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

(WT/DS400, WT/DS401)

Integrated Executive Summary of the United States of America

March 15, 2013

I. GATT 1994: Article XX(a)

1. With respect to considering whether a measure meets paragraph (a) of Article XX of the GATT 1994, the proper elements to consider are whether the measure protects public morals and whether the measure is "necessary" to do so. This calls for determining whether the measure in question has the objective of protecting a value that is a public moral in the respondent's community or nation. 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. 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.

2. Next, it is necessary to consider whether the measures are "necessary" to protect public morals. To do so, 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'."

3. 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. This means that 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.

4. 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. 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.

5. Finally, if presented with an alternative measure by Canada or Norway, 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. 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.

6. A "less trade restrictive" standard is not supported by the text of Article XX(a), which 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. 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. According to the Appellate Body, the ordinary meaning of the term necessary as used in Article XX is "located significantly closer to the pole of 'indispensable' than to the opposite pole of 'making a contribution to'." In this regard, the Appellate Body's 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. As the *US – Tuna-Dolphin* panel noted when comparing the text of TBT Article 2.2 to GATT Article XX, 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.

7. The United States also finds instructive the Appellate Body's discussion in *US – Tuna-Dolphin* of the circumstances in which, when considering a claim under TBT Article 2.2, a panel may not need to consider an alternative measure. 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.

II. TBT Agreement

8. With respect to the TBT Agreement, the United States presents its views on: (1) the definition of "technical regulation," and in particular, the meaning and relevance of product characteristics in that definition under Annex 1.1; (2) the concept of "less favorable treatment" under Article 2.1 and the related approach recently utilized by the Appellate Body regarding "legitimate regulatory distinction"; and (3) the definition of the term "conformity assessment procedures" under Annex 1.3 and the implications for the scope of Articles 5.1 and 5.2.

9. First, Annex 1.1 of the TBT Agreement defines a "technical regulation" as a "document

which lays down product characteristics or their related processes and production methods ... ." Stated differently, to be a technical regulation, a document must either set out that a product possess or not possess a particular characteristic, or it must prescribe certain processes or production methods related to a product characteristic. In this regard, the United States observes that 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. 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*.

10. It is also 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 ("Guide"). In particular, the Guide 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." Similarly, the Guide 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." It is also helpful to consider definition 5.4 in the Guide of a "product standard": "*Standard* that specifies *requirements* to be fulfilled by a product or a group of products, to establish its *fitness for purpose*."

11. These statements in the 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, but to prohibit the sale of the product entirely. The purpose of technical regulation, on the other hand, is to set out product characteristics (or their related processes or production methods), which if met, allows the product to be marketed. In other words, a technical regulation's aim is not to ban a 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.

12. 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...." 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.

13. 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, is 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 it to be sold under the measure. Thus, to the extent 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.

14. Second, with respect to TBT Article 2.1, when considering whether a measure applies less favorable treatment to like products, it is necessary to consider the proper scope for the comparison between products. As the Appellate Body stated in *US – Clove Cigarettes*, a panel is to "compare, on the one hand, the treatment accorded under the technical regulation at issue to all like products imported from the complaining Member with, on the other hand, that accorded to all like domestic products." Though the Appellate Body in that dispute was addressing a national treatment claim under Article 2.1, the United States believes the scope of comparison is similar when considering a most favored nation claim under the same article; that is, the proper scope of comparison is between the treatment accorded to all like products from one Member to all like products "originating in any other country."

15. The United States notes, however, that within the scope of the products being compared, Article 2.1 does not require Members to accord no less favorable treatment to each and every imported product as compared with each and every like domestic product or like product originating in any other country. Technical regulations, "by their very nature," establish distinctions between products. Such distinctions between groups of like products do not breach Article 2.1 so long as the distinction is based on a legitimate regulatory distinction, and not on some impermissible basis, such as the origin of a product. Moreover, when considering whether a distinction drawn between like products is legitimate, a panel may consider the objective behind the distinction being drawn. In making that consideration, a panel should not just consider the "central" or overarching objective of the measure. Measures often have multiple objectives. And in the case of exceptions to a measure, the objectives of the measure may even be competing with each other. Indeed, it is difficult to conceive of another reason why a measure would make exceptions in the first place. It is natural for governments to need to balance competing legitimate objectives. Thus, to suggest that an exception to a measure is not based on a legitimate regulatory distinction because it does not contribute – or may even detract – from the "central" objective of the measure is incorrect. Rather, the proper question for the panel to consider is whether that distinction reflects discrimination. That test can only be satisfied while taking into account all objectives of the measure.

16. Third, with respect to the claims under Articles 5.1 and 5.2 of the TBT Agreement, it is useful to recall that those Articles provide obligations with respect to "conformity assessment procedures." Accordingly, another important threshold question under the TBT Agreement is what is a "conformity assessment procedure."

17. "Conformity assessment procedures" are defined in Annex 1.3 as: "Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled." While Canada and Norway allege, and the EU appears to accept, that the determination as to whether a product falls within the marine resource management or indigenous communities exceptions are conformity assessment procedures, the United States believes the Panel should consider whether these exceptions are technical regulations, and thus, whether any determination concerning eligibility for these exceptions is subject to Articles 5.1 and 5.2.

18. The United States recalls that when a measure is alleged to be a technical regulation within the meaning of the first sentence of Annex 1.1, that measure must set out "product characteristics or their related processes and production methods...." The meaning of product characteristics was just discussed in our statement. With respect to the rest of the sentence, the words "their" and "related" refer to the term "product characteristics," and indicate that the processes and production methods addressed by the first sentence of the definition of a technical regulation are those that relate to product characteristics. Processes or production methods unrelated to product characteristics are not covered by the first sentence of the definition of a technical regulation.

19. Therefore, if an exception does not concern a requirement in a technical regulation (and by definition those requirements would concern product characteristics or processes or production methods related to product characteristics), then a determination as to whether a particular product was eligible for the exception would not be the type of determination specified in the definition. That is, it would not involve a determination as to whether relevant requirements in technical regulations are fulfilled. If an exception does not depend on or prescribe any characteristic of the product or a process or production method related to the characteristic of the product, then it would appear that the exception is not a technical regulation. Accordingly, any procedure for determining eligibility with the exception would not be a procedure for "a positive assurance of conformity with" a technical regulation.

20. Therefore, where a determination is required with respect to whether a product satisfies a measure (or an aspect of a measure) that is not a technical regulation, that requirement does not come under Article 5.1. Since Article 5.2 applies to situations in which a Member is implementing the provisions of Article 5.1, Article 5.2 also would not apply to measures or aspects of measures that are not technical regulations or standards.

21. Thus, to the extent that a determination of eligibility for an exception that sets out non-product characteristics is required, that determination is *not* within the scope of Article 5.1 or 5.2. However, a determination procedure may of course still be amenable to challenge under other WTO agreements, including Article III:4 of the GATT 1994 as a measure that accords less favorable treatment to like products.