

**MARKET ACCESS FOR NON-AGRICULTURAL PRODUCTS**

Compendium from the United States containing the most recent NTB's text on an Agreement on Non-Tariff Barriers Pertaining to the Electrical Safety and Electromagnetic Compatibility (EMC) of Electronic Goods, as well as the history of questions and answers related to this proposal

*Communication from the United States*

The following communication, dated 2 December 2009, is being circulated at the request of the delegation of the United States.

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**Agreement on Non-Tariff Barriers Pertaining to the  
Electrical Safety and Electromagnetic Compatibility (EMC) of Electronic Goods**

**Members,**

*Recalling* that pursuant to paragraph 16 of the Doha Ministerial Declaration, Members agreed to negotiations aimed at reducing or as appropriate eliminating tariffs and non-tariff barriers on non-agricultural goods;

*Recognizing* the important contribution of electronic goods to global economic growth and development;

*Desiring* to ensure that technical regulations, standards, and conformity assessment procedures do not create unnecessary obstacles to international trade in electronic goods;

*Affirming* their existing rights and obligations under the WTO Agreement, including the Agreement on Technical Barriers to Trade (TBT Agreement);

*Recognizing* that no Member should be prevented from taking measures that are necessary for the protection of human, animal or plant life or health, of the environment, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement, or that are necessary for the protection of its essential security interest;

*Recognizing* that a Member's selection of an appropriate conformity assessment procedure may involve the consideration of a number of factors, such as the risks associated with non-conformity or the product for which conformity is sought;

**Seeking to supplement and elaborate on the TBT Agreement with respect to standards, technical regulations, and conformity assessment procedures affecting electronic goods; and**

**With a view to expanding the products listed in Members' schedules to Annex I, II, III, and IV to this Agreement in the future.**

**Agree as follows:**

## **I. DEFINITIONS**

**For purposes of this Agreement:**

**Central government body means a central government body as defined in Annex 1 of the TBT Agreement;**

**Electronic good means any information technology, telecommunications, audio-visual, or other electronic or electrical product, whether for business or personal use, listed in Annex I of this Agreement; [Note: Annex I would cover a range of products falling under Chapter 84, 85, or 90 of the World Customs Organization's Harmonized Commodity Description and Coding System and apply to all Members];**

Question from Thailand: Could the U.S. provide HS codes for the product coverage? (JOB/08)/113)

- U.S. answer: We are currently considering the best way to characterize the products for listing in the relevant Annexes of the proposal, given that regulators do not regulate by HS code. We would welcome suggestions. (JOB(09)/37)

**Supplier means any party that supplies the product and may include a manufacturer, distributor, or importer;**

**Supplier's declaration of conformity (SDoC) means a declaration by a supplier based on an evaluation of the results of conformity assessment procedures that a product meets a specified standard or technical regulation or other specification;**

**Standard, technical regulation, or conformity assessment procedure means respectively a standard, technical regulation, or conformity assessment procedure as defined in Annex 1 of the TBT Agreement that pertains to the electrical safety or electromagnetic compatibility (EMC) of an electronic good; and**

**Third-party certification means a declaration by a body, which the Member accepting the declaration has determined is independent of suppliers and users, that a product meets a specified standard or technical regulation or other specification based on an evaluation of the results of conformity assessment procedures.**

Question from Singapore: We understand that the standards, technical regulations and conformity assessment procedures for E/E products covers not only electrical safety or EMC, but also includes energy efficiency, WEEE etc. Why is the NT proposal limited to only electrical safety or EMC? Are those principles in the US proposal not applicable to energy efficiency and other regulations on E/E products, for example? (JOB(09)/22)

- U.S. answer: Two main reasons: our proposal was a response to the EC proposal, which was limited to electrical safety and EMC, and these were also the regulatory areas in which our

industry was requesting action. Certainly, transparency and good regulatory practice are also applicable to environmental regulations and would study any proposal Singapore might provide to address environmental regulations and energy efficiency for electronics goods. (TN/MA/W/115)

## **II. SCOPE AND COVERAGE**

**A. This Agreement shall apply to any standard, technical regulation, or conformity assessment procedure, as defined in paragraph I.**

**B. This Agreement shall impose obligations on Members only with respect to standards, technical regulations, and conformity assessment procedures of central government bodies.**

Question from Thailand: Please explain why the Agreement shall impose obligations only on standards, technical regulations and conformity assessment of central government bodies while the TBT Agreement covers local government bodies and non-governmental bodies as well. (JOB(08)/113)

- U.S. answer: The United States regulates electrical safety and EMC at the Federal level, hence we drafted the text to apply to the Federal level only. However, several Members have suggested that we broaden the disciplines of our initiative to the sub-Federal level, noting that some Members regulate electrical safety and EMC at the sub-Federal level. Some possible options for doing this might include (a) Members could schedule the regulatory body to which its commitments under this initiative apply (including if applicable sub-Federal entities); or (b) the proposal could include language that tracks the language of TBT Article 3.1 which states that “Members shall take such reasonable measures as may be available to them to ensure compliance by [sub-Federal bodies] ...” . (JOB(09)/37)

Question from Singapore: Does the proposal apply only to Central Government bodies? Or also to state or local government bodies? We note that the WTO TBT Agreement applies to the Central Government Bodies, local government bodies and non-governmental bodies. (JOB(09)/22)

- U.S. answer: The United States regulates electrical safety and EMC at the Federal level; hence we drafted the text to apply to the Federal level only. However, several Members have suggested that we broaden the disciplines of our initiative to the sub-Federal level, noting that some Members regulate electrical safety and EMC at the sub-Federal level. Some possible options for doing this might include the following: (a) Members could schedule the regulatory bodies to which its commitments under this initiative apply (including if applicable sub-Federal entities); or (b) the proposal could include language that tracks the language of TBT Articles 3.1 and 7.1 which state that “Members shall take such reasonable measures as may be available to them to ensure compliance by [sub-Federal bodies] ...” We would be interested in Members’ views on this issue. (TN/MA/W/115)

**C. This Agreement shall not apply to purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies.**

Question from Thailand: Does this paragraph stating that the Agreement shall not apply to purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies apply to the Members that are parties to the Government Procurement Agreement? Please clarify. (JOB(08)/113)

- U.S. answer: The proposal tracks the language of TBT Article 1.4, which states that “Purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies are not subject to the provisions of this Agreement, but are addressed in the Agreement on Government Procurement.” Our intent that the proposal would not apply to purchasing specifications in government procurements, just as the TBT Agreement does not apply to purchasing specifications in government procurements. As TBT Article 1.4 notes such purchasing specifications are addressed in the GPA. (JOB(09)/37)

**D. Any reference in this Agreement to standards, technical regulations, or conformity assessment procedures shall be construed to include any amendment thereto and any additions to the rules or product coverage thereof, except amendments and additions of an insignificant nature, to the extent such amendment or addition pertains to electrical safety or EMC for electronic goods.**

### **III. STANDARDS, TECHNICAL REGULATIONS, AND CONFORMITY ASSESSMENT PROCEDURES**

#### *Assessing Costs*

**A. Where a Member proposes to prepare or adopt a technical regulation or conformity assessment procedure, it shall take into account, *inter alia*, costs of complying with the proposed technical regulation or conformity assessment procedure.**

Question from Thailand: Please provide more information on “costs of complying” with the proposed technical regulation or conformity assessment procedures. For example, how to assess them? (JOB(08)/113)

- U.S. answer: It is up to each individual Member to decide how to assess the costs of complying with the proposed technical regulation or conformity assessment procedure. In fact, different regulatory bodies within a single economy may have different methods of assessing the costs of complying. The point of the provision is to ensure that costs of complying are taken into account in the regulatory process. (JOB(09)/37)

#### *International Standards*

**B. In determining whether an international standard, guide or recommendation within the meaning of Articles 2 and 5 and Annex 3 of the TBT Agreement exists pertaining to electrical safety or EMC of an electronic good, each Member shall base its determination on the principles set out in *Decisions and Recommendations adopted by the Committee since 1 January 1995, G/TBT/1/Rev.8, 23 May 2002, Section IX (Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement) (Committee Decision)* issued by the WTO Committee on Technical Barriers to Trade (TBT Committee).**

#### *Transparency*

**C. Further to Articles 2.9 and 5.6 of the TBT Agreement, where a Member proposes to prepare or adopt a technical regulation or conformity assessment procedure that may have a significant effect on trade of other Members, the Member shall, with a view to providing meaningful opportunity for comment:**

- (1) **publish, in print or electronically, the proposed technical regulation or conformity assessment procedure at the earliest appropriate stage, in such a manner as to enable interested parties to become acquainted with it and to submit written comments before the Member finalizes it;<sup>1</sup>**
- (2) **to the extent applicable, identify in any notification it makes pursuant to Article 2.9.2 or 5.6.2 of the TBT Agreement any provisions of the proposed technical regulation or conformity assessment procedure that deviate in substance from relevant international standards, guides, or recommendations;**
- (3) **upon request from another Member, provide particulars concerning how it took or plans to take into account the costs of complying with the proposed technical regulation or conformity assessment procedures in accordance with paragraph A;**
- (4) **normally allow not less than 60 days for Members to comment in writing on the proposed technical regulation or conformity assessment procedure;**
- (5) (i) **allow reasonable time for interested parties to comment in writing on the proposed technical regulation or conformity assessment procedure, which normally shall not be less than 60 days;<sup>2</sup> and (ii) take into account any such comments the Member receives in finalizing the technical regulation or conformity assessment procedure; and**
- (6) **publish, in print or electronically, any written comments it receives from Members or interested parties on the proposed technical regulation or conformity assessment procedure.**

**Members shall comply with the obligations set out in this paragraph and Articles 2.9 and 5.6 of the TBT Agreement regardless of whether relevant international standards, guides, or recommendations exist or the technical content of the proposed technical regulation or conformity assessment procedure is in accordance with relevant international standards, guides, or recommendations.**

Question from Thailand: Does the U.S. view that proposed additional commitments beyond TBT Agreement such as notifying the proposed standards, technical regulation or conformity procedures and publishing the responses to any comments will create significant burdens to developing countries, particularly those that do not use WTO language as official languages? (JOB(08)/113)

- U.S. answer: We recognize that the proposal adds a new requirement to notify proposed technical regulations and conformity assessment procedures to the WTO even where such regulations or procedures are based on relevant international standards. However, we view the benefits of this additional requirement as enhancing transparency and facilitating trade and that these benefits for industries far outweigh the additional requirement for governments. In this regard, we note that the United States notifies proposed technical regulations and conformity assessment procedures to the WTO regardless of whether they are based on relevant international standards. We would encourage discussions regarding our and other

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<sup>1</sup> When a Member publishes a proposed technical regulation or conformity assessment procedure in accordance with this subparagraph, it shall be deemed to have satisfied the obligation in Article 2.9.1 or 5.6.1 of the TBT Agreement, as the case may be, to publish a notice of the proposed technical regulation or conformity assessment procedure.

<sup>2</sup> Each Member shall publish a notice, in print or electronically, specifying the comment period and give favourable consideration to reasonable requests from interested parties to extend it.

Members' experience with notifications. Moreover, having all proposed technical regulations and conformity assessment procedures in one central depository would be significantly less burdensome on developing countries with limited resources than engaging someone with the task of monitoring other countries' websites or official journals for notices of new proposed technical regulations or conformity assessment procedures and then translating those notices into the domestic language. Responses to comments need not be responses to individual comments, but can be grouped by topic and summarized, for example, in the final rulemaking. (JOB(09)/37)

Question from Singapore: How are the transparency provisions different from those in the WTO TBT Agreement? (JOB(09)/22)

- U.S. answer: Under our proposal, all the transparency provisions of the TBT Agreement continue to apply, with the addition of seven main requirements: (1) a Member must notify all proposed standards, technical regulations or conformity assessment procedures that may have a significant effect on trade, not just those that are not based on relevant international standards; (2) a Member must identify up front in its WTO notice the parts of the proposed measure that in substance deviate from relevant international standards, guides or recommendations (rather than provide such information subsequently upon request) (3) a Member must consider comments from interested persons, not just Members, on the proposed standard, technical regulation or conformity assessment procedure; (4) a Member must allow as a "reasonable time" for the submission of comments from Members on a proposed measure normally not less than 60 days; (5) a Member must publish (in print or electronically) the proposed standard, technical regulation or conformity assessment procedure (rather than simply a notice thereof); (6) a Member must be prepared to provide particulars upon request concerning the standard, technical regulation or conformity assessment procedure including how it took into account the costs of complying with the proposed technical regulation or conformity assessment procedures; and (7) Members must publish or otherwise make available to the public comments it receives on the proposed standard, technical regulation or conformity assessment procedure as well as its responses to significant and relevant issues raised in those comments. (TN/MA/W/115)

Question from Canada – Transparency: Sectoral Requirements

- Separate transparency requirements for the automotive or the electronics sectors could result in unique transparency requirements, the implementation of which would prove operationally challenging for many Members' Notification Authorities and Enquiry Points.
- Could the U.S. advise why it believes that different transparency requirements are required specifically for the automotive and electronics sectors? (JOB(09)/31+Corr.1)
- U.S. answer: The United States believes that additional transparency requirements can benefit many if not all sectors. However, the NAMA NTB negotiations have provided an opportunity to address TBT-related issues on a sector specific basis, and in response to this opportunity a number of Members have submitted sector-specific TBT-related NTB proposals that reflect sectors identified in the indicative list of NTBs. Autos and electronics are two of those sectors and sectors where increased transparency can be particularly beneficial. We acknowledge that other sectors may also benefit from improved transparency but we have a mandate to address TBT-related NTBs on a sectoral basis and should not neglect the opportunity we have to increase transparency in these sectors simply because transparency improvements may also be useful in other sectors.

With respect to the automotive and electronics sectors, both are examples of heavily regulated sectors with significant international trade, global supply chains and companies that operate in many different countries. In our view, transparency provisions that guarantee all interested parties a meaningful opportunity to comment on proposed measures is particularly beneficial in such sectors. Our proposals help ensure meaningful opportunity for comment among other things by requiring that the proposed measure itself to be published, in print or electronically, and by requiring Members to take interested parties' comments -- in addition to comments from Members -- into account in finalizing the proposed measure. In sectors with global significance, ensuring that interested parties in all WTO Members can comment on proposed measures is critical. In addition, our proposals would require all proposed technical regulations, conformity assessment procedures and standards developed by central government bodies (and having a significant effect on trade) to be published and notified to the WTO. In our view, even measures based on international standards can benefit from interested party input, including for example, on elements of the measure that may differ from or go beyond relevant international standards. In our view, greater opportunities for interested party input can facilitate greater alignment and help prevent the creation of unnecessary barriers. We have the opportunity to make these improvements in the NAMA NTB context and to do so on a sectoral basis and believe it is both appropriate and important that take advantage of that opportunity in our autos and electronics proposals. (JOB(09)/157)

#### Question from Canada: Transparency: Publication of Standards

- The WTO TBT Agreement deals separately with the three distinct types of measures that it covers (i.e. technical regulations, standards, and conformity assessment procedures). Each measure is subject to distinct transparency requirements which should not be lumped together and made subject to common obligations. For example, standards are typically developed by private-sector organisations which normally provide their standards to the public only on a cost basis.
- How does the U.S. foresee the implementation of the requirement for Members to publish and provide copies of standards in a way that reflects the copyrights of standards-developments organizations?
- In order to avoid the need for Members' Notification Authorities to unnecessarily duplicate existing processes for the publication, notification and provision of draft standards, has the U.S. considered making reference to Annex 3 of the WTO TBT Agreement, which requires that work programmes of standards be published?
- Similarly has the U.S. considered adding a reference to Article 10.4 of the WTO TBT Agreement, which requires Members to take such reasonable measures as may be available to them to ensure that, upon request, copies of documents "*are supplied at an equitable price (if any) which shall, apart from the real cost of delivery, be the same for the nationals of the Member concerned or of any other Member*"? (JOB(09)/31+Corr.1)
- U.S. answer: With respect to the point Canada raises about the TBT Agreement addressing standards differently than technical regulations and conformity assessment procedures, in response to Members' feedback, the United States has revised its autos and electronics proposals to set out the transparency provisions for standards and technical regulations and conformity assessment procedures separately.

Generally, we have included "standards" in the proposals' transparency provisions to cover those instances when governments themselves develop a standard and in many instances then mandate compliance with that standard. Often the development stage of that standard is the time at which interested parties can provide the most meaningful input, as opposed to the time when the Member simply proposes that compliance with that standard become mandatory.

While recognizing that Annex 3 of the TBT Agreement contains some transparency disciplines for standards development, for example the requirement under paragraph J to publish a work program, our proposals seek to build upon those, for example, by requiring that the proposed standard also be published. (Note that the U.S. proposals are limited to central government bodies such that the proposals' transparency provisions would only apply to standards developed by central government bodies.)

With respect to Canada's questions on copyrights, our proposals do not intend to require private-sector standardizing bodies to follow the proposals' transparency provisions and therefore do not see that they raises copyright issues. Instead, for those that have accepted it, Annex 3 would continue to apply to non-governmental standardizing bodies (including the requirement to publish work programs). We note that Annex 3 would also continue to apply to government standardizing bodies – a point which we believe is made clearer in the revised autos and electronics proposals we tabled in September. (See TN/MA/W/105/Rev.2 and TN/MA/W/120). For government standardizing bodies, for the reason noted above, we believe the additional publication and notification requirements our proposals would impose are important to enhancing transparency in these sectors. Our proposals do not reference Article 10.4 of the TBT Agreement because that provision would continue to apply in addition to the requirements of our proposals. (JOB(09)/157)

#### Question from Canada – Transparency: Deviations from International Standards

- The U.S. proposals would require Members to always indicate any provisions that deviate in substance from international standards. The WTO TBT Agreement only requires Members to identify such provisions upon request.
- How does the U.S. plan to address this new obligation from a resource-requirement and practical implementation perspective?
- Does the U.S. foresee modifying the WTO template for notifications to include a new section in which Members would indicate provisions that deviate in substance from international standards? (JOB(09)/31+Corr.1)
- U.S. answer: Because the TBT Agreement already requires Member to take into account relevant international standards in developing its standards, technical regulations and conformity assessment procedures, each Member should readily know whether, and which parts, of a proposed measure deviate in substance from relevant international standards. Accordingly, the United States does not anticipate reporting that information in Members' WTO notifications to be a significant new recourse or practical burden, and in any event, we view the benefits of greater transparency this requirement would provided our industries as outweighing the additional requirement for governments. (JOB(09)/157)

#### Question from Canada – Transparency: Good Regulatory Practices

- It could be burdensome for Members to provide, upon request, particulars concerning how elements of good regulatory practices, such as the cost of complying with the proposed measure, were taken into account.
- As an alternative, has the U.S. considered allowing Members to simply provide a regulatory impact analysis statement, or equivalent information, provided that it is publicly available? (JOB(09)/31+Corr.1)
- U.S. answer: It is up to each individual Member to decide how to assess the costs of complying with the proposed technical regulation or conformity assessment procedure. In fact, different regulatory bodies within a single economy may have different methods of assessing the costs of complying. Accordingly, a regulatory impact analysis statement or equivalent information that included consideration of the cost of complying would be one



avenue Members could take to comply with this provision, and in turn providing copies of such an analysis statement or equivalent information could be one way in which to provide particulars concerning how the Member considered the cost of complying. The point of these provisions is to ensure that Members take costs of complying into account in the regulatory process and that other Members and stakeholders have access to such information. (JOB(09)/157)

Question from Canada – Transparency: Publication of Comments and Responses

- Some Members' regulatory regimes provide for the presumption that confidential information submitted to the government will be treated appropriately and not be published. Canada's regulatory practices, for example, provide for the publication of summaries of comments and summaries of responses, rather than verbatim comments and responses. This approach is efficient and effectively addresses confidentiality issues.
- Has the U.S. considered providing for the publication of summaries of comments and summaries of responses, rather than verbatim comments and responses? (JOB(09)/31+Corr.1)
  - U.S. answer: Our proposals would require that when a Member publishes an adopted measure (or as soon as possible thereafter), it also publish (in print or electronically) responses to significant issues raised in the comments it received. We agree this requirement should allow the Member to publish a summary of those responses. Our proposals would also require Members to publish (in print or electronically) any written comments it received. We agree that with respect to both requirements confidential business information should not be published. (JOB(09)/157)

**D. Where urgent problems of safety, health, environmental protection, or national security arise or threaten to arise for a Member, the Member may omit such steps enumerated in paragraph C as it finds necessary, provided that the Member, upon finalizing the technical regulation or conformity assessment procedure, shall:**

- (1) **to the extent applicable, identify in any notification it makes pursuant to Article 2.10.1 or 5.7.1 of the TBT Agreement any provisions of the technical regulation or conformity assessment procedure that deviate in substance from relevant international standards, guides, or recommendations;**
- (2) **upon request, provide other Members particulars concerning how it took or plans to take into account the costs of complying with the technical regulation or conformity assessment procedure in accordance with paragraph A; and**
- (3) **(i) allow interested parties to submit comments in writing on the technical regulation or conformity assessment procedure; and (ii) take these comments into account in deciding whether to modify the technical regulation or conformity assessment procedure.**

**E. Further to Article 4.1 and Annex 3 of the TBT Agreement, where a Member proposes to prepare or adopt a standard, it shall with a view to providing meaningful opportunity for comment:**

- (1) **publish, in print or electronically, the proposed standard at the earliest appropriate stage, in such a manner as to enable interested parties to become acquainted with it and to submit written comments before the Member finalizes it;**
- (2) **notify other Members through the Secretariat of the proposed standard at the earliest appropriate stage, including the products the proposed standard covers, together with a brief indication of its objective and rationale and, to the extent applicable, any**

**provisions of the standard that deviate in substance from relevant international standards, guides, or recommendations;**

- (3) upon request from another Member, provide particulars concerning the proposed standard;**
- (4) upon request, discuss written comments it receives from Members and take the results of those discussions into account in finalizing the proposed standard; and**
- (5) publish, in print or electronically, any written comments it received from Members or interested parties on the proposed standard.**

**Each Member shall provide for standardizing bodies within its territory to apply paragraphs L and M of Annex 3 to other Members as well as to interested parties within the territory of a Member of the WTO.**

**F. When publishing a standard, technical regulation, or conformity assessment procedure, or if paragraph D applies, as soon as possible after publication of the final standard, technical regulation, or conformity assessment procedure, each Member shall publish, in print or electronically:**

- (1) its responses to any significant and relevant issues raised in comments it received from Members or interested parties during the comment period;<sup>3</sup> and**
- (2) the objective and rationale for preparing or adopting the particular standard, technical regulation, or conformity assessment procedure.**

Question from Thailand: Why the treatment of conformity assessment bodies apply only to products listed in Annex II instead of applying to all products under the Agreement? (JOB(08)/113)

- U.S. answer: While some of the disciplines in the proposal would apply to all products listed in Annex I, our suggestion is that Members self-select the products for which they wish to undertake the commitments to accept SDoC or third party certification and identify those in Annex III and VI, respectively. The proposal is meant as a flexible and transparent framework that would provide a tool for progressive deregulation and liberalization consistent with market development, regulatory capacity, and ensuring the continued protection of human health and safety. The concept of scheduling varied commitments has been used in the services negotiations. With respect to Annex II, the proposal contemplates Members' listing products with respect to which the obligation to afford national treatment to conformity assessment bodies would apply. We included this provision to afford greater flexibility for Members for whom taking on such an obligation would be difficult, but are open to the possibility of eliminating Annex II and requiring national treatment with respect to all products listed in Annex I. (JOB(09)/37)

### ***Treatment of Conformity Assessment Bodies***

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<sup>3</sup> For greater certainty, if a Member or an interested party submits comments during the comment period that raise questions or concerns regarding why the standard, technical regulation or conformity assessment procedure deviates from relevant international standards, guides, or recommendations or how the Member took into account the costs of complying with the technical regulation or conformity assessment procedure, the Member shall publish its responses to such comments.

**G. Each Member shall accord to conformity assessment bodies in the territory of any other Member treatment no less favourable than that it accords to conformity assessment bodies in its own territory with respect to the procedures, criteria, and other conditions with which conformity assessment bodies must comply in order for the Member to accredit or otherwise approve them as competent to test or certify that a product conforms with the Member's standard or technical regulation. This paragraph shall apply only with respect to products listed for electrical safety, EMC or both in the Member's schedule to Annex II.**

*Test Results*

**H. If a Member requires test results (alone or in conjunction with other assurances of conformity) or other assurances of conformity that are based on test results as an assurance that a electronic good conforms with a standard or technical regulation, it shall not require the testing to be performed in a testing facility within its territory and shall accept the test results if they are performed by a facility that the Member deems competent, or otherwise approves, for that purpose. If the Member requires the testing facility to comply with requirements concerning the testing of electronic goods for conformity with the standard or technical regulations or requires the body that accredits the testing facility to comply with requirements concerning that accreditation, it shall ensure that such requirements are based on:**

- (1) a relevant international standard, guide or recommendation that has been developed in accordance with the TBT Agreement and the Committee Decision; or**
- (2) a conformity assessment procedure established by the Member in accordance with the procedures set out in paragraphs III.C and III.F.**

Question from Thailand: Please elaborate more on the term "...deems competent, or otherwise approves..." What does it mean? (JOB(08)/113)

- U.S. answer: We used the terminology recognizing that, while some countries have procedures to affirmatively approve conformity assessment bodies, other countries do not but nonetheless permit conformity assessment bodies that meet certain criteria to perform conformity assessment procedures. We consider that the word "deems" reflects the situation where no affirmative approval process is necessary and that the word "approves" reflects the situation where there is an affirmative approval process. (JOB(09)/37)

*SDoC*

**I. If a Member requires a positive assurance that a product listed for electrical safety, EMC or both in its schedule to Annex III conforms with a standard or technical regulation, it shall accept as such assurance a supplier's declaration of conformity (SDoC). The Member shall base any requirements for an SDoC on a relevant international standard, guide or recommendation that has been developed in accordance with the TBT Agreement and the *Committee Decision*, and may refuse to accept a declaration from any supplier if, upon request from the Member's regulatory or enforcement authorities, the supplier does not provide to those authorities documentation necessary to demonstrate the basis for a declaration or declarations (e.g., relevant test results) within a reasonable period after the date of the request.**

Question from Thailand: In the case of SDoC, each country has different domestic regulations which require, for example, different technical files and accept SDoC for different type of goods. If such details are not harmonized, how would this proposal reduce or eliminate the NTB problem? (JOB(08)/113)

- U.S. answer: Our proposal recognizes at the outset the variations in existing regulatory regimes. Given these variations, we suspect it would be difficult for all Members to adopt the same regulatory approach for all products in the timeframe of the Doha negotiations. Our approach, therefore, has been to suggest a flexible framework under which Members would schedule existing regulatory requirements, with the opportunity for future deregulation and liberalization, consistent with market development, regulatory capacity, and ensuring the continued protection of human health and safety. This does not detract from harmonization and over the longer term can contribute to it. It also serves an important transparency function and prevents regression to less trade-facilitating regimes. Is there an interest in broadening the proposal to more aggressively promote harmonization? (JOB(09)/37)

Question from Singapore: For products in Annex III, can Members choose not to accept SDoC but use other assurances of conformity such as the Certification of Conformity (CoC) as required in the other Member's domestic regulation? On what basis are the products to be included in Annex III determined? (JOB(09)/22)

- U.S. answer: Members self-select the products to include in Annexes III (SDoC) and IV (Third-Party Certification) from the list in Annex I. Our intent is that for each product listed in Annex I for which a Member requires an assurance of conformity, the Member would indicate whether it accepts SDoC (by listing it in Annex III) or third-party certification (Annex IV). We would need more information on the Certification of Conformity to answer this question fully (e.g., is it a self-certification or a third-party certification?). (TN/MA/W/115)

#### *Third-Party Certification*

**J. If a Member requires third-party certification as positive assurance that a product listed for electrical safety, EMC, or both, in its schedule to Annex IV, conforms with a standard, technical regulation, or conformity assessment procedure, it shall not require the body performing the third-party certification to be within its territory and shall accept the third party certification if it is performed by a body that the Member deems competent, or otherwise approves, for that purpose. The Member shall ensure that it bases any requirements that the body must meet to be deemed competent or otherwise approved on:**

- (1) a relevant international standard, guide or recommendation that has been developed in accordance with the TBT Agreement and the Committee Decision; or
- (2) a conformity assessment procedure established by the Member in accordance with the procedures set out in paragraphs III.C and III.F.

**Members shall give positive consideration to allowing certification bodies to base certifications, where such certifications are required, on test results from any testing facility that the certification body deems competent or otherwise approves.**

Question from Thailand: What does "positive consideration" for third party certification mean? (JOB(08)/113)

- U.S. answer: This phrase is also used in TBT Article 2.7. We interpret it to mean that a Member will consider with a view toward undertaking a particular action – in this case, allowing certification bodies to base certifications, where such certifications are required, on test results from any testing facility that the certification body deems competent or otherwise approves. Although the term "positive consideration" suggests that a Member will respond favourably, it does not commit the Member to do so. (JOB(09)/37)

### *Procedures for Review*

#### **K.**

- (1) Each Member shall establish or maintain judicial, quasi-judicial, or administrative tribunals and procedures for the purpose of the review of its administrative actions relating to technical regulations and conformity assessment procedures. Each Member shall ensure that such tribunals are impartial and independent of the office or authority entrusted with administrative enforcement and not have any substantial interest in the outcome of the matter and that proceedings before such tribunals comply with due process of law.
- (2) Each Member shall also establish or maintain procedures for it to review, at regularly-scheduled intervals, its technical regulations and conformity assessment procedures to determine whether such measures should be modified or eliminated so as to make the Member's regulatory program more effective in achieving the legitimate objective(s) pursued.

Question from Thailand: Please provide more explanation on procedures for review. As developing countries and LDCs already have resources constraint, if the Agreement obliges each member to establish additional bodies for the purpose of the review of its administrative actions, it might cause some problems. Moreover, does not it duplicate the work of TBT Committee? (JOB(08)/113)

- U.S. answer: Our suggestion was that this agreement – or understanding if it is ultimately called that – would be monitored by a Sub-Committee of the TBT Committee. We have not proposed the establishment of a separate new committee. The proposed Sub-Committee could meet on the margins of the TBT Committee and take advantage of any capital-based representatives attending the TBT Committee. We are happy to discuss other ideas for monitoring the implementation of this initiative. (JOB(09)/37)

#### **IV. INFORMATION AND ASSISTANCE**

Nothing in this Agreement shall be construed to require a Member to furnish or allow access to confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or which would prejudice the legitimate commercial interests of particular enterprises, public or private.

*[We may want to include other provisions under this heading along the lines of those in TBT Articles 10 and 11]*

#### **V. MONITORING AND OVERSIGHT**

A Subcommittee on Electronic Goods (Subcommittee) is hereby established as a subcommittee to the TBT Committee to oversee the operation and implementation of this Agreement and further its objectives and to provide a forum for discussions on any matter related to this Agreement. The Subcommittee shall:

- (1) comprise representatives of each Member;
- (2) elect its own Chairman and apply the TBT Committee working procedures;

- (3) meet 12 months after the date of entry into force of this Agreement, and at the end of each one-year period thereafter, or earlier as necessary, to:
  - (a) review the implementation and operation of this Agreement, and where appropriate, consider proposals for amending it; and
  - (b) review Annexes I, II, III, and IV and consider whether they should be modified; and
- (4) report to the TBT Committee and the Committee of Participants on the Expansion of Trade in Information Technology Products established pursuant to the *Communication to the Chairman of the Council on Trade in Goods: Implementation of the Ministerial Declaration on Trade in Information Technology Products G/L/160 (March 26, 1997)* (ITA Committee) with a view to complementing and not duplicating the work of those committees, and to this end, communicate to the TBT and ITA Committees the results of its review conducted pursuant to subparagraph (3) and, as appropriate, any proposed amendments to this Agreement or recommendations to modify Annex I, II, III, or IV.

## VI. DISPUTE SETTLEMENT

Article 14 of the TBT Agreement shall apply *mutatis mutandis* to this Agreement.

*[Note: Need to further consider relationship with Dispute Settlement Understanding]*

## VII. FINAL PROVISIONS

### *Annexes*

Annexes I, II, III, and IV shall constitute an integral part of this Agreement. To the extent a Member seeks to modify its schedule to Annex II, III, or IV and the modification would expand the products subject to this Agreement, the Member may do so by notifying other Members through the Secretariat of the Member's modified schedule. The Secretariat shall modify Annex II, III, or IV, as necessary, to include the Member's modified schedule. A Member may modify its schedule to Annex II, III, or IV in a manner that would reduce the products subject to this Agreement in accordance with Article [ ] (Modification of Schedules) of this Agreement.

*[Note: Need to consider additional "final provisions" to be included in this Agreement, such as entry into force, withdrawal, amendment, modifications of schedules, WTO Secretariat to service Agreement, deposit etc. - items included, for example, in the various UR WTO agreements]*

### Annex I - Electronic Goods

*[Add positive list of electronic goods subject to the Agreement. This list would apply to all Members.]*

Question from Singapore: On what basis are the products to be included in Annex II determined? (JOB(09)/22)

- U.S. answer: We are currently considering the best way to characterize the products for listing in the relevant Annexes of the proposal, given that regulators do not regulate by HS code. We would welcome suggestions. (TN/MA/W/115)

## **Annex II -Treatment of Conformity Assessment Bodies**

*[Add positive list of electronic goods covered for each agency of the Member with respect to the obligations in III.F. Each agency and its covered products may be listed separately with respect to EMC and electrical safety.]*

## **Annex III - Acceptance of SDoC**

*[Add positive list of electronic goods covered for each agency of the Member with respect to the obligations in III.H. Each agency and its affected products may be listed separately with respect to EMC and electrical safety. For example, SDoC accepted for x product with respect to EMC and for y product with respect to electrical safety.]*

## **Annex IV – Acceptance of Third-Party Certification**

*[Add positive list of electronic goods covered for each agency of the Member with respect to the obligations in III.I. Each agency and its affected products may be listed separately with respect to EMC and electrical safety. For example, Third-Party Certification accepted for x product with respect to EMC and for y product with respect to electrical safety.]*

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### General Questions:

Question from Thailand: Unlike other proposals that use the term “Understanding on,” the U.S. uses the term “Agreement on...” So, we would like to ask whether the U.S. intends to propose a new agreement. Do these two words contain different legal implications? (JOB(08)/113)

- U.S. answer: Our intent is that each of the U.S. TBT-related proposals – regardless of whether the title of the proposal refers to an “understanding” or an “agreement” – memorialize an agreement between WTO Members. We intend that agreement to be binding and enforceable through dispute settlement. We are open to Secretariat guidance and other Members’ views on how best to accomplish that. We note, for example, that certain Uruguay Round Agreements are stylized as “Understandings” but nonetheless contain binding commitments enforceable through dispute settlement. In addition, we view each of the U.S. TBT-related proposals as adding an additional layer of disciplines. These new disciplines would apply in addition to existing TBT Agreement obligations. The proposals do not “reopen” the TBT Agreement since existing TBT Agreement obligations would continue to apply; instead the proposals seek to deepen Members’ commitments in particular sectors that Members and industry have identified as particularly plagued by NTBs. (JOB(09)/37)

Question from Thailand: Does this Agreement allow the standards bodies of the importing countries to perform product testing under surveillance mechanism? (JOB(08)/113)

- U.S. answer: The proposal does not preclude post-market surveillance. (JOB(09)/37)

Question from China: Many Members have expressed their view that the two proposals on electronics should merge into one since these two are trying to address similar issues. Otherwise it is too time and energy consuming. China would like to urge the proponents to speed up this process.

- China believes it is necessary to promote the harmonization of international standards in electronics. The revised part of the EC's proposal is interesting and China will study this proposal carefully. China notices that the US' and EC' proposals are trying to address this issue in different approaches. China would like to invite the US and EC to comment on each other's proposal regarding the standards issues.
- Regarding the idea of SDoC contained in EC's proposal, it feels to many developing Members that applying this system is unrealistic. Conformity assessment procedure is something closely related to the economic development level of a Member and its monitoring capacity. What is the EC' reflection to this fact?
- Regarding the US' proposal, we notice that four annexes need to be developed. Would the US explain how the lists in the annex are developed? Selected by a Member on its own or through negotiation? Paragraph V(3)(b) provides that the Subcommittee shall "review Annexes I, II, III, and IV and consider whether they should be modified". Could the proponent elaborate on how these work to be carried out? Who determines the modification should be done or not? (JOB(09)/60)
- U.S. answer: With respect to the merging of the U.S. and EC proposals, the United States and the EC have been attempting to do so. However, given the different approaches the respective proposals take and the differing views of the United States and the EC on certain issues, our efforts to merge the texts, while on-going, have not gone easily or quickly. The United States welcomes questions, comments, and text suggestions from other Members on both proposals so as to better inform our merger discussions.

With respect to one of the issues relevant to the U.S. and EC efforts to merge the proposals – the question of whether to name particular standards or standards developing bodies in the proposal – the United States maintains its view that NAMA TBT-related negotiating texts should not recognize, endorse or otherwise refer to specific standards-setting bodies or standards. Our electronics and autos proposals would commit Members to apply the 2000 Decision by the TBT Committee on the principles for the development of international standards in determining what may be considered to be the relevant international standard. We believe this approach is best suited for a sector in which innovation, technology and time-to-market are critical factors influencing whether a standard is relevant in achieving a legitimate regulatory objective.

With respect to the development of the Annexes I-IV, please see our answer to Singapore's questions 4 and 5 in TN/MA/W/115, namely that given that regulators do not regulate by HS code, we are considering the best way to characterize the products for listing in the relevant annexes of the proposal. We welcome suggestions from China in this regard. In terms of deciding which products to list in the Annexes II, III, and IV, each Member would self-select the products to include, but at the same time we envision Members engaging with each other about the products they have chosen to include and that such engagement may include requests from one Member to another Member to expand the number of products that Member has listed in a particular annex. The Subcommittee established in the proposal would create an ongoing forum for such discussions. Ultimately, however, a decision to include a product in a particular Member's annex remains with that member. (JOB(09)/156)



Question from Korea: Given that the two proposals presented by the United States and the EC cover a similar subject area, it would be desirable to merge the two proposals into one. Have the U.S. and EC proceeded with this task? If they have, what are its status and prospects? (JOB(09)/26)

- U.S. answer: Please see our response to China's question above regarding the prospect of merging the separate proposals.
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