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TERMS AND THEIR DEFINITIONS FOR THE
PURPOSE OF THIS AGREEMENT

The terms presented in the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities, shall, when used in this Agreement, have the same meaning as given in the definitions in the said Guide taking into account that services are excluded from the coverage of this Agreement.

For the purpose of this Agreement, however, the following definitions shall apply:

1. Technical regulation

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory.

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The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.

TBT Agreement prevail to the extent that they depart from the definitions set out in the ISO/IEC Guide 2: 1991."¹

considered as an integral part of the technical regulation and are thus subject to the substantive provisions of the TBT Agreement. In the context of Annex 1.1, we understand the appositive clause 'including the applicable administrative provisions' to refer to provisions to be applied by virtue of a governmental mandate in relation to either product characteristics or their related processes and production methods."⁹

8. The Appellate Body in *EC – Seal Products* also observed that "[t]o the extent that the essential and integral aspects" of the measure "do not set out product characteristics, it follows that their related administrative provisions cannot be characterized as being applicable to product characteristics".¹⁰

9. In *Australia – Tobacco Plain Packaging*, the Panel considered in detail whether Australia's tobacco plain packaging measures "lay down product characteristics for tobacco products". In the course of its analysis, the Panel opined that requirements concerning the "appearance" and "packaging" of products could be said to "lay down product characteristics".¹¹ Further, the Panel found that the term "characteristics" is "sufficiently broad to encompass requirements relating to terminology, marking or labelling that affect the manner in which a sign, including one that is protected as a trademark, may be displayed on the relevant product".¹² Quoting the Panel in *EC – Trademarks and Geographical Indications (Australia)*, the Panel emphasized that "[t]he issue is not whether the content of the label refers to a product characteristic: the label on a product is a product characteristic".¹³

10. The measures at issue in *EC – Asbestos* and *EC – Sardines* both laid down product characteristics in a negative form, and both were found to be "technical regulations" within the

must be 'mandatory'. A 'technical regulation' must, in other words, regulate the 'characteristics' of products in a binding or compulsory fashion."¹⁸

13. In EC Sardines, both the Panel and the Appellate Body concluded that the measure at issue set forth product characteristics that were "mandatory". The conclusion was based on the fact that the measure at issue stated that the requirements contained therein were "binding in its entirety and directly applicable in all Member States".¹⁹

14. The Panel in EC Trademarks and Geographical Indications (Australia) noted that the word "mandatory" means "obligatory in consequence of a command, compulsory".²⁰

15. In assessing whether compliance with the Vilsack letter was mandatory, the Panel in US COOL observed that "[o]n its face, the Vilsack letter is clearly not mandatory". However, the Panel held that "the nature of compliance with the Vilsack letter is not a merely formalistic question":

"On its face, the Vilsack letter is clearly not mandatory. Unlike the instruments composing the COOL measure, the Vilsack letter is not a piece of legislation or regulation legally binding in US law. In outlining action by industry, the Vilsack letter uses permissive, hortatory terms such as 'might', 'should' and 'would'; it mentions the word 'voluntary' at least four times; and it notes that it contains 'suggestions for voluntary action'. It is also not followed up by a classic legal enforcement mechanism.

But the nature of compliance with the Vilsack letter is not a merely formalistic question. We agree with the complainants that this matter should not be decided purely on the basis of the language in the Vilsack letter, in particular the use of the word 'voluntary'. Adopting a formalistic interpretation of the phrase 'with which compliance is mandatory' would allow Members

the circumstances of the case. In some cases, this may be a relatively straightforward exercise. In others, the task of the panel may be more complex. Certain features exhibited by a measure may be common to both technical regulations falling within the scope of Article 2 of the TBT Agreement and, for example, standards falling under Article 4 of that Agreement. Both types of measure could, for instance, contain conditions that must be met in order to use a label. In both cases, those conditions could be 'compulsory' or 'binding' and 'enforceable'. Such characteristics, taken alone, cannot therefore be dispositive of the proper legal characterization of the measure under the TBT Agreement. Instead, it will be necessary to consider additional characteristics of the measure in order to determine the disciplines to which it is subject under that Agreement. This exercise may involve considering whether the measure consists of a law or a regulation enacted by a WTO10.3 (g w)8.7 (JT4d(a)7 (s)7 (u)-1 6n)-2

"[T]he proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole ... the scope and generality of those prohibitions can only be understood in light of the exceptions to it which, albeit for a limited period, permit, inter alia, the use of certain product products containing asbestos and, principally, products containing chrysotile asbestos fibres. The measure is, therefore, not a total prohibition on asbestos fibres, because it also includes provisions that permit, for a limited duration, the use of asbestos in certain situations. Thus, to characterize the measure simply as a general prohibition, and to examine it as such, overlooks the complexities of the measure, which include both prohibitive and permissive elements. In addition, we observe that the exceptions in the measure would have no autonomous legal significance in the absence of the prohibitions. We, therefore, conclude that the measure at issue is to be examined as an integrated whole, taking into account, as appropriate, the prohibitive and the permissive elements that are part of it."²⁸

21. In EC Seal Products, the Panel found that the measure at issue (the EU Seal Regime) comprised both prohibitive and permissive aspects: (i) a prohibition of all seal products, whether they are made exclusively of seal or contain seal as an input (prohibitive aspect); and (ii) an exception with regard to the import and/or placing on the market of seal products in three situations, namely when they result from IC hunts, MRM hunts, or in the case of Travellers imports (the permissive aspect).²⁹ The Panel considered that the Appellate Body's analysis of the measure at issue in EC Asbestos does not suggest that for a measure consisting of a ban and certain exceptions to qualify as a technical regulation, both the prohibition and the exceptions must individually lay down product characteristics or their related PPMs.³⁰ The P

the measure at issue without analysing the weight and relevance of the essential and integral elements of the measure as an integrated whole."³³

23. The Appellate Body in EC – Seal Products was unpersuaded that the prohibition on the placing on the EU market of seal-containing products constituted "the main feature of the measure at issue" and found that "the measure as a whole" did not lay down product characteristics:

"To the extent the measure prohibits the placing on the EU market of seal-containing products, it could be seen as imposing certain 'objective features, qualities or characteristics' on all products by providing that they may not contain seal. However, as stated above, we are not persuaded that this part of the Regulation constitutes the main feature of the measure at issue. Moreover, the EU Seal Regime's prohibition of 'mixed' products differs, to a considerable extent, from the prohibitive aspects of the French Decree under EC – Asbestos. More importantly, as noted by the Panel, the EU Seal Regime 'consists of both prohibitive and permissive components and should be examined as such'. As we see it, when the prohibitive aspects of the EU Seal Regime are considered in the light of the IC and MRM exceptions, it becomes apparent that the measure is not concerned with banning the placing on the EU market of seal products as such. Instead, it establishes t 0.1363g 3 -1.213-3 (r)

the TBT Agreement was a deliberate choice on the part of the drafters of the TBT Agreement, and that the last two phrases of the Explanatory note were included to give ef

"[A] document provides product characteristics (or other relevant features, such as packaging requirements) 'for common and repeated use' when these are designed for the specific purpose of being frequently shared alike by all persons or things in question, with the aim of achieving the optimum degree of order in a given context. The need for the characteristics at issue to be amenable 'for common and repeated use' further suggests that they need to possess a degree of clarity and precision sufficient to allow them to be implemented in a consistent and predictable manner, as documents lacking these attributes are unlikely to achieve the optimum degree of order required to address the 'actual or potential problem' giving rise to them. At the same time, ... the exact degree of specificity needed for such requirements to be 'for common and repeated use' can only be assessed on a case-by-case basis, depending on the type of 'problem' addressed by the document claimed to be a standard, and the 'context' under which this problem arises."⁴⁷

32. The Panel suggested that a document containing guidelines that provided a "range of options" to Members, and thus allowed different Members to implement those guidelines in ways

under the EU Seal Regime constitute a CAP within the meaning of the TBT Agreement."⁵⁰

Current as of: December 2023

⁵⁰ Panel Reports, EC Seal Products, para. 7.510; and Appellate Body Reports, EC Seal Products, para. 6.1.