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

(WT/DS400, WT/DS401)

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

February 19, 2013

Mr. Chairman, members of the Panel:

1. Thank you for this opportunity to present the views of the United States as a third party in this dispute. My authorities have instructed me to provide the following views on three issues related to the interpretation of the *Agreement on Technical Barriers to Trade* ("TBT Agreement"): (1) the definition of the term "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. These views are in addition to the views expressed in the U.S. third party written submission.

I. Annex 1.1: Technical Regulation

2. A review of the parties' submissions indicates that one issue in this dispute is what type of measure comes within the definition of a technical regulation. This is an important threshold issue for any claim under the TBT Agreement related to technical regulations. 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.

3. The relevant part of 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.[1] 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."[2]

4. With these definitions in mind, 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.[3] 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*.

5. 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").

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[1] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos* ("*EC – Asbestos (AB)*"), WT/DS135/AB/R, para. 69.

[2] *EC – Asbestos (AB)*, para. 67.

[3] *EC – Asbestos (AB)*, para. 71.

6. Although the TBT Agreement distinguishes its definition of "standard" in certain respects from that in the Guide, the 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 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."[4] 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."[5] 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*."

7. 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; the purpose of a sales ban is 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.

8. 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.

9. 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

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[4] 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.)

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

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.

10. 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.

II. Article 2.1: Less Favorable Treatment

11. With respect to Article 2.1 of the TBT Agreement, the United States will comment on the proper comparison for determining "less favorable treatment" in terms of applying the Appellate Body's approach of what constitutes a "legitimate regulatory distinction" between products.

12. First, 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."[6] 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."[7]

13. 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.[8] Technical regulations, "by their very nature," establish distinctions between products.[9] 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.[10]

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[6] Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* ("*US – Clove Cigarettes (AB)*"), WT/DS406/AB/R, para. 193.

[7] TBT Agreement, Art. 2.1.

[8] *US – Clove Cigarettes (AB)*, para. 193; EU First Written Submission, para. 292.

[9] *US – Clove Cigarettes (AB)*, para. 169.

[10] *US – Clove Cigarettes (AB)*, para. 215.

14. Second, when considering whether a distinction drawn between like products is legitimate, a panel may consider the objective behind the distinction being drawn.[11] In making that consideration, a panel should not just consider the "central" or overarching objective of the measure.[12] 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.[13] That test can only be satisfied while taking into account all objectives of the measure.

III. Article 5: Scope of Obligations Pertaining to Conformity Assessment Procedures

15. 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."

16. "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.[14]

17. 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.

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[11] *See, e.g., US – Clove Cigarettes (AB)*, para. 225.

[12] *Contra*, Canada First Written Submission, paras. 391, 402-403, 409.

[13] *US – Clove Cigarettes (AB)*, para. 215.

[14] *See also*, EU First Written Submission, para. 149.

18. 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.

19. 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.

20. 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.

21. We thank the Panel and the Secretariat, the parties and the other third parties, for their time and attention. We would be pleased to receive any questions.