EC – Measures Prohibiting the Importation and Marketing of Seal Products
(WT/DS400 / WT/DS401)

Response of the United States to the Questions of the Panel to the Third Parties

March 8, 2013

1. (*All third parties*) Do you consider the EU Seal Regime to be a technical regulation as defined by Annex 1:1 of the TBT Agreement?

1. As a general matter, the United States notes that the European Union ("EU") has raised the threshold issue of whether the EU seal regime "lays down product characteristics" within the meaning of Annex 1.1 of the *Agreement on Technical Barriers to Trade* ("TBT Agreement").[1] The United States recalls that it is the first sentence of the definition of a technical regulation in the TBT Agreement that appears to be at issue in this dispute. With respect to that sentence, for a measure to be a technical regulation it must be a document that mandates either (1) that a product must possess or not possess a particular characteristic or (2) certain processes or production methods related to a product characteristic. To the extent the EU seal regime, or some aspect of it, does not mandate characteristics that a product must or must not possess (or processes or production methods related to a product characteristic), the EU seal regime, or that aspect of it, would not be a technical regulation. The United States has not taken a position in this dispute on the specifics of the measure at issue.

2. (*All third parties*) Should the interests or concerns protected through the exceptions under the EU Seal Regime be considered as separate objectives pursued by the European Union *or* as part of the main policy objective that the European Union alleges the measure aims to achieve?

2. All of the objectives of a measure must be considered. The interests or concerns protected through an exception to a measure are part of the objectives of the overall measure and must be considered as such. As the United States noted in its oral statement, it is improper to consider a measure, including its exceptions, in light of only some (or what a party characterizes as the "main") objectives of the measure.[2] All of the measure's objectives must be considered.

3. (*All third parties*) Is the protection of the interests of the Inuit or indigenous communities a legitimate objective within the meaning of Article 2.2 of the TBT Agreement?

3. The United States notes that the ordinary meaning of "legitimate objective" is "an aim or

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[1] EU First Written Submission, paras. 210-224.

[2] *See*, U.S. Oral Statement at the First Panel Meeting, para. 14.

target that is lawful, justifiable, or proper."[3] While Article 2.2 gives several examples of the types of measures that are considered to have legitimate objectives – *e.g.*, "national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment" – that list is preceded by the phrase "*inter alia*" clearly indicating that the list is not exhaustive. The Appellate Body has stated that the objectives expressly listed in Article 2.2 "provide a reference point for which other objectives may be considered to be legitimate in the sense of Article 2.2."[4] This consideration must occur in light of the sixth recital of the preamble of the TBT Agreement, which recognizes Members' right to take measures for a number of reasons, so long as they are not applied in a manner that would constitute a means of unjustifiable discrimination or a disguised restriction on international trade.[5]

4. (*All third parties*) Please explain the extent of the relevance of the *United Nations Declaration on the Rights of Indigenous Peoples* and the *ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries* to the analysis of the parties' claims under Article XX of the GATT 1994 and Article 2.1 and/or Article 2.2 of the TBT Agreement.

4. The United States does not believe the *United Nations Declaration on the Rights of Indigenous Peoples* or the *ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries* have any relevance for the purposes of this dispute. The United States does not understand the EU to have put forth either document in support of its arguments under Article XX of the GATT 1994. With respect to the TBT Agreement, it appears the EU put forth the UN Declaration and ILO Convention to support its arguments with respect to Article 2.1, purportedly as evidence of what constitutes a "legitimate objective."[6] The United States notes, however, that the concept of "legitimate objective" is not one that appears in Article 2.1. To the extent that the Panel is called upon to consider the legitimacy of the objective under Article 2.2, the documents would seem to be unnecessary, as both Canada and Norway agree that the objective of protecting the interests of Inuit and other indigenous communities is legitimate.[7] As such, the United States considers the *United Nations Declaration on the Rights of Indigenous Peoples* or the *ILO Convention concerning Indigenous and Tribal Peoples in Independent*

[3] *See*, Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* ("*US – Tuna-Dolphin (AB)*"), WT/DS381/AB/R, para. 313.

[4] *US – Tuna-Dolphin (AB)*, para. 313.

[5] *See*, Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* ("*US – Clove Cigarettes (AB)*"), WT/DS406/AB/R, para. 95.

[6] EU First Written Submission, para. 274.

[7] *See*, EU First Written Submission (*citing* Canada's First Written Submission, para. 463; Norway's First Written Submission, para. 641).

Countries irrelevant to this dispute.

5. (*All third parties*) Please explain how Article XX of the GATT 1994 can be distinguished from Article 2.1 and Article 2.2 of the TBT Agreement in terms of the specific requirements under each provision.

5. The TBT Agreement does not contain "general exceptions" in the way that Article XX provides general exceptions to the obligations set out in the *General Agreement on Tariffs and Trade 1994*. The Appellate Body has recognized, however, that the preamble of the TBT Agreement – in particular the recognition of Members' right to take measures for a number of reasons subject to the requirement that regulations are not applied in a manner constituting arbitrary or unjustifiable discrimination or a disguised restriction on trade – "is not, in principle, different from the balance set out in the GATT 1994 ... by the general exceptions provision of Article XX."[8]

6. Nevertheless, as the United States noted in its written submission, the question posed in Article XX(a), (c), or (d) of the GATT 1994 is whether the measure *itself* is "necessary," whereas under Article 2.2 of the TBT Agreement, the question is whether the amount of *trade-restrictiveness* of the measure is necessary.[9] Moreover, the analysis under Article 2.2 of the TBT Agreement involves comparing two presumptively WTO-consistent measures, while to the extent that alternatives are compared under Article XX of the GATT 1994, the WTO-inconsistent measure for which the exception is being invoked is to be compared to a WTO-consistent alternative measure.[10] In this regard, unlike under Article XX of the GATT 1994, the complaining party bears the burden of establishing that the measure is "more trade-restrictive than necessary" under Article 2.2 of the TBT Agreement. The fact that the two provisions have different functions, with different allocations of the burden of proof, distinguishes them.

6. (*All third parties*) What kind of evidence is necessary to establish the existence of "public morals" under Article XX(a) of the GATT 1994? Does it differ depending on the type of public moral in question? What differentiates a public moral from public opinion?

7. As the United State noted in its written submission, when considering whether a measure is designed to protect a public moral, a panel must consider the concept of "public morals" as defined and applied by the responding Member "according to their own systems and scales of

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

[9] U.S. Third Party Submission, para. 10 (*citing* Panel Report, *United States – Measures Affecting the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, para. 7.460).

[10] *See*, U.S. Third Party Submission, para. 11.

values."[11] This necessarily means that the types of evidence that will establish the existence of a public moral will differ depending on the case, including the alleged public moral at issue. It is therefore not possible to suggest, in the abstract, the type of evidence necessary to establish the existence and content or scope of a public moral. The United States does find the evidence put forth by the EU in this instance – including that contained in the text of the measure and its legislative history,[12] and in related measures maintained by the EU and other Members[13] – to be of the type that can be useful in the consideration of whether a measure seeks to protect a public moral.

8. With respect to public opinion, this is a concept distinct from public morals. The United States believes while public opinion may be relevant evidence of a public moral, public opinion does not constitute a public moral. Rather, a public moral is a "standard[] of right and wrong conduct maintained by or on behalf of a community or nation."[14] Public opinion may not have the element of right and wrong conduct, and public opinion can change quickly. A public moral would seem to have a more lasting, fundamental character.

7. (*All third parties*) Should a panel's analysis of a claim under paragraph (a) of Article XX of the GATT 1994 be different from the other paragraphs of Article XX? If so, explain how.

9. A panel's analysis of a claim that a measure meets one of the exceptions set out in Article XX of the GATT 1994 should be guided by the particular text of each exception. There are important differences between the exceptions. Past panels and the Appellate Body have noted, for example, the difference between the condition of "necessary" in some of the exceptions compared to the condition of "relating to" in other exceptions.[15] All exceptions under Article XX must meet the *chapeau* of that article, but each exception sets forth the interest to which a measure qualifying for the exception must be directed towards (*e.g.*, "to protect public morals"), and the requisite "nexus" between measure and the interest (*e.g.*, "necessary").[16]

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[11] U.S. Third Party Submission, para. 4 (*quoting* Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* ("*US – Gambling (Panel)*"), WT/DS285/R, para. 6.461).

[12] *See, e.g.*, EU First Written Submission, paras. 46-47, 53.

[13] *See, e.g.*, EU First Written Submission, paras. 75-76.

[14] *US – Gambling (Panel)*, para. 6.465.

[15] *See, e.g.*, Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, p. 17.

[16] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* ("*US – Gambling (AB)*"), WT/DS285/AB/R, para. 292.

17. (*United States*) Based on the analysis set out in the United States' oral statement at the first substantive meeting, does the United States consider that the EU Seal Regime constitutes a technical regulation under the TBT Agreement either as a whole, or parts thereof?

10. As noted above, the United States has not taken a position in this dispute on the specifics of the measure at issue. The question will be whether the EU measure mandates either (1) that a product must possess or not possess a particular characteristic or (2) certain processes or production methods related to a product characteristic.

18. (*United States*) More generally, does the United States consider that a ban and exceptions can be separated and the exceptions element considered a technical regulation? What elements of a measure or measures should be taken into account in making this analysis?

11. A measure can have different aspects that would need to be analyzed separately for purposes of the definition in the TBT Agreement.[17] 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.[18]

19. (*United States*) Does the US seal ban from 1972 reflect a "public moral" in the United States? Does the recent US Senate resolution condemning the practice confirm such a public moral, and if so, how far back could it be said to date?

12. The United States notes that this question is directed at a measure outside the terms of reference of this dispute.

20. (*United States*) The United States asserts that an alternative measure does not need to be less trade restrictive than the measure examined for its necessity under Article XX of the GATT 1994. How is this reconciled with the following statement by the Appellate Body in paragraph 156 of its report in *Brazil – Tyres*:

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[17] *See*, U.S. Third Party Submission, paras. 2-10.

[18] 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."

> **We recall that, in order to qualify as an alternative, a measure proposed by the complaining Member must be not only less trade restrictive than the measure at issue, but should also 'preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued.'**

13. The United States believes that, consistent with prior Appellate Body findings, when considering an alternative measure as part of the "necessity" test under Article XX (a), (b), or (d), a panel must consider whether the proposed alternative measure is WTO-consistent. The United States does not believe that the Appellate Body report in *Brazil – Tyres* should be read to be inconsistent with that longstanding principle. Such a finding would be contrary to earlier Appellate Body reports, and in *Brazil – Tyres* the Appellate Body did not indicate that it was intending to diverge from the approach in those prior reports. Such a finding would also result in other interpretative difficulties, as discussed by the United States in its written submission.[19]

14. The GATT 1947 panel in *US – Section 337*, in a finding subsequently endorsed by the Appellate Body, stated that "it was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as 'necessary' in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it."[20] Other GATT panels followed the same standard.[21]

15. Drawing on the "necessity" test as set out by the GATT 1947 panels referenced above, WTO panels and the Appellate Body have repeatedly stated that an alternative measure must be WTO consistent.[22] For example, in considering the "necessity" test under Article XIV(a) of the *General Agreement on Trade in Services*, the Appellate Body stated that "the requirement, under Article XIV(a), [is] that a measure be 'necessary' – that is, that there be no 'reasonably available', WTO-consistent alternative."[23]

16. The Appellate Body has summarized its findings with respect to the "necessity test" under Article XX of the GATT 1994 in the same way:

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[19] *See*, U.S. Third Party Submission, paras. 10-11.

[20] GATT Panel Report, *United States – Section 337 of the Tariff Act of 1930* ("*US – Section 337*"), L/6439 - 36S/345,, para. 5.26 (emphasis added) (*quoted in* Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* ("*Korea – Beef (AB)*"), WT/DS161/AB/R, WT/DS169/AB/R, para. 165).

[21] *See, e.g.*, GATT Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R - 37S/200, para. 75.

[22] *Korea – Beef (AB)*, para. 165; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products ("EC – Asbestos (AB)")*, WT/DS135/AB/R, paras. 170-171.

[23] *US – Gambling (AB)*, para. 308 (emphasis added).

> In *Korea – Various Measures on Beef* and *EC – Asbestos*, the Appellate Body clarified that, as part of an overall evaluation of 'necessity' using the 'weighing and balancing' process, a panel must examine whether the responding party could reasonably be expected to employ an alternative measure, consistent (or less inconsistent) with the covered agreements, that would achieve the objectives pursued by the measure at issue.[24]

Moreover, in a finding cited by the Appellate Body,[25] the panel in *China – Audiovisual Products* similarly considered that the proper "necessity" test is based on whether or not a proposed alternative measure is WTO consistent, stating "[w]e see no reason to believe that the alternative in question would be inherently WTO-inconsistent or that it could not be implemented by China in a WTO-consistent manner."[26]

17. The remainder of the sentence quoted above from *US – Gambling* provides one rationale for the "necessity" test being based on a WTO-consistent, rather than less trade-restrictive, alternative. There, the Appellate Body stated that the requirement that the alternative be WTO consistent "reflects the shared understanding of Members that substantive GATS obligations should not be deviated from lightly."[27]

18. The United States does not consider the Appellate Body in *Brazil – Tyres* to be stating that it was departing from its earlier and later findings as to the "necessity" test under Article XX. Rather, the Appellate Body has repeatedly recognized that the trade-restrictiveness of a measure is one of the factors that may be helpful in considering the "necessity" of the measure, but when evaluating a proposed alternative measure, it has required that the alternative measure be WTO- consistent. The United States believes the Panel should not read the Appellate Body report in *Brazil – Tyres* in a way that would place that report at odds with the Appellate Body's findings in reports such as *Korea – Beef*, *EC – Asbestos*, *US – Gambling*, and *China – Audiovisual Products*.

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[24] Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* ("*China – Audiovisual Products (AB)*"), WT/DS363/AB/R, para. 318 (emphasis added). The United States does not believe that it would be appropriate to consider whether a measure is "less inconsistent," as comparing degrees of inconsistencies of breaches is impossible and, as explained below, obligations under the WTO Agreement should not be deviated from lightly.

[25] *China – Audiovisual Products (AB)*, paras. 326-327, *and* fn. 602.

[26] Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, para. 7.907.

[27] *US – Gambling (AB)*, para. 308.