

Refining What Qualifies As WTO 'Technical Regulation'

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In a new World Trade Organization holding, the Appellate Body (“AB”) strictly interpreted the meaning of “technical regulation” under the WTO Agreement on Technical Barriers to Trade (“TBT Agreement”) and, as a result, held that the measure at issue did not fall within the agreement’s scope. In *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (“EC-Seal Products”), the AB determined that the measure did not qualify as a technical regulation because it did not “lay down product characteristics.” Subsequently, the AB declined to analyze whether the measure could still meet the “technical regulation” definition by qualifying as a “related process or production method” (“PPM”). In coming to this decision, it rationalized that the parties had only developed arguments regarding whether the restriction stipulated “product characteristics” and, therefore, did not consider it appropriate to complete the legal analysis without a thorough examination by the parties and the underlying WTO panel.



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Although in previous cases WTO panels and the AB have rarely found that a measure did not qualify as a “technical regulation,” this case puts future WTO complainants on notice that this threshold question for consideration under the TBT agreement may have new life, and that — going forward — a thorough analysis is needed on each portion of the “technical regulation” definitional criteria.[1]

Background

In November 2009, co-complainants Canada and Norway requested consultations with the European Communities (“EC”) regarding EC Regulation No. 1007/2009, which sought to limit the importation of seal products into the EU market (“the Seals Regime”). The regulation implemented a general ban on seal products, but allowed for certain exemptions — namely, the importation and sale of seal products deriving from indigenous hunts, hunts conducted for marine resource management (the “IC” and “MRM” exceptions, respectively) and traveler imports. Canada and/or Norway asserted that the Seals Regime violated, among other WTO provisions, Articles 2.1 and 2.2 of the TBT Agreement. Article 2.1 prohibits WTO members from enacting or maintaining “technical regulations” that provide less favorable treatment to “like” imported products, while Article 2.2 prohibits members from adopting “technical regulations” that are “more trade-restrictive than necessary to fulfill a legitimate objective.”

In November 2013, the WTO panel circulated its report, holding that the Seals Regime, while inconsistent with Article 2.1 of the agreement, did not violate Article 2.2. The panel found that the measure fulfilled a legitimate objective — i.e., addressing public moral concerns on the welfare and treatment of seals. The panel also held that Norway and Canada did not show that the EU could implement any reasonably alternative measure that would make an “equivalent or greater contribution to the fulfillment of this objective.” In other words, the panel did not consider the regulation more trade-restrictive than necessary.

In its decision, before tackling the substantive requirements of Articles 2.1 and 2.2, the panel needed to decide the threshold issue of whether the Seals Regime qualified as a “technical regulation.” Annex 1.1 to the TBT Agreement defines “technical regulation” as: “[a] document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process, or production method.” The AB in EC-Asbestos developed this definition into a three-tier test, holding that in order to constitute a technical regulation a measure must meet the following criteria:

1. it must apply to an “identifiable product or group of products”;
2. it must lay down product characteristics or their related processes or production methods, including the applicable administrative provisions; and
3. it must be mandatory.

The panel held that the Seals Regime met all of these criteria because it: (1) applied to a particular group of products — i.e., seal products; (2) stipulated product characteristics in a “negative form” by banning all products containing seal; and (3) required compliance.

The parties appealed the panel’s decision, and in May of this year, the AB issued its report. Surprisingly, the AB did not agree with the panel’s finding that the measure qualified as a “technical regulation.” Instead of taking the panel’s approach, which “seemed satisfied ... that the prohibition on seal-containing products laid down product characteristics in the negative form,” the AB noted that it needed to collectively examine both the general ban as well as the IC and MRM exceptions. In other words, the AB considered it inappropriate to look at only one portion of the regulation. Moreover, the AB found “no basis in the text of Annex 1.1 or in prior AB reports to suggest that the identity of the hunter, the type of hunt, or the purpose of the hunt could be viewed as product characteristics.” According to the AB, such characteristics were not characteristics of the product, and thus the regulation was not subject to the TBT Agreement.

“Technical Regulation” Analysis in Prior Cases

As noted above, prior WTO reports had very little difficulty establishing that measures raised under the TBT Agreement set out “product characteristics” that met the Annex 1.1 definition of a “technical regulation.” For instance:

- In EC-Sardines, the panel and AB held that various provisions of an EC regulation, which implemented marketing standards for preserved sardines, stipulated several product characteristics. For example, the regulation required producers that wanted to label their products as “sardines” to exclusively use the species *Sardina pilchardus*. The panel held that this

provision qualified as a “product characteristic” because it “objectively define[d] features and qualities of preserved sardines.”

- In EC-Asbestos, the AB reviewed a measure which banned asbestos fibers in their natural state and asbestos-containing products, subject to an “exhaustive list” of exempted products which could contain chrysotile asbestos fibers. While the body noted that the prohibition on asbestos fibers alone did not lay down product characteristics because it simply banned asbestos fibers in their natural state, the AB did find that the general ban on products containing asbestos and the exemptions provided for “product characteristics.” The AB looked at this measure as a whole and held that the first portion of the measure — the general ban — “effectively prescribes or imposes certain objective features, qualities, or ‘characteristics’ on all products.” In other words, the measure prohibits products from having a certain component — asbestos fibers. The AB described that the exemptions, which only apply to products that can demonstrate a certain level of safety and cannot rely on an acceptable alternative fiber, lays down “applicable administrative provisions” for a narrowly defined group of products. For these reasons, the AB concluded that the measure qualified as a technical regulation “which lays down product characteristics ... including the applicable administrative provisions.”
- In U.S.-Clove Cigarettes, the panel reviewed a U.S. law that prohibited the sale of cigarettes with flavors (other than tobacco or menthol) such as clove. The panel stated that “a measure that prohibits cigarettes from containing certain constituents or additives with a ‘characterizing flavor’ is by definition a measure that lays down one or more ‘product characteristics.’”
- In U.S.-Tuna II (Mexico), the panel reviewed whether a U.S. measure that set out conditions for using a “dolphin-safe” label on tuna products sold in the United States constituted a technical regulation. The United States argued that the provisions did not specify product characteristics because they did not state what qualifications tuna products must meet in order to be eligible for sale on the U.S. market. Ultimately, the panel agreed with Mexico, concluding that the measure established labeling requirements as applied to a “product.” Therefore, the subject-matter of the measures — i.e., defining the conditions that must be met in order to use a “dolphin-safe” label — fell within the scope of the definition of “technical regulation” under Annex 1.1.
- In U.S.-COOL, the panel reviewed whether a country-of-origin labeling (“COOL”) measure lays down one or more characteristics of products. The panel agreed that the essence of the measure at issue was a requirement to place country of origin labels on certain products (e.g., beef, pork, livestock). The panel found that the measure provided for “product characteristics” by directly citing an earlier WTO decision (EC – Trademarks and Geographical Indications (Australia)), which held that a country of origin labeling requirement addresses a product characteristic.

The Decision to Abstain

The AB's detailed treatment of this threshold issue under EC-Seal Products should alert WTO members that, in the future, the examination of what constitutes a "technical regulation" could receive a more rigorous level of scrutiny. But while the reasoning that "the identity of the hunter, the type of hunt, or the purpose of the hunt" do not qualify as "product characteristics" seems grounded, it is less clear why the AB refused to review whether the measure could nonetheless qualify as a "related process and production method" ("PPM") and, consequently, still constitute a "technical regulation" for purposes of Annex 1.1 of the TBT Agreement.

The AB claimed that, although the complainants made arguments on related PPMs before the panel, the panel did not sufficiently examine whether the Seals Regime also stipulated PPMs. According to the AB, the complainants also failed to brief on the PPMs issue in their written submissions to the AB. As a consequence, the AB abstained from considering the issue. It stated, "In view of the novel character of an issue which the panel 'has not examined at all' ... we do not consider it appropriate to complete the legal analysis by ruling on whether the EU Seals Regime lays down 'related processes and productions methods.'" This rationale seems somewhat at odds with the full record present in this dispute. In fact, it appears that the AB went out of its way to avoid completing the analysis, though one could argue that this avoidance was within the AB's discretion.

Lessons Learned

As stated earlier, the outcome of the EC-Seal Products AB report should alert future WTO members that each definitional criterion for a "technical regulation" may be more strictly scrutinized in future WTO cases. Complainants and respondents should not assume that a measure will easily qualify as a "technical regulation." They must take the time to carefully analyze and draft arguments for each and all criteria. This effort could eventually make the difference between success and failure in a WTO case implicating the TBT Agreement. Furthermore, to best ensure that lengthy WTO proceedings do not end in a frustrating draw under which a panel or the AB takes the opportunity to avoid a difficult decision and fully resolve a dispute, the parties should take care to properly and sufficiently brief the panel and the AB on each measure and legal claim.

Substantively, parties in a TBT dispute may wish to consider adding parallel claims pursuant to the General Agreement on Tariffs and Trade ("GATT") Article III:4, which — considering the current stringent posture that the WTO has taken — appears to have a lower threshold requirement for complainants to meet than under the TBT Agreement. Indeed, under the exceptions provision of Article XX of the GATT, the burden of proof shifts more easily from the complainant to the respondent. However, GATT Article III:4 only addresses discriminatory concerns and does not cover the breadth of regulatory disciplines encompassed within the TBT Agreement. Article 2.2, for example, constrains technical regulations that impose an unnecessarily high regulatory burden on the imported product, even if the technical regulations do not qualify as discriminatory. This limitation under GATT Article III:4 is significant and cannot be ignored.

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[1] In only two previous WTO disputes, the WTO body found that the measures at issue did not qualify as a “technical regulation” under Annex 1.1 of the TBT Agreement. See Panel Report, EC-Trademarks/GIs, paras. 7.492-515; and Panel Report, U.S./COOL, paras. 7.149-217.

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