Korea – Measures Affecting the Importation of Bovine Meat and Meat Products from Canada

(WT/DS391)

Oral Statement of the United States at the Third Party Session of the First Substantive Meeting of the Panel with the Parties

April 14, 2010

Madame Chair, members of the Panel:

1. I am pleased to appear before you today to present the oral statement of the United States as a third party to this proceeding. This dispute presents a number of issues of significance and the United States is following this dispute closely. In today's statement, the United States takes no position on the particular claims of consistency or inconsistency with the covered agreements. Rather, the United States will limit its remarks to one particular legal issue in this dispute arising under Article 5.5 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPS Agreement"). That issue concerns the relationship between a Member's appropriate level of protection from a particular risk to human, animal, or plant life or health and its sanitary or phytosanitary ("SPS") measure or measures.

2. In its written submission, Canada asserts that Korea provides different treatment to U.S. and Canadian bovine meat and meat products, and that it is proper to infer that the alleged difference in treatment indicates that Korea is seeking to achieve two different appropriate levels of protection with regard to imports of bovine meat and meat products: one appropriate level of protection for Canadian products and one for U.S. products.[1] Canada then goes on to argue that Korea's maintenance of two different appropriate levels of protection is arbitrary and unjustifiable, resulting in discrimination or a disguised restriction on international trade, in breach of Article 5.5 of the SPS Agreement.[2]

3. Korea disagrees with Canada's contention, arguing that Korea applies the same appropriate level of protection for all imports of bovine meat and meat products.[3] According to Korea, it only permits imports of bovine meat and meat products that present a "negligible" risk of bovine spongiform encephalopathy ("BSE").[4] In Korea's view, the differing treatment about which Canada complains is the result of U.S. products achieving, and Canadian products not

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[1] Canada's First Submission, para. 255.

[2] *See id.* at paras. 256-269.

[3] Korea's First Submission, para. 209.

[4] *Id.*

achieving, the same appropriate level of protection.[5]

4. The parties' arguments on these questions raise very important conceptual issues. As an initial matter, the United States notes that it is important to distinguish between a Member's SPS *measure* and a Member's *appropriate level of protection*. It is important not to conflate these two concepts. Many provisions of the SPS Agreement apply with respect to a Member's SPS *measure*. Different provisions apply with respect to a Member's appropriate level of protection from a particular risk to human, animal, or plant life or health.

5. One key question raised in this dispute is whether it is possible or appropriate to infer from the measures at issue the appropriate level of protection that the measures seek to achieve. This would not appear to be necessary here since Korea has specified the appropriate level of protection that it is seeking to achieve – "negligible" BSE risk. The United States notes in addition that inferring an appropriate level of protection from a measure is an exercise that is at best fraught with difficulty, which is another reason that the United States would respectfully suggest that the Panel not adopt this approach in this dispute. Among other things, this approach risks confusing the SPS measure with the appropriate level of protection that the measure seeks to achieve. For example, inferring the appropriate level of protection from the measure could mean concluding that by definition the measure *achieves* that appropriate level of protection, and in turn that conclusion could have important implications for obligations under the SPS Agreement.

6. A second key question raised in this dispute is whether it is proper to talk about "distinctions" in the appropriate levels of protection with respect to the same product from different export sources. This would not appear to be a proper approach conceptually. A Member's appropriate level of protection is not with respect to a *product*, but rather a Member's appropriate level of protection is for a particular *risk*. Significantly, Articles 5.3 and 5.5 of the SPS Agreement both refer to "protection" from a "risk". The SPS Committee's guidelines on Article 5.5 also make this point.[6] As a result, the Member's appropriate level of protection would apply regardless of the source of the product (although of course different measures might be required to achieve that appropriate level of protection in the case of products from different sources since each source could present a different level of risk).

7. The fact that conceptually a Member's appropriate level of protection does not differentiate between the sources of a product is confirmed by Article 9.1 of the SPS Agreement. In particular, Article 9.1 refers to an appropriate level of protection "in the market" of a Member, making clear that the appropriate level of protection applies throughout the Member's market and does not distinguish between particular products of particular Members.

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[5] *Id.*

[6] *See* Guidelines to Further the Practical Implementation of Article 5.5, at 4, G/SPS/15, July 18, 2000.

8. The difference between a Member's appropriate level of protection and its SPS measure is also apparent in Article 5.5 where the appropriate level of protection is the starting point of the analysis, not the conclusion. As the Appellate Body stated in *EC – Hormones*, to establish a breach of Article 5.5 a Member must show the presence of three distinct elements: (1) the Member adopts different appropriate levels of protection in several "different situations"; (2) those appropriate levels of protection exhibit differences which are "arbitrary or unjustifiable"; and (3) those differences result in discrimination or a disguised restriction on international trade.[7] According to the Appellate Body, the last element refers "to the measure embodying or implementing a particular level of protection as resulting, in its application, in discrimination or a disguised restriction on international trade."[8] As a result, it is not appropriate to conclude that measures that treat products from different sources differently are the result of differing appropriate levels of protection. Such a conclusion would risk being tautological since it would be saying that any difference in measures means by definition there are distinctions in the appropriate levels of protection. Furthermore, the analysis would be starting with the third element (is there discrimination) rather than the first element (are there distinctions in the appropriate levels of protection), and would be using the third element (discrimination) to *assume* an important part of the first element (that is, if there is discrimination, then there are distinctions in the appropriate levels of protection).

9. In contrast, it would seem that the better approach conceptually would be to consider that in the situation where a Member believes that the same conditions do not prevail in two exporting Members, then it is the importing Member's *measures* (not appropriate levels of protection) that may differ as to each exporting Member in order to achieve the importing Member's (unitary) appropriate level of protection.

10. Madame Chair, members of the Panel, this concludes the oral statement of the United States. Thank you for your attention.

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[7] *EC – Hormones* (AB), para. 214.

[8] *Id.*