotes with approval a statement by the panel in *China – Audiovisual Products* that “the protection of public morals ‘ranks among the most important values or interests pursued by Members as a matter of public policy.’”⁷ To the extent the EU is asserting that the protection of public morals is of greater importance than other societal values and the other general exceptions set forth in Article XX, the United States disagrees. Nor is there any requirement in Article XX for a panel or the Appellate Body to “rank” or “prioritize” the objectives listed in that Article. Rather, under Article XX, Members have agreed that the objectives listed justify providing for exceptions from the other provisions of the GATT 1994, subject to certain conditions.

7. This means that contrary to what some may advocate, it is not required, nor is it appropriate, to determine whether the trade-restrictiveness of the measure is justified by the importance of the objective. The text does not require a panel to assign some sort of quantitative or qualitative value to the trade-restrictiveness of the measure and the importance of the objective, and then compare those two values; such an inquiry would be extraordinarily difficult, if not impossible. Nor is there any support in the text of Article XX for a view that a measure that has been found to be designed to achieve one of the exceptions set out in Article XX can be found to be unnecessary (if a WTO-consistent alternative is not available) simply because a panel may find the objective of the measure insufficiently important to justify the measure’s trade-restrictiveness.

⁶ *U.S. – Gambling (AB)*, para. 307; *see also, Korea – Beef (AB)*, para.166.

⁷ EU First Written Submission, para. 584 (*quoting* Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, adopted 19 January 2010, as modified by the Appellate Body Report, WT/DS363/AB/R (“*China – Audiovisual Products (Panel)*”), para. 7.817). The EU also quotes with approval the panel’s opinion that it is “[not] simply accident that the exception relating to ‘public morals’ is the first exception identified in the ten subparagraphs of Article XX.”

8. With respect to the contribution of the measure to its objective, it is for the Member, in designing its measure, to select the level at which the objective will be achieved.⁸ The United States notes that it is well established that the determination of what is the respondent Member's actual desired level is based on the design of the measure and the evidence provided.⁹

9. Finally, if presented with an alternative measure by Canada and Norway¹⁰, the inquiry then will be whether the alternative measure is WTO-consistent, is "reasonably available," and will achieve the EU's objective at the level chosen by the EU.¹¹ The EU incorrectly states that the alternative measure must be "less trade restrictive" than the EU measure. This implies that the alternative measure could be WTO-inconsistent, but so long as it is less trade restrictive than the EU measure, the EU measure will be deemed unnecessary. The United States disagrees: in determining "necessity" the comparison is between the GATT 1994-inconsistent measure and an alternative measure that is GATT 1994-consistent.

10. A "less trade restrictive" standard is not supported by the text of Article XX(a). Article XX(a) requires that the measure be "necessary." The ordinary meaning of the term "necessary," in context and in light of the object and purpose of the GATT 1994, does not encompass a "least trade restrictive" test as such. Rather, the trade-restrictiveness of a measure is one of the factors that may be helpful in evaluating the "necessity" of the measure, as the Appellate Body has recognized. The Appellate Body has stated that the ordinary meaning of the term necessary as used in Article XX is one that is "located significantly closer to the pole of 'indispensable' than to the opposite pole of 'making a contribution to'."¹² In this regard, the Appellate Body interpretation of the ordinary meaning of the term "necessary" is clearly related to the degree of contribution the measure makes to an objective set out in Article XX (a), (b), or (d). Additionally, context provided by the *Agreement on Technical Barriers to Trade* ("TBT Agreement") and the *Agreement on the application of Sanitary and Phytosanitary Measures* ("SPS Agreement") demonstrates that where Members sought to provide an obligation that a measure is required to be no more trade restrictive than required or necessary, the WTO Agreement sets out that standard clearly.¹³ As the panel in *US – Tuna-Dolphin* found when

⁸ EU First Written Submission, para. 571; *see also*, Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007 ("*Brazil – Tyres (AB)*"), para. 140.

⁹ *See, Korea – Beef (AB)*, para. 178.

¹⁰ The complaints are not required to present an alternative in order to demonstrate that the measure is not necessary, nor must the EU demonstrate as part of its *prima facie* case on necessity that no alternative measure is available. *US – Gambling (AB)*, paras. 309-311; *see also, Korea – Beef (AB)*, paras. 172-173.

¹¹ *US – Gambling (AB)*, paras. 308-311.

¹² *Korea – Beef (AB)*, paras. 159-161.

¹³ TBT Agreement, Art. 2.2 ("Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations *shall not be more trade-restrictive than necessary* to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.") (emphasis added); SPS Agreement, Art. 5.6 ("Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are *not more*

comparing the text of Article 2.2 of the TBT Agreement to the text of Article XX of the GATT 1994:

[U]nder Article 2.2 of the TBT Agreement, unlike in Article XX of the GATT 1994, the aspect of the measure to be justified as “necessary” is its trade restrictiveness rather than the necessity of the measure for the achievement of the objective. Given the fact that, under Article 2.2, the “necessity” to be assessed is that of the “trade-restrictiveness” of the measures rather than of the measures themselves, we understand the term “necessary” in the second sentence of Article 2.2 to mean essentially that the trade-restrictiveness must be “required” for the fulfilment of the objective.¹⁴

Thus, in contrast to Article 2.2 of the TBT Agreement, under Article XX, the “trade restrictiveness” of the measure as compared to an alternative is not relevant; what must be considered is the necessity of relying on a measure inconsistent with the GATT 1994 to achieve an objective listed in Article XX.

11. In this regard, the United States also finds instructive the Appellate Body’s discussion of the circumstances in which, when considering a claim under Article 2.2 of the TBT Agreement, a panel may not need to consider an alternative measure.¹⁵ The Appellate Body stated that, if a measure is not trade restrictive, then it would not be inconsistent with Article 2.2. Article XX of the GATT 1994, however, does not operate in this manner. Article XX is an affirmative defense. One conducts an analysis under Article XX because of a finding of inconsistency with another provision of the GATT 1994. One is not excused from a breach by showing lack of trade restrictiveness. Rather, a measure qualifies for an exception under Article XX by meeting the conditions of Article XX. In other words, a measure found to be GATT 1994-inconsistent is not excepted from that finding under Article XX on the basis that it has no or limited trade effect. Similarly, a GATT 1994-inconsistent measure otherwise excepted from the obligations of the GATT 1994 does not become “unnecessary” simply because it is highly trade restrictive.

12. In sum, in the event that an alternative measure is presented, the EU would not be required to rebut arguments that an alternative measure is less trade restrictive than the EU measure. The only question the EU would have to address is whether the alternative measure

trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.”) (emphasis added); and fn. 3 (“For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is *significantly less restrictive to trade*.”) (emphasis added).

¹⁴ Panel Report, *United States – Measures Affecting the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted June 13, 2012, as modified by the Appellate Body Report, WT/DS381/AB/R (“*US – Tuna-Dolphin (Panel)*”), para. 7.460; see also, paras. 7.458-7.465.

¹⁵ Appellate Body Report, *United States – Measures Affecting the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted June 13, 2012, (“*US – Tuna-Dolphin (AB)*”), fn. 647.

would be WTO-consistent, reasonably available, and achieve the objective at the EU's chosen level.¹⁶

III. Preliminary Ruling Request

13. The United States thanks the Panel for the opportunity to comment on the EU's Preliminary Ruling Request regarding exhibits JE-13 and NOR-75.

14. First, the United States notes the EU arguments that the documents contained in those exhibits appear to be of limited probative value. The EU has stated that the documents are non-binding opinions of one of many EU legal services, apparently not accepted by other EU legal services, on a draft measure that is not before the Panel.¹⁷

15. These EU arguments go to the weight it believes the Panel should assign to that evidence. Panels are charged with weighing the evidence presented and as part of that function may determine what weight to assign to particular pieces of evidence. The United States observes that the legal opinions of an agency of a Member would appear to be of limited relevance to the matter before the Panel. The opinions do not appear to be advanced to establish any relevant fact, such that taking note of their existence or content would assist the Panel in making its objective assessment of the facts. Nor would these opinions appear to be relevant to the Panel's interpretation of any provision of the WTO Agreement as they fall nowhere under the customary rules of interpretation of public international law called for by Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). And to the extent that the opinions are offered for their views on the WTO-consistency of the challenged measures, we do not see how they contribute or are relevant to the Panel's own "objective assessment of ... the applicability of and conformity with the relevant covered agreements."¹⁸ If the complaining parties consider certain arguments or analysis contained in the opinions compelling, then they may present those arguments or analysis to the Panel themselves; authorship by an agency of the responding party does not itself contribute to the force of the arguments or analysis.

16. Second, the EU has not provided any basis in the DSU for a panel to reject a piece of evidence provided by a party simply because another party asserts that the information in the document was intended to have limited public access.¹⁹ Without a basis in the DSU for rejecting the documents, the United States believes that the Panel should refrain from doing so.²⁰

¹⁶ Similarly, Canada and Norway would not be required to demonstrate that an alternative measure they may put forward is less trade restrictive than the EU seal regime, but they must be able to show that the alternative measure is WTO-consistent.

¹⁷ EU Preliminary Ruling Request, paras. 2-6.

¹⁸ DSU, Art. 11.

¹⁹ EU Preliminary Ruling Request, para. 7.

²⁰ The EU appears to make some arguments on the basis that due process is "inherent in the WTO dispute system." (EU Preliminary Ruling Request, para. 28). While the United States agrees that due process is an

17. The EU cites two provisions of the DSU as supporting its preliminary ruling request: Articles 3.10 and 13.1. The EU asserts that, in breach of Article 3.10 of the DSU, Norway is not acting in “good faith” because Norway has been “uncooperative” in withdrawing the exhibits.²¹ As an initial matter, the United States notes that Article 1.1 of the DSU provides that the DSU applies to claims of a breach of the DSU. Therefore a claim that a Member is in breach of Article 3.10 of the DSU is one that would be the subject of a separate consultations and perhaps a panel request. It is a very serious charge, meriting a full review, and it is clearly not within the terms of reference of this dispute.

18. Furthermore, the EU asserts that this is not in good faith because it “could impair [the EU’s] rights of defence” by, for instance, preventing the EU “from even addressing such evidence in the WTO proceedings.”²² Without commenting (for the terms of reference reasons specified above) on whether such facts would constitute a breach of Article 3.10, the United States notes that the EU has not asserted in its preliminary ruling request that it is actually prevented by its laws from addressing the evidence. And as noted earlier, unless the evidence would be probative of any relevant fact, there would appear to be little, if anything, for the EU to address.

19. The EU also points to Article 13.1 of the DSU, which contains provisions for the protection of confidential information provided to a panel. The United States fails to see what relevance this has to the question of whether the Panel should reject a piece of evidence. To the contrary, Article 13 of the DSU concerns the right of panels to seek and consider information. The Panel has ample authority under DSU Article 12.1 to adopt procedures to protect confidential information as necessary, and Article 13 sets out a further circumstance in which confidential information will be protected from public disclosure.

20. Based on the arguments provided by the EU so far, the United States does not see a basis in the DSU for the Panel to reject exhibits JE-13 and NOR-75.

21. Instead, the EU appears to be seeking to have the Panel assist the EU in enforcing EU rules on access to these documents. That is not the function of WTO dispute settlement. The EU rules on which the EU relies are not covered agreements within the meaning of the DSU and it is not within the terms of reference of this Panel proceeding to determine if there has been a breach of those rules.

important component of the WTO dispute settlement system, due process is provided for by the provisions of the DSU. It is not the case that “due process” is a concept in the abstract that has whatever meaning an individual Member may seek to assign to it. Therefore, any EU argument on the basis of “due process” would need to be based on a specific provision of the DSU.

²¹ EU Preliminary Ruling Request, para. 27.

²² EU Preliminary Ruling Request, paras. 21, 27.

22. The United States also notes with great surprise the EU’s assertion that the members of the Panel and the Secretariat “could render themselves accomplices to an illicit act and become exposed to prosecution” by a Member.²³ This statement could be misperceived by some as a threat by the EU of criminal prosecution addressed to the individual members of the Panel and the Secretariat. Such a misperception could seriously affect the integrity of the WTO dispute settlement system. The United States is unaware of any prior instance in which a Member has made statements of this nature and sincerely hopes that the EU would promptly move to dispel any such misperception or that the Panel would take appropriate steps to address this EU statement.

²³ EU Preliminary Ruling Request, para. 20.