

1. TBT Agreement

10. Canada requests that the Appellate Body reverse the Panel's findings and conclusions on the definition of the term "technical regulation", hold that the Decree as a whole falls within the scope of the TBT Agreement, and find that the Decree is inconsistent with paragraphs 1, 2, 4 and 8 of Article 2 of the TBT Agreement.

11. Canada asserts that the Panel erred in law in failing to examine Canada's allegations under the TBT Agreement. The Panel wrongly split the Decree into two and considered the prohibitions and exceptions in the Decree to be separate measures for the purposes of determining whether the Decree is a technical regulation within the meaning of the TBT Agreement. Canada believes that the Panel's analysis is arbitrary, contrary to the internal coherence of the Decree, and allows the applicability of the TBT Agreement to be determined by the way in which a Member drafts its legislation.

12. Canada argues that the Panel also erred in its interpretation of the definition of "technical regulation" in Annex 1 to the TBT Agreement, in particular, in articulating two criteria that must be satisfied before a measure can be a "technical regulation": (i) the measure must concern identifiable products; and (ii) the measure must identify the technical characteristics that products must have to be marketed in the territory of the Member taking the measure. This interpretation adds requirements to the definition of "technical regulation" that have no basis in the text of the TBT Agreement, and are inconsistent with the object and purpose of that Agreement, namely to restrain non-tariff barriers to trade that may be disguised as technical regulations. In addition, with respect to the first criterion, requiring a measure to relate to identifiable products to constitute a technical regulation could lead to arbitrary results in practice. As for the second criterion, Canada alleges that it is too narrow and would exclude from characterization as "technical regulations", and thereby insulate from the disciplines of the TBT Agreement, measures regulating activities other than the marketing of products, such as measures relating to transportation of products, disposal of hazardous waste, and use of special equipment to repair certain products.

*5 13. Canada challenges the Panel's conclusion that the TBT Agreement does not apply to a general prohibition like the one in the Decree. The Panel relied on a false distinction between general prohibitions, which it considered fall exclusively under the GATT 1994, and technical regulations, which are subject to the disciplines of the TBT Agreement. In fact, a technical regulation can have the effect on trade of a general prohibition.

14. Canada maintains that, had the Panel viewed the Decree as a unified measure, and correctly interpreted the term "technical regulation", the Panel would have concluded that the Decree is a technical regulation within the meaning of the TBT Agreement. However, even if the general prohibition contained in the Decree were not characterized as a technical regulation, the Panel nevertheless erred in failing to examine Canada's claims under the TBT Agreement, given that the Panel also found that the TBT Agreement applies to the part of the Decree concerning exceptions, and that Canada's claims related to the Decree as a whole. Canada therefore requests the Appellate Body to reverse the Panel's conclusions on the applicability of the TBT Agreement to the Decree, and to assess the compatibility of the Decree with that Agreement. Canada argues that, as in United States - Import Prohibition of Certain Shrimp and Shrimp Products ("United States - Shrimp"), "the facts on the record of the panel proceedings" allow the Appellate Body "to undertake the completion of the analysis required to resolve this dispute." [FN14]