European Communities – Measures Prohibiting the Importation and Marketing of Seal Products

Third Party Submission of the United States of America

February 14, 2014

TABLE OF CONTENTS

TABLE OF REPORTS

Short Form	Full Citation
Chile – Alcoholic Beverages (AB)	Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000
EC – Asbestos (AB)	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/R, adopted 5 April 2001
EC – Seals (Panel)	Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R, WT/DS401/R and Add.1
Japan – Alcoholic Beverages II (AB)	Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, adopted 1 November 1996.
US – Clove Cigarettes (AB)	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012
US – COOL (AB)	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012
US – Tuna II (Mexico) (AB)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012

I. INTRODUCTION

1. The United States welcomes the opportunity to provide its views on certain issues raised in this dispute, in which Canada, Norway, and the European Union each appeal certain findings by the Panel. The United States has a strong interest in the proper interpretation of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and the *Agreement on Technical Barriers to Trade* ("TBT Agreement") and, in particular, in the development of a coherent and consistent understanding of the relationship between those agreements.

2. The issues presented in these appeals are issues with systemic importance to Members, including issues that touch on Members' ability to regulate to fulfill legitimate public policy objectives. For example, the Panel report suggests that Members would be prohibited from pursuing any public policy objective other than those in the general exceptions of the GATT 1994 if measures to achieve those objectives would have a detrimental impact on imports. Similarly, the Panel report suggests that any ban on a product would be a technical regulation subject to the disciplines of the TBT Agreement.

3. In this submission, the United States addresses issues on appeal related to the proper interpretation of the relationship between Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement and the proper definition of a "technical regulation" under the TBT Agreement.

II. LEGAL ARGUMENT

A. The Panel Erroneously Interpreted Article III:4 of the GATT 1994 as Establishing a Different Legal Standard than Article 2.1 of the TBT Agreement.

4. The Panel found that Article III:4 of the GATT 1994 represented a significantly different legal standard from the legal standard under Article 2.1 of the TBT Agreement, despite the identical wording of the two provisions' critical phrases. The Panel's interpretation is inconsistent with the text of the provisions, the structural relationship between the GATT 1994 and the TBT Agreement, and the principles animating relevant Appellate Body reports.

1. The Panel's Interpretation is Inconsistent with the Text of GATT 1994 Article III:4 and TBT Article 2.1.

5. The critical phrases of the national treatment provisions of the GATT 1994 and the TBT Agreement – Articles III:4 and 2.1, respectively – are identically worded. Article III:4 of the GATT 1994 states:

> The *products* of the territory of any contracting party imported into the territory of any other contracting party *shall be accorded treatment no less favourable than that accorded to like products of national origin* in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are

> based exclusively on the economic operation of the means of transport and not on the nationality of the product. (emphasis added).

Similarly, Article 2.1 of the TBT Agreement states:

> Members shall ensure that in respect of technical regulations, *products* imported from the territory of any Member *shall be accorded treatment no less favourable than that accorded to like products of national origin* and to like products originating in any other country. (emphasis added).

Thus, the two agreements use the same language to describe the national treatment obligation they set forth: Members shall accord to products imported from the territory of any other Party "treatment no less favourable" than that accorded to like products of domestic origin.

6. Under the customary rules of interpretation of public international law reflected in Article 31 of the Vienna Convention on the Law of Treaties, the text of these provisions should be interpreted using the ordinary meaning of the terms, in context, and in light of the object and purpose of the agreement.[1] The identical terms would have the same ordinary meaning. Furthermore, nothing in the provisions' context or in the object and purpose of either agreement indicates that the terms should have different meanings. Indeed, the preamble to the TBT Agreement includes: "Desiring to further the objectives of GATT 1994."[2] This also indicates the two provisions should be interpreted in the same way.

7. Nevertheless, the Panel found that the phrase "treatment no less favourable" should be interpreted differently in Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement. The Appellate Body has found that the "treatment no less favourable" standard of TBT Article 2.1 "does not prohibit detrimental impact on imports that stems exclusively from a legitimate regulatory distinction."[3] Consequently, Article 2.1 of the TBT Agreement requires a two-step analysis: (1) whether the challenged technical regulation creates a detrimental impact on imports of like products; and (2) whether the detrimental impact stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.[4]

8. Despite the identical wording of the provisions, the Panel found that the legal standard under Article 2.1 of the TBT Agreement did not "equally appl[y]" to GATT 1994 Article III:4.[5] Instead, the Panel found that while "treatment no less favourable" in Article 2.1 requires the two-

---

[1] *See* Vienna Convention on the Law of Treaties, Art. 31(1), stating: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Note also that Article 31(4) provides: "A special meaning shall be given to a term if it is established that the parties so intended." No special meaning is assigned to the relevant terms in either the GATT 1994 or the TBT Agreement.

[2] TBT Agreement, preamble, 2nd recital.

[3] *See US – Clove Cigarettes (AB)*, paras. 180-82, 215; *US – Tuna II (Mexico*) *(AB)*, para. 215.

[4] *See US – Clove Cigarettes (AB)*, paras. 180-82; *US – Tuna II (Mexico*) *(AB)*, para. 215.

[5] Panel Report, paras. 7.584-85.

step inquiry the Appellate Body set forth in *US – Clove Cigarettes* and *US – Tuna II (Mexico)*, the same phrase in Article III:4 of the GATT 1994 requires *only* a finding of detrimental impact on imports of like products to support a finding of inconsistency.[6] Thus, under the Panel's interpretation, the same phrase, used in two related national treatment provisions, sets forth significantly different legal standards.

9. Seeking to justify this confusing result, the Panel (and now appellees Canada and Norway) cite the Appellate Body's statement that the "scope and content" of Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 are not the same.[7] This is true, of course, but irrelevant to the fact that the same words, expressing the same concept, used in related contexts between the same parties, should bear the same meaning. It is plain, for example, that GATT 1994 Article III:4's content is narrower in some respects—it only contains a national treatment obligation, whereas TBT Article 2.1 contains national treatment and most-favored-nation obligations. In other respects, Article III:4 of the GATT 1994 is broader—it covers "all laws, regulations and requirements affecting [the] internal sale [of goods]," while Article 2.1 of the TBT Agreement covers only technical regulations.

10. These differences in scope and content, however, are not at issue in this dispute; the critical issue is the identical language of the two provisions for the same concept. Neither the Panel nor Norway nor Canada put forward a reason that would justify interpreting these two identical provisions differently from one another. Such an approach is inconsistent with established principles of treaty interpretation and is particularly inappropriate given the close relationship between the two agreements.

2. The Panel's Interpretation Creates an Incoherent and Inconsistent Relationship between the TBT Agreement and the GATT 1994.

11. The text of the TBT Agreement establishes, and the Appellate Body has confirmed, that the TBT Agreement and the GATT 1994 are closely connected in content and purpose. The preamble of the TBT Agreement states that the Members intended the TBT Agreement "to further the objectives of GATT 1994."[8] The Appellate Body has noted that the TBT Agreement and the GATT 1994 "overlap in scope and have similar objectives."[9] Thus a comparison of the scope, content, and language of GATT 1994 Article III:4 and TBT Article 2.1 suggests that the national treatment obligation in Article 2.1 could usefully be considered as, essentially, a subset of the obligation in Article III:4 of the GATT 1994: Article III:4 of the GATT 1994 applies the "treatment no less favourable" test to a broad range of measures, including technical regulations, while Article 2.1 of the TBT Agreement applies the same standard to technical regulations.

12. In light of the structural connections between the GATT 1994 and the TBT Agreement, the Appellate Body has concluded that "the two Agreements should be interpreted in a *coherent*

---

[6] *See id.* para. 7.605.

[7] *See* Panel Report, para. 7.587 (citing *US – Tuna II (Mexico) (AB)*, para. 405, stating: "[T]he scope and content of these provisions is not the same."); Norway's Appellee Submission, para. 252.

[8] *US – Clove Cigarettes (AB)*, para. 91 (quoting the TBT Agreement, preamble, 2nd recital).

[9] *US – Clove Cigarettes (AB)*, para. 91.

and consistent manner."[10] The need for consistent interpretation is particularly strong with regard to Articles 2.1 and III:4 due to the fact that the two national treatment obligations are "built around the same core terms."[11] Consequently, the Appellate Body has affirmed that Article III:4 of the GATT 1994 serves as relevant context for the interpretation of TBT Article 2.1.[12] The Panel's interpretation of Articles III:4 and 2.1 is contrary to this principle in several ways.

a. The Panel's Approach Is Inconsistent with the Appellate Body's Interpretation of GATT Article III:4 and Its Relationship to TBT Article 2.1.

13. The Panel's approach is inconsistent with the fact that the phrase "treatment no less favourable" in Article III:4 was always interpreted as providing regulatory space for Members to take otherwise legitimate measures that may restrict trade unevenly across the membership of the WTO.[13] The general principle of GATT 1994 Article III:1,[14] which informs the meaning of Article III:4[15] makes it clear that considerations of discrimination and "protection" are inherent in Article III:4.[16]

14. The second sentence of Article III:4 conveys a similar concept. It states: "The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product." Thus Article III:4 itself embraces the concept that the reason behind a measure is important for purposes of the Article III:4 analysis.

---

[10] *US – Clove Cigarettes (AB)*, para. 91 (emphasis added).

[11] *US – Clove Cigarettes (AB)*, para. 100; *see also EC – Asbestos (AB)*, para. 95 (concluding that the two sentences of Article III:2 "must be interpreted in a harmonious manner that gives meaning to both sentences of that provision," and the interpretation of one sentence "necessarily affects" the way the other sentence is interpreted).

[12] *US – Clove Cigarettes (AB)*, para. 100 ("The very similar formulation of the provisions, and the overlap in their scope of application in respect of technical regulations confirm that Article III:2 of the GATT 1994 is relevant context for the interpretation of the national treatment obligation of Article 2.1 of the TBT Agreement.").

[13] *See, e.g., EC – Asbestos (AB)*, para. 100 ("[A] Member may draw distinctions between products which have been found to be 'like,' without, for this reason alone, according to the group of 'like' imported products, 'less favourable treatment' than that accorded to the group of 'like' domestic products.").

[14] Article III:1 of the GATT 1994 states:

> The contracting parties recognize that internal taxes and other internal charges, laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of products . . . should not be applied to imported or domestic products so as to afford protection to domestic production.

[15] *See Japan – Alcoholic Beverages (AB)*, pp. 17-18 (stating that the "general principle" of Article III:1 "informs the rest of Article III"); *EC—Asbestos (AB)*, para. 94 (stating: "[I]n our view, Article III:1 has particular contextual significance in interpreting Article III:4, as it sets for the 'general principle' pursued by that provision.")

[16] *See EC – Asbestos (AB)*, para. 100 ("The term 'less favourable treatment' expresses the general principle, in Article III:1, that internal regulations 'should not be applied . . . so as to afford protection to domestic production."); *see also Chile – Alcoholic Beverages (AB)*, paras. 69-71 (concluding that the absence of a clear relationship between the stated objectives of a measure and the structure of the Chilean tax measures confirmed its conclusion that, based on the architecture, structure and design of the measures, the measures were applied so as to afford protection).

15. In other words, the Appellate Body never has adopted or endorsed the narrow interpretation of the Article III:4 national treatment standard that the Panel articulated, and which Norway and Canada now defend—namely that *any* detrimental impact on like imports is, *per se*, sufficient to support a finding of inconsistency with Article III:4. Accordingly, the Appellate Body's finding that TBT Article 2.1 does not preclude technical regulations reflecting solely legitimate regulatory distinctions (and the two-step inquiry that this finding necessitated) followed naturally from the "context" of past Appellate Body reports examining Article III:4 of the GATT 1994.[17] If this were not the case, and the two (identically worded) national treatment provisions, in fact, called for entirely different legal analyses, the Appellate Body could not have found that they should be interpreted "in a coherent and consistent manner."[18]

16. Canada and Norway now ask the Appellate Body to turn this analysis on its head and find that, although the two-step inquiry for Article 2.1 articulated in in the TBT disputes (*US – COOL*, *US – Tuna II (Mexico)*, and *US – Clove Cigarettes*) originally flowed from the Appellate Body's analysis under GATT Article III:4, the two provisions should now be interpreted as establishing different legal standards.[19] This result would be contradictory, given the origin of the Appellate Body's approach to TBT Article 2.1. Interpreting GATT Article III:4 and TBT Article 2.1 as setting different legal standards would also contradict the Appellate Body's statement that the two agreements should be interpreted consistently.[20]

17. Norway and Canada also argue that interpreting GATT 1994 Article III:4 and TBT Article 2.1 in a "coherent and consistent manner" does not require interpreting them as having "the same meaning."[21] They propose that the existence of GATT 1994 Article XX, and the absence of a comparable provision in the TBT Agreement, justify interpreting the provisions as setting forth different legal standards.[22] These arguments fail because, as discussed further below, the Panel's interpretation yields an incoherent and inconsistent result.[23] The TBT Agreement was intended to further the GATT 1994 objectives by defining specific obligations regarding technical regulations.[24] Under the Panel's interpretation of GATT 1994 Article III:4, however, the TBT Agreement would permit a broader range of technical regulations than the GATT 1994 (taking into account Article XX), for example because a technical regulation was fulfilling a legitimate objective other than the specific ones listed in Article XX. Further, the Panel interprets the same phrase, appearing in analogous provisions, as setting forth conflicting legal standards. While it is true that TBT Article 2.1 and GATT 1994 Article III:4 should not be interpreted *identically* (their scope is different, for example), the Panel's approach is neither "coherent" nor "consistent."

---

[17] *See US – Clove Cigarettes (AB)*, para. 100; *US – Tuna II (Mexico) (AB)*, para. 214-15; *US – COOL (AB)*, para. 269.

[18] *US – Clove Cigarettes (AB)*, para. 91.

[19] Norway's Appellee Submission, para. 317; Canada's Appellee Submission, paras. 252-55.

[20] *See US – Clove Cigarettes (AB)*, para. 91.

[21] Norway's Appellee Submission, paras. 288-89.

[22] Norway's Appellee Submission, paras. 288-89; Canada's Appellee Submission, para. 240

[23] *See* Part II.A.2.b, *infra*.

[24] *US – Clove Cigarettes (AB)*, para. 91 (citing the preamble of the TBT Agreement).

18. To adopt two different legal standards under TBT Article 2.1 and GATT 1994 Article III:4 now, and to find that a finding of detrimental impact, alone, is sufficient to support a finding of inconsistency under Article III:4, would contravene the Appellate Body's finding that TBT Article 2.1 and GATT Article III:4 should be applied consistently and coherently.

b. The Panel's Approach Establishes a Discrepancy between the Scope of Measures Consistent with TBT Article 2.1 and Those Consistent with GATT Article III:4.

19. As noted above, the Panel's interpretation of GATT 1994 Article III:4 establishes the illogical possibility that a technical regulation could be found to be consistent with the national treatment obligation in the relevant specific agreement, namely the TBT Agreement, but inconsistent with the same national treatment language in the more general agreement, the GATT 1994. It does not make sense that Members would negotiate a provision in an agreement that specifically deals with a particular type of measure that would permit measures already prohibited under pre-existing language in the more general agreement. Indeed, the provision in the specific agreement would appear in that case to be inutile.[25]

20. The Panel's interpretation would yield this result for a whole class of measures, namely technical regulations that pursue objectives that fall outside of the scope of Article XX and that result in a detrimental impact that stems exclusively from legitimate regulatory distinctions. While such measures would be upheld under Article 2.1 of the TBT Agreement, they would fail under the GATT 1994. That is, under the Panel's erroneous interpretation, any examination of whether the regulation draws a legitimate, even-handed distinction would be deferred to analysis of whether the measure is justified under Article XX. For technical regulations that pursue legitimate objectives not listed in Article XX, the inquiry would end there, and the measure would be found to be WTO-inconsistent. A responding Member would not have the opportunity to explain, nor would a panel have the ability to examine, the underlying rationale and operation of the standard. The legitimacy—even the correctness—of the requirements would be wholly immaterial to the national treatment analysis under Article III:4.

21. As a logical matter, the fact that such a technical regulation could be found consistent with the specialized TBT Agreement but run afoul of the general GATT 1994 confirms the wrongness of the Panel's approach. The language of the TBT Agreement Preamble demonstrates that this outcome was not envisioned by the parties. It states:

> Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant

[25] Indeed, it is not clear why, under the Panel's interpretation, any Member would ever bring a claim under TBT Article 2.1, which, the Panel found, sets a higher bar than GATT 1994 Article III:4. The proceedings in this dispute demonstrate this phenomenon. Canada brought a TBT Article 2.1 claim and a GATT III:4 claim but requested the Panel to examine the GATT claims first and, if Canada prevailed, to "exercise judicial economy with respect to [its] claims under Article 2.1 of the TBT Agreement." Norway was even more direct: although Norway originally alleged that the EU Seal Regime was inconsistent with TBT Article 2.1 and GATT Article III:4, *inter alia*, Norway subsequently dropped the Article 2.1 claim. As a result, Norway relies exclusively on its Article III:4 claim to prove a national treatment breach by a measure that it contends is a technical regulation under the TBT Agreement. *See* Panel Report, paras. 7.59, 3.4; European Union's Other Appellant Submission, para. 308.

> life or health, or the environment, or for the prevention of deceptive practices at the levels it considers appropriate . . .

This suggests that the parties to the TBT Agreement thought that if a technical regulation were consistent with a provision of the TBT Agreement, a party would not be "prevented" from implementing the regulation by analogous provisions of more general agreements.

22. In addition to being illogical, the discrepancy that the Panel's interpretation creates between the national treatment provisions of the TBT Agreement and the GATT 1994 contradicts the principle that the Agreements strike the same balance between trade liberalization and the rights of members. The Appellate Body has observed, that:

> [T]he balance that the preamble of the *TBT Agreement* strikes between, on the one hand, the pursuit of trade liberalization and, on the other, Members' right to regulate, is not, in principle, different from the balance that exists between the national treatment obligation of Article III and the general exceptions provided under Article XX of the GATT 1994.[26]

23. Under the Panel's interpretation of Article III:4, however, the "balance" struck by the TBT Agreement and the GATT 1994 is significantly different. Under Article 2.1 of the TBT Agreement, as interpreted by the Appellate Body, measures causing a detrimental impact on imports are not prohibited if the detrimental impact stems exclusively from a legitimate regulatory distinction.[27] The list of possible legitimate objectives that may justify a technical regulation is open and broad, including reducing youth smoking,[28] avoiding harm to dolphins caused by tuna fishing,[29] and providing information to consumers.[30] Article XX, by contrast, presents a closed list of legitimate objectives, meaning that measures may be justified only if they are related to one of the objectives enumerated by Article XX paragraphs (a) to (j). Some, but not all, of the objectives allowed under Article 2.1 fall within the scope of Article XX.

24. Thus, under the Panel's interpretation of GATT Article III:4, a Member will be required to consider—for every measure it develops—whether the measure will have an incidental detrimental effect on imports from any country, even if the detrimental impact is entirely explained by a legitimate regulatory purpose. This approach suggests that, prior to applying any technical regulation, Members must survey all current and potential trading partners of products affected by the measure to determine whether the products of those countries will be detrimentally affected (or speculate whether, as occurred in *US – Tuna II (Mexico)*, imports may become detrimentally affected, due to future changes in the relevant industry).[31] This

---

[26] *US – Clove Cigarettes (AB)*, para. 96.

[27] *See US – Clove Cigarettes (AB)*, paras. 180-182, 215; *US – Tuna II (Mexico) (AB)*, para. 215.

[28] *US – Clove Cigarettes (AB)*, para. 225.

[29] *US – Tuna II (Mexico) (AB)*, para. 286.

[30] *US – COOL (AB)*, paras. 341-350.

[31] In *US – Tuna II (Mexico)*, at the time the United States prohibited tuna products from carrying the "dolphin-safe" label where the tuna was caught through the intentional encirclement of dolphins, but the U.S. and Mexican fleets engaged in this fishing practice. However, the U.S. fleet adapted to the new standard and ceased its intentional

interpretation significantly shifts the balance between the rights of Members to regulate in the public interest and the general interest in trade liberalization in favor of the latter, both as compared to the standard of TBT Article 2.1 and as compared to the standard implicit in previous WTO disputes.

25. In their appellee submissions, Norway and Canada make several unsuccessful attempts to explain away the different "balance" struck by TBT Article 2.1 and GATT Article III:4, under the Panel's interpretation. First, Norway and Canada both emphasize that the GATT 1994, unlike the TBT Agreement, contains the Article XX general exceptions, and that the "balance" struck by the GATT 1994 reflects Article XX, as well as Article III:4.[32] This argument does nothing to address the fact that "legitimate regulatory distinction" covers a broader range of objectives than the Article XX exceptions.

26. Second, Norway and Canada both argue that the theoretical difference between the "closed" list of objectives reflected in Article XX and the "open" list reflected in the Appellate Body's interpretation of TBT Article 2.1 is insufficient to demonstrate "any material imbalance between the legitimate policy interests that may be pursued under the TBT Agreement and the GATT 1994," as interpreted by the Panel.[33] This argument also fails because, in fact, the difference between the closed list of legitimate objectives under Article XX and the open list under TBT Article 2.1 would have real world implications for Members' ability to regulate. A few examples of "legitimate regulatory objectives" that potentially fall outside the scope of Article XX are: providing consumer information, preventing deceptive, misleading, and fraudulent practices, and ensuring the compatibility and efficiency of telecommunication goods[34] as well as the objective explicitly recognized in the preamble to the TBT Agreement of ensuring the quality of exports. Under the Panel's interpretation, the balance between Members rights' and trade liberalization, with respect to these objectives, would be completely different under TBT Article 2.1 and GATT 1994 Articles III:4 and XX. Under TBT Article 2.1, technical regulations serving these objectives could be justified; under the Panel's interpretation of GATT Article III:4, measures serving these objectives could not be justified, as the objectives do not come under the specific Article XX exceptions.

B. The Interpretation of "Technical Regulation" As It Applies to the EU Seal Regime

27. The question of whether the EU Seal Regime is a technical regulation is an important threshold issue in this dispute, and it is also an issue that has important systemic implications for Members' regulations in general. In particular, this dispute raises the question of whether any ban on a product would automatically be considered to be a technical regulation and thus subject to the disciplines of the TBT Agreement.

---

encirclement of dolphins, while Mexico continued the fishing practice. *See US—Tuna II (Mexico) (AB)*, para. 206. The impact of a measure on imports could also shift over time as producers in other markets change their practices.

[32] Norway's Appellee Submission para. 243; *see* Canada's Appellee Submission paras. 231-32.

[33] Norway's Appellee Submission, para. 298; *see* Canada's Appellee Submission para. 239.

[34] As listed on the WTO website, Members have submitted to the TBT Committee notifications relating to each of these regulatory objectives.

28. A technical regulation is a particular, defined subset of measures, and any measure needs to meet all the conditions of the definition in order to be a technical regulation.

29. The relevant part of Annex 1.1 of the TBT Agreement for purposes of this dispute is the first sentence of the definition of a "technical regulation" as a "document which lays down product characteristics or their related processes and production methods..." Thus, for a measure to be a technical regulation, it must be a document that either sets out that a product possess or not possess a particular characteristic, or that prescribes certain processes or production methods related to a product characteristic.[35] A characteristic is an "objectively definable" feature or quality, such as "a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity."[36]

30. A measure that simply prohibits the sale of a product does not prescribe a product characteristic. For example, a measure that prohibits the sale of asbestos does not prescribe any characteristics of that product.[37] Such a ban would not operate by allowing asbestos with certain intrinsic characteristics to be sold while restricting the sale of asbestos with other intrinsic characteristics; that measure would simply ban the sale of asbestos *per se*.

31. A measure can have different aspects that would need to be analyzed separately for purposes of the definition in the TBT Agreement. For example, consider the situation where a Member bans the marketing of asbestos, and requires that cement not contain above a certain *de minimis* amount of asbestos in order to be marketed. The ban is made without reference to product characteristics, and therefore would not be a technical regulation. The requirement that cement not contain asbestos above a certain threshold would mandate a product characteristic and would appear to be a technical regulation. However, the requirement for cement would not appear to be best characterized as an exception to the ban on asbestos – it would appear to be a distinct measure.[38]

---

[35] *EC – Asbestos (AB)*, para. 69.

[36] *EC – Asbestos (AB)*, para. 67. In paragraph 67, the Appellate Body report also states: "In the definition of a 'technical regulation' in Annex 1.1, the *TBT Agreement* itself gives certain examples of 'product characteristics' – 'terminology, symbols, packaging, marking or labelling requirements'." However, it is not clear what the textual basis is for perceiving these as examples of product characteristics. The text of the definition consists of two sentences. The first specifies that a technical regulation is a document that "lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory." The second sentence begins: "It may *also include or deal exclusively with*" and then states the elements of "terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method." From the structure of the definition, then, the use of the introductory phrase "also include or deal exclusively with" would appear to indicate that what follows is something that is not encompassed in the first sentence. Rather, this introductory phrase and the structure of the definition would appear to indicate that these elements are something in addition to product characteristics, not examples of product characteristics.

[37] *EC – Asbestos (AB)*, para. 71.

[38] In this regard, the United States recognizes that the concept of "measure" is not defined in the covered agreements and has been viewed as a flexible concept. For example, one section of a law may be a "measure," the entire law could be considered to be a "measure," or a number of laws and regulations operating together could be considered as one "measure." Therefore while it would appear reasonable to determine the nature of a measure by examining it

32. In this regard, it may be helpful to recall that individual Members may ban the sale of a number of products for various reasons, such as illegal drugs. And as part of the effort to prevent the sale of those products, a Member may also ban the sale of products containing the banned product. Under the Panel's reasoning, it is not clear why this would result in a finding every time that the ban should be considered to be a technical regulation. The Panel found that a ban prescribes product characteristics in the negative – no product sold can contain the banned product.[39] However, this would not appear to be consistent with the text of the definition, in accordance with the ordinary meaning of its terms in context, and in light of the object and purpose of the TBT Agreement.

33. With respect to the context, it is useful to note that Annex 1 relies on the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities ("ISO/IEC Guide").

34. Although the TBT Agreement distinguishes its definition of "standard" in certain respects from that in the ISO/IEC Guide, the ISO/IEC Guide nonetheless may serve as a useful reference point regarding whether a ban on a product *per se* constitutes a technical regulation. In particular, the ISO/IEC Guide 2 notes that: "Important benefits of *standardization* are improvement of the suitability of products, processes, and services for their intended purposes, prevention of barriers to trade and facilitation of technological cooperation."[40] Similarly, the ISO/IEC Guide 2 states that:

> *Standardization* may have one or more specific aims, to make a product, process or service *fit for its purpose*. Such aims can be, but are not restricted to, *variety control*, usability, *compatibility*, *interchangeability*, health, *safety*, *protection of the environment*, *product protection*, mutual understanding, economic performance, trade. They can be overlapping.[41]

It is also helpful to consider definition 5.4 in the ISO/IEC Guide of "product standard": "*Standard* that specifies *requirements* to be fulfilled by a product or a group of products, to establish its *fitness for purpose*."

35. These statements in the ISO/IEC Guide show that the focus of standards, and by extension technical regulations (certain types of standards with which compliance is mandatory), is on ensuring that a product is fit for its purpose or aim. However, the purpose or aim of a sales ban is not to ensure that a product is fit for its purpose; the purpose of a sales ban is to prohibit the sale of the product entirely. The purpose of a technical regulation, on the other hand, is to set out product characteristics (or their related processes or production methods) which, if met, allow the product to be marketed. In other words, a technical regulation's aim is not to ban a

---

as a whole, it is first necessary for that purpose to determine what is the definition of the "measure" that makes sense in the particular situation.

[39] Panel Report, para. 7.106.

[40] The ISO/IEC Guide 2, note 2 to the definition of "standardization." (In each quote of the Guide, any emphasis is in the original denoting a term defined in the Guide.)

[41] The ISO/IEC Guide 2, note to definition 2, "Aims of standardization."

product but to ensure that the product possesses or does not possess a product characteristic that makes it usable, compatible, safe, protective of the environment or health, etc.

36. While the result of a technical regulation may be that a form of a product that possesses (or does not possess) a particular characteristic may not be sold, this result alone is not what makes a measure a technical regulation. Rather, for a measure to constitute a technical regulation, it must be a "document which lays down product characteristics or their related processes and production methods ...." and compliance with the document must be mandatory. A prohibition on the sale of a product that possesses (or does not possess) a particular characteristic is the *mechanism* through which compliance with the "document which lays down product characteristics or their related processes and production methods ..." is made mandatory. However, unlike a *per se* ban on the product, a technical regulation sets out product characteristics that, if met, do allow the product to be marketed.

37. For example, consider a measure that (1) bans asbestos and (2) requires that any cement sold not contain asbestos. One aspect of the measure bans a product *per se*: asbestos. Another aspect of the measure allows cement to be sold if it does not possess a particular characteristic – namely, if the cement does not contain asbestos. In this example, the ban on asbestos *per se* is not a technical regulation and would not be subject to the TBT Agreement; it is simply a ban on the sale of asbestos. However, the aspect of the measure that sets out that any cement marketed must not contain asbestos, would appear to be a technical regulation for cement. The same cannot be said for the aspect of the measure that simply bans the sale of asbestos, as there are no product characteristics that asbestos could possess (or not possess) that would allow asbestos to be sold under the measure.

38. As a result, to the extent that a measure bans the sale of a product, rather than prescribing that the product possess or not possess a certain product characteristic, the measure is not a technical regulation. And for this purpose, contrary to the Panel's approach,[42] it would not appear accurate to describe a ban on a product as prescribing negative characteristics for all products. It is a ban on the sale of a product – the ban does not prescribe characteristics for any product.

39. Another aspect of the EU Seal Regime is the aspect that exempts seal products caught as a result of particular types of hunts from the prohibition on products containing seal products. A question that arises is whether this aspect of EU Seal Regime is a technical regulation (along with other aspects of the EU Seal Regime that ban products from containing seal products). The answer to this question is no, as this aspect of the EU Seal permits products to contain seal products, provided certain types of hunts were used to obtain the seal products. This aspect does not prescribe that products must not contain seal products as other aspects of the EU Seal Regime do. Rather, this aspect provides that any seal products in a product (such as a seal fur collar on a woolen coat) must result from certain processes or production methods.

40. These processes or production methods, however, are unrelated to the characteristics of the product. Fur from a seal resulting from a commercial hunt has the same product characteristics as fur from a seal resulting from an IC or MRM hunt – it is not the product

[42] Panel Report, para. 7.106.

characteristics that distinguish between them, but the process or production method involved. And the process or production method is not related to product characteristics.

41. The definition of a technical regulation provides that a document which lays down product characteristics or *their* related processes and production methods is a technical regulation. The words "their" and "related" refer to the term "product characteristics" and indicates that the processes and production methods referred to in the definition are those that relate to product characteristics. Processes and production methods not related to a product characteristic – such as the aspect of the EU Seal Regime that permits products to contain seal products provided certain types of hunts we used to obtain the seal products – fall outside the definition of a technical regulation.

42. It would appear that this aspect of the EU Seal Regime is distinguishable from the measure at issue in the EC Asbestos dispute. In the EC Asbestos dispute, the requirement that products not contain asbestos was a requirement that was related to product characteristics.

43. Another issue in examining whether a measure meets the definition of a technical regulation because it "lays down" "applicable administrative provisions," it is important to examine the scope of the term "applicable." Under the text of the definition, the administrative provisions would need to apply to (be "applicable" to) "product characteristics or their related processes and production methods." An important question then is whether the EU administrative provisions at issue apply to product characteristics or processes or production methods ("PPMs") that are related to product characteristics, or whether they instead apply to PPMs that are not related to product characteristics, such as the nature of the hunt involved.

III. CONCLUSION

44. The United States notes that there are numerous issues involved in this appeal. While this submission has highlighted two of them, the United States may take the opportunity of its oral statement to address a number of others, including issues related to Article XX of the GATT 1994, which presents a number of systemic concerns, and the interpretation of Article 2.2 of the TBT Agreement, which raises systemic issues concerning Members' ability to balance competing public policy objectives and determine the level at which they desire to fulfill their legitimate objectives.