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## **1 ARTICLE 2**

### **1.1 Text of Article 2**

#### **Article 2**

##### *Preparation, Adoption and Application of Technical Regulations by Central Government Bodies*

With respect to their central government bodies:

2.1 Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

2.3 Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.

2.4 Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

2.5 A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.

2.6 With a view to harmonizing technical regulations on as wide a basis as possible, Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations.

2.7 Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations.

2.8 Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.

2.9 Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall:

- 2.9.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular technical regulation;
- 2.9.2 notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;
- 2.9.3 upon request, provide to other Members particulars or copies of the proposed technical regulation and, whenever possible, identify the parts which in substance deviate from relevant international standards;
- 2.9.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

2.10 Subject to the provisions in the lead-in to paragraph 9, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 9 as it finds necessary, provided that the Member, upon adoption of a technical regulation, shall:

- 2.10.1 notify immediately other Members through the Secretariat of the particular technical regulation and the products covered, with a brief indication of the objective and the rationale of the technical regulation, including the nature of the urgent problems;
- 2.10.2 upon request, provide other Members with copies of the technical regulation;
- 2.10.3 without discrimination, allow other Members to present their comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

2.11 Members shall ensure that all technical regulations which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them.

2.12 Except in those urgent circumstances referred to in paragraph 10, Members shall allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.

## **1.2 Article 2.1**

### **1.2.1 General**

1. The Appellate Body observed that Article 2.1 of the TBT Agreement contains a national treatment and a most-favoured nation treatment (MFN) obligation.<sup>1</sup> The MFN treatment obligation prohibits discrimination through technical regulations among like products imported from different countries, while the national treatment obligation prohibits discrimination between domestic and imported like products.<sup>2</sup>

2. The Panel in *Russia – Railway Equipment* examined whether the application of a conformity assessment procedure could be inconsistent with Article 2.1 of the TBT Agreement. After considering the differences between the substantive contents of Articles 2-4 and Articles 5-9 of the TBT Agreement, as well as the definition of a technical regulation in its Annex 1.1, the Panel concluded that:

"[T]he explicit distinction in the TBT Agreement between, on the one hand, disciplines applicable to substantive technical requirements and, on the other hand, disciplines applicable to procedures for assessment of conformity with substantive technical requirements indicates that issues relating to conformity with substantive technical requirements do not fall within the scope of application of Article 2.1."<sup>3</sup>

### **1.2.2 Legal test**

3. The Appellate Body in *US – Clove Cigarettes* and *US – Tuna II (Mexico)* set out a three-pronged legal test for this provision:

"Article 2.1 of the *TBT Agreement* consists of three elements that must be demonstrated in order to establish an inconsistency with this provision, namely: (i) that the measure at issue constitutes a 'technical regulation' within the meaning of Annex 1.1; (ii) that the imported products must be like the domestic product and the products of other origins; and (iii) that the treatment accorded to imported products must be less favourable than that accorded to like domestic products and like products from other countries."<sup>4</sup>

4. For the definition of a technical regulation, see the Section on Annex 1.1 of the TBT Agreement.

### **1.2.3 "like products"**

5. In *US – Clove Cigarettes*, the Appellate Body endorsed a competition-oriented approach to the "like products" analysis under Article 2.1 of the TBT Agreement and rejected the approach based on the regulatory objectives of a technical regulation.<sup>5</sup> While the Appellate Body did not object to the Panel's reliance on the likeness criteria developed in the jurisprudence under Article III of the GATT 1994, it disagreed with the particular weight the Panel attached to the health

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<sup>1</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 87.

<sup>2</sup> Appellate Body Reports, *US – COOL*, para. 267.

<sup>3</sup> Panel Report, *Russia – Railway Equipment*, para. 7.878.

<sup>4</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 202 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 87). See also Appellate Body Reports, *US – COOL*, para. 267.

<sup>5</sup> Appellate Body Report, *US – Clove Cigarettes*, paras. 107-120.

objective of the technical regulation at issue in its assessment of the products' physical characteristics and consumers' tastes and habits.<sup>6</sup> According to the Appellate Body:

"[T]he very concept of 'treatment no less favourable', which is expressed in the same words in Article III:4 of the GATT 1994 and in Article 2.1 of the *TBT Agreement*, informs the determination of likeness, suggesting that likeness is about the 'nature and extent of a competitive relationship between and among products'. Indeed, the concept of 'treatment no less favourable' links the products to the marketplace, because it is only in the marketplace that it can be determined how the measure treats like imported and domestic products."<sup>7</sup>

6. The Appellate Body further elaborated on why likeness is a determination about a competitive relationship between and among the products rather than a determination based on the regulatory objectives of the measure:

"More importantly, however, we do not consider that the concept of 'like products' in Article 2.1 of the TBT Agreement lends itself to distinctions between products that are based on the regulatory objectives of a measure. As we see it, the concept of 'like products' serves to define the scope of products that should be compared to establish whether less favourable treatment is being accorded to imported products. If products that are in a sufficiently strong competitive relationship to be considered like are excluded from the group of like products on the basis of a measure's regulatory purposes, such products would not be compared in order to ascertain whether less favourable treatment has been accorded to imported products. This would inevitably distort the less favourable treatment comparison, as it would refer to a 'marketplace' that would include some like products, but not others. As we consider further below in respect of the United States' appeal of the Panel's less favourable treatment finding, distinctions among products that have been found to be like are better drawn when considering, subsequently, whether less favourable treatment has been accorded, rather than in determining likeness, because the latter approach would alter the scope and result of the less favourable treatment comparison."<sup>8</sup>

7. Notwithstanding its conclusion that the determination of likeness should not be based on the regulatory objectives of technical regulations, the Appellate Body also acknowledged the relevance of regulatory concerns:

"[T]he regulatory concerns underlying a measure, such as the health risks associated with a given product, may be relevant to an analysis of the 'likeness' criteria under Article III:4 of the GATT 1994, as well as under Article 2.1 of the TBT Agreement, to the extent they have an impact on the competitive relationship between and among the products concerned".<sup>9</sup>

8. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel stated that a complainant, in framing its claim under Article 2.1, has a degree of leeway in identifying the like product, but added that such leeway is not unlimited. The Panel then found that, in the case at hand, the complainant's identification of the like product was not geared to artificially skew the Panel's assessment:

"The Panel considers that a complainant has a degree of leeway in how it frames its claim under Article 2.1, including the identification of the imported and domestic products to compare. However, this does not mean that a complainant's choice of products to compare for the purposes of a likeness analysis is free of any scrutiny. It cannot be excluded that in particular factual circumstances a complainant might identify only an artificially defined subset of like products to compare in a manner that could distort the picture of the adverse impact of the measure on the groups of like products as it has defined them. This seems to be the concern that was recognized by the Appellate Body in *US – Clove Cigarettes*, which the European Union relies on, when

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<sup>6</sup> Appellate Body Report, *US – Clove Cigarettes*, paras. 107, 112 and 121-160.

<sup>7</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 111.

<sup>8</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 116.

<sup>9</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 119.

stating that 'a panel is not bound by its terms of reference to limit its analysis to those products identified by the complaining Member'. Accordingly, a panel must be able to look beyond the like products identified by the complainant to determine which domestic products and products of foreign origin are in a sufficiently close competitive relationship with the products imported from the complaining Member to be considered like.

However, the Panel does not consider that Malaysia's identification of the products to compare for the purposes of its claim under Article 2.1 is geared towards artificially skewing the outcome of the assessment. It is uncontested by the parties that the European Union's imports of biofuel from Malaysia consists exclusively of oil palm crop-based biofuel, and more specifically PME. Nor do the parties contest that the European Union produces and imports from other countries biofuel made from rapeseed oil, soybean oil and palm oil. Under these circumstances, and especially given that Malaysia does not produce on a commercial scale biofuel made from other feedstocks than palm oil, it is not clear how including biofuels made from other feedstocks than palm oil, rapeseed oil and soybean oil in the assessment of less favourable treatment would artificially skew the outcome of the assessment."<sup>10</sup>

9. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel underlined the importance of conducting a holistic analysis of likeness:

"In the Panel's view, it follows from the above overview that a number of physical characteristics of PME, RME and SBME, while not identical, are similar. This includes the properties particularly relevant to the products' nature as a biofuel, such as viscosity, density, and flash point. The Panel notes that the European Union does not explain why properties other than CFPP, cetane number and iodine value would not be relevant to the assessment whether the biofuels at issue are like. Ignoring these similarities, would run counter to the established practice of holistically assessing whether two or more products are like based on the totality of evidence before the Panel."<sup>11</sup>

10. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel declined to accord significant weight to the likeness analysis by an investigating authority in an earlier trade remedy proceeding involving the same product:

"The Panel must base its likeness analysis on the evidence and arguments presented by the parties and should not accord undue weight to findings made by a national investigating authority in the context of adopting anti-dumping and countervailing duty measures. The Panel further notes that the findings at issue were subsequently reviewed by the panel in *EU – Biodiesel (Indonesia)*. Having said this, in the Panel's view the findings of the trade defence investigations relied on by the parties, read in their proper context, confirm that despite certain differences in product characteristics, there is a significant degree of overlap between PME, RME and SBME. The European Union found in these investigations, among other things, that 'PME is in competition with biodiesel produced in the Union, which is not just RME but also biodiesel made from other feedstocks'."<sup>12</sup>

11. In *EU and Certain Member States – Palm Oil (Malaysia)*, the European Union pointed to public concern over deforestation associated with palm oil production, and argued that, therefore, consumer preferences reflecting this concern should be taken into account in the likeness analysis. The Panel disagreed, noting that the European Union had not submitted evidence substantiating this argument:

"The European Union submits that the consumers' tastes and habits must nevertheless be considered due to the widespread public concern with deforestation associated with palm oil production and the impact of such concerns on decisions of fuel suppliers. The European Union posits that a more general concern with products containing or made from palm oil has manifested itself in the food industry and is also relevant to the fuel sector. The European Union argues that there is a latent demand for palm oil-free

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<sup>10</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.417-7.418.

<sup>11</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.431.

<sup>12</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.443.

fuels that the Panel should consider in the determination whether PME is like RME and SBME. According to the European Union, the consumers' preference for palm oil-free fuel is reflected in the decisions by certain EU fuel suppliers to avoid or reduce producing palm oil-based biofuels. In the European Union's view, this shows that if there was a labelling requirement for the composition of biofuels, the latent preferences and tastes of EU consumers would become manifest and indicate palm oil-based biofuel is not like other biofuels.

The Panel finds unconvincing the evidence produced by the European Union and pertaining to decisions by certain biofuel and fuel producers reducing the use of oil palm crop-based biofuel in their fuel blends. In particular, other than mentioning only in general terms sustainability considerations, the evidence does not elucidate the specific reasons behind such decisions or that they were in fact driven by consumers' preferences."<sup>13</sup>

#### **1.2.4 "treatment no less favourable"**

##### **1.2.4.1 Two-step analysis**

12. In *US – Clove Cigarettes*, the Appellate Body set out the current understanding of the "treatment no less favourable" requirement in Article 2.1 of the TBT Agreement on the basis of the interpretation of that provision in light of its context, as well as the object and purpose of the TBT Agreement. The Appellate Body began its analysis by noting the definition of a technical regulation in Annex 1.1 of the TBT Agreement and considered that:

"As such, technical regulations are measures that, by their very nature, establish distinctions between products according to their characteristics or their related processes and production methods. This suggests, in our view, that Article 2.1 should not be read to mean that *any* distinction, in particular those that are based *exclusively* on particular product characteristics or their related processes and production methods, would *per se* accord less favourable treatment within the meaning of Article 2.1."<sup>14</sup>

13. The Appellate Body further observed that:

"The context provided by Article 2.2 suggests that 'obstacles to international trade' may be permitted insofar as they are not found to be 'unnecessary', that is, 'more trade-restrictive than necessary to fulfil a legitimate objective'. To us, this supports a reading that Article 2.1 does not operate to prohibit *a priori* any obstacle to international trade. Indeed, if *any* obstacle to international trade would be sufficient to establish a violation of Article 2.1, Article 2.2 would be deprived of its *effet utile*."<sup>15</sup>

14. Continuing its analysis, the Appellate Body noted that the sixth recital of the preamble to the TBT Agreement made clear that "technical regulations may pursue the objectives listed therein, provided that they are not applied in a manner that 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 the *TBT Agreement*".<sup>16</sup>

15. Finally, the Appellate Body recalled its earlier observation that the object and purpose of the TBT Agreement is to strike a balance between the objective of trade liberalization and Members' right to regulate.<sup>17</sup> In view of this, the Appellate body considered that Article 2.1 should not be interpreted as prohibiting any detrimental impact on competitive opportunities for imports in cases

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<sup>13</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.450-7.451.

<sup>14</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 169. See also Appellate Body Reports, *US – Tuna II (Mexico)*, para. 215; *US – COOL*, para. 271.

<sup>15</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 171.

<sup>16</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 173.

<sup>17</sup> Appellate Body Report, *US – Clove Cigarettes*, paras. 174 and 94-95.

where such detrimental impact on imports stems exclusively from legitimate regulatory distinctions.<sup>18</sup>

16. The Appellate Body thus found that the context and object and purpose of the TBT Agreement weigh in favour of reading the "treatment no less favourable" requirement of Article 2.1 as prohibiting both *de jure* and *de facto* discrimination against imported products, while at the same time permitting detrimental impact on competitive opportunities for imports that stems exclusively from legitimate regulatory distinctions.<sup>19</sup>

17. Based on its interpretation of Article 2.1, the Appellate Body in *US – Clove Cigarettes* explained that:

"[W]here the technical regulation at issue does not *de jure* discriminate against imports, the existence of a detrimental impact on competitive opportunities for the group of imported vis-à-vis the group of domestic like products is not dispositive of less favourable treatment under Article 2.1. Instead, a panel must further analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. In making this determination, a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether it discriminates against the group of imported products."<sup>20</sup>

18. In subsequent cases, this analytical approach crystallised into the following two-step assessment of whether the technical regulation at issue accords *de facto* less favourable treatment under Article 2.1: (i) whether the technical regulation modifies the conditions of competition to the detriment of imported products *vis-à-vis* like products of domestic origin and/or like products originating in any other country; and (ii) whether such detrimental impact "stems exclusively from a legitimate regulatory distinction".<sup>21</sup>

#### **1.2.4.2 Burden of proof**

19. In *US – Tuna II (Mexico)*, the Appellate Body explained that the complainant must prove its claim by showing less favourable treatment, which the respondent may rebut:

"In the context of Article 2.1 of the *TBT Agreement*, the complainant must prove its claim by showing that the treatment accorded to imported products is 'less favourable' than that accorded to like domestic products or like products originating in any other country. If it has succeeded in doing so, for example, by adducing evidence and arguments sufficient to show that the measure is not even-handed, this would suggest that the measure is inconsistent with Article 2.1. If, however, the respondent shows that the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction, it follows that the challenged measure is not inconsistent with Article 2.1."<sup>22</sup>

20. In *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, the Appellate Body, however, reproached the Panel for not recognizing the responsibilities of both parties in its discussion of the burden of proof.<sup>23</sup> While the Appellate Body affirmed its earlier jurisprudence that places the burden of showing less favourable treatment on the complainant<sup>24</sup>, it opined that the respondent will be best situated to adduce arguments and evidence with respect to the second element of the assessment under

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<sup>18</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 174.

<sup>19</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 175.

<sup>20</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 182.

<sup>21</sup> Appellate Body Reports, *US – Tuna II (Mexico)*, para. 215; *US – COOL*, para. 271; and *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.26. See also Panel Reports, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.73; and *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.60-7.62.

<sup>22</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 216.

<sup>23</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.34.

<sup>24</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.32.



Article 2.1 – whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction:

"[H]aving promulgated the technical regulation containing the regulatory distinctions that result in the detrimental impact, the responding Member will be best situated to adduce the arguments and evidence needed to explain why, contrary to the complainant's assertions, the technical regulation is even-handed and thus why the detrimental impact on imports stems exclusively from a legitimate regulatory distinction."<sup>25</sup>

#### **1.2.4.3 Temporal scope of a panel's analysis**

21. The Appellate Body in *US – Clove Cigarettes* agreed with the participants that Article 2.1 does not establish a rigid temporal limitation on the evidence a panel could review when assessing the consistency of the measure with this provision:

"We agree with the participants that Article 2.1 does not establish a rigid temporal limitation on the evidence that the Panel could review in assessing Indonesia's claim under Article 2.1. Nothing in Article 2.1 enjoins panels from taking into account evidence pre-dating the establishment of a panel to the extent that such evidence informs the panel's assessment of the consistency of the measure at that point in time. This is particularly so in the case of a *de facto* discrimination claim, where a panel must base its determination on the totality of facts and circumstances before it, including the design, architecture, revealing structure, operation, and application of the technical regulation at issue. Therefore, evidence that Section 907(a)(1)(A) had "chilling" regulatory effects on domestic producers of flavoured cigarettes prior to the entry into force of the ban on those cigarettes could be relevant in the Panel's assessment of Indonesia's claim under Article 2.1."<sup>26</sup>

#### **1.2.4.4 Detrimental impact on the conditions of competition**

##### **1.2.4.4.1 General**

22. In *US – COOL*, the Appellate Body provided the following guidance to panels regarding their analysis of whether a measure has a *de facto* detrimental impact on the conditions of competition of the relevant group of products:

"We first recall that, as explained above, Article 2.1 of the *TBT Agreement* prohibits both *de jure* and *de facto* discrimination between domestic and like imported products. Therefore, where a technical regulation does not discriminate *de jure*, a panel must determine whether the evidence and arguments adduced by the complainant in a specific case nevertheless demonstrate that the operation of that measure, in the relevant market, has a *de facto* detrimental impact on the group of like imported products. A panel's analysis must take into consideration the totality of the facts and circumstances before it, including any implications for competitive conditions discernible from the design and structure of the measure itself, as well as all features of the particular market at issue that are relevant to the measure's operation within that market. In this regard, 'any adverse impact on competitive opportunities for imported products vis-à-vis like domestic products that is caused by a particular measure may potentially be relevant' to a panel's assessment of less favourable treatment under Article 2.1."<sup>27</sup><sup>28</sup>

23. In *US – Tuna II (Mexico)*, the Appellate Body agreed with the Panel that the lack of access to the "dolphin-safe" label of tuna products containing tuna caught by setting on dolphins had a detrimental impact on the competitive opportunities of Mexican tuna products in the US market.<sup>29</sup> With respect to the question of whether the detrimental impact on Mexican tuna products resulted

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<sup>25</sup> Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.33.

<sup>26</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 206.

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<sup>28</sup> Appellate Body Report, *US – COOL*, para. 286.

<sup>29</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 235.

from the measure itself rather than from the actions of private parties, the Appellate Body recalled the Panel's findings that while US consumers' decisions to purchase dolphin-safe tuna products were the result of their own choices rather than of the measure, it was the measure itself that controlled access to the label and allowed consumers to express their preferences for dolphin-safe tuna.<sup>30</sup> Thus, in the Appellate Body's view:

"These findings by the Panel suggest that it is the governmental action in the form of adoption and application of the US 'dolphin-safe' labelling provisions that has modified the conditions of competition in the market to the detriment of Mexican tuna products, and that the detrimental impact in this case hence flows from the measure at issue. Moreover, it is well established that WTO rules protect competitive opportunities, not trade flows.<sup>31</sup> It follows that, even if Mexican tuna products might not achieve a wide penetration of the US market in the absence of the measure at issue due to consumer objections to the method of setting on dolphins, this does not change the fact that it is the measure at issue, rather than private actors, that denies most Mexican tuna products access to a 'dolphin-safe' label in the US market. The fact that the detrimental impact on Mexican tuna products may involve some element of private choice does not, in our view, relieve the United States of responsibility under the *TBT Agreement*, where the measure it adopts modifies the conditions of competition to the detriment of Mexican tuna products.<sup>32</sup>"<sup>33</sup>

24. In *US – COOL*, the Panel concluded that, given the particular circumstances of the US livestock market, the least costly way of complying with the COOL measure was for producers to rely exclusively on domestic livestock.<sup>34</sup> Relying on that conclusion, the Panel found that the COOL measure created an incentive for US market participants to process exclusively domestic livestock and reduced the competitive opportunities of imported livestock as compared to domestic livestock.<sup>35</sup> On appeal, the Appellate Body rejected the United States' contention that the Panel had wrongly attributed to the COOL measure a detrimental impact on imports caused exclusively by factors "external" to that measure, noting that the COOL measure itself, as applied in the US livestock and meat market, created an incentive for US producers to segregate livestock according to origin, in particular by processing exclusively US-origin livestock.<sup>36</sup> The Appellate Body explained as follows:

"We further emphasize that, while detrimental effects caused *solely* by the decisions of private actors cannot support a finding of inconsistency with Article 2.1, the fact that private actors are free to make various decisions in order to comply with a measure does not preclude a finding of inconsistency. Rather, where private actors are induced or encouraged to take certain decisions *because of the incentives created by a measure*, those decisions are not 'independent' of that measure. As the Appellate Body noted, the 'intervention of some element of private choice does not relieve [a Member] of responsibility ... for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product', and thus does not preclude a finding that the measure provides less favourable treatment."<sup>37</sup>

25. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel pointed out that Article 2.1 covers not only the measures that restrict importation or distribution of the relevant product but also those that entail incentives for the use of certain products over others:

"The Panel now turns to the question whether the high ILUC-risk cap and phase-out modifies the conditions of competition in the relevant market to the detriment of products imported from Malaysia. It is uncontested between the parties that the high ILUC-risk cap and phase-out does not formally prohibit the importation or distribution of palm oil-based biofuel on the EU market. However, Article 2.1 covers not only those measures that condition access to a Member's market, but also those that result in a

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<sup>30</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 238.

<sup>33</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 239.

<sup>34</sup> Panel Reports, *US – COOL*, para. 7.350.

<sup>35</sup> Panel Reports, *US – COOL*, para. 7.357.

<sup>36</sup> Appellate Body Reports, *US – COOL*, para. 289.

<sup>37</sup> Appellate Body Reports, *US – COOL*, para. 291.

detrimental impact by creating incentives to choose certain products (domestic or imported from other countries) over others (imported from the complaining Member). Otherwise, the obligation of no less favourable treatment could easily be circumvented by adopting measures that formally do not condition access to the market, but in other ways discriminate *de jure* or *de facto* against imported products by causing a detrimental impact on competitive opportunities for imported products that does not stem exclusively from a legitimate regulatory distinction. This assessment should focus on the design and operation of the measure at issue taking into account the relevant regulatory context."<sup>38</sup>

26. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel was not convinced by the European Union's argument that in the EU market demand for biofuels was driven by environmental concerns:

"Indeed, evidence submitted by the parties confirms that demand for biofuels in the European Union is 'almost exclusively' driven by the European Union's and its member States' renewable energy policies and that in the absence of blending mandates applying to biofuel made from a particular feedstock, there is no or little demand for biofuel made from that particular feedstock. Relatedly, the evidence on the record does not support the European Union's contention that environmental concerns would drive demand for biofuels regardless of any governmental support.

Logically, it follows that if the EU member States cannot use biofuel made from a particular feedstock to meet their national contributions to the EU-wide renewable energy target, there will be no reason to promote its use as fuel. As a result, and given the price difference between fossil fuels and biofuels, there will be little to no demand for biofuels that are excluded from counting towards the renewable energy targets."<sup>39</sup>

27. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel, having found that demand for biofuels in the EU market was not driven by environmental concerns, found that such demand was determined by the challenged technical regulation:

"The Panel recalls that currently, the only biofuel deemed to be high ILUC-risk is that made from palm oil. Pursuant to Article 26(2) of RED II, its eligibility to count towards the targets is capped at 2019 levels and those levels will be gradually reduced to zero by 2030, at the latest. This rule is mandatory in that it must be observed by EU member States and fuel suppliers for the purpose of calculating EU-wide and national renewable energy consumption in the transport sector. In sum therefore, limiting and gradually excluding the eligibility to count towards the targets by virtue of the high ILUC-risk cap and phase-out will result in a decrease if not complete absence of demand for palm oil-based biofuel on the EU market.

Certain arguments of the European Union, especially those made in the context of the measure's contribution to the pursued objectives, corroborate the existence of a link between the high ILUC-risk cap and phase-out and limiting or eliminating the demand for palm oil-based biofuels on the EU market. The European Union submits *inter alia* that 'the high ILUC-risk phase-out makes sure that the EU Biofuels Regime will gradually induce less and less demand for high ILUC-risk crop biofuels'. A decrease in demand for biofuels made from high ILUC-risk feedstocks (only palm oil-based biofuel at present), is therefore an intended consequence of the design and operation of the measure. In the Panel's view, there is thus a genuine relationship between the high ILUC-risk cap and phase-out and the detrimental impact on the competitive opportunities for palm oil-based biofuel on the EU biofuel market."<sup>40</sup>

28. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel found that the availability of an exception from the restrictions entailed in the challenged technical regulation did not change

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<sup>38</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.472.

<sup>39</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.476-7.477.

<sup>40</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.478-7.479.

its finding that the measure changed conditions of competition, and had a detrimental impact on, biofuel produced from palm oil:

"As a result, only a limited amount of a high ILUC-risk crop can qualify for low ILUC-risk certification and thereby become eligible to count towards the renewable energy targets beyond the limitations imposed by the high ILUC-risk cap and phase-out. This means that any mitigation of the detrimental impact of the high ILUC-risk cap and phase-out is considerably limited. At the same time, the Panel does not consider that limiting low ILUC-risk certification to additional yields generates a detrimental impact of its own. In the Panel's view, any commercial disadvantage related to this requirement stems directly from and is a corollary of the classification of a crop as high ILUC risk.

In light of the above considerations, the Panel is unpersuaded by the European Union's argument that Malaysia presents a flawed analysis of the relevant market conditions. The Panel is of the view that by limiting and eventually excluding palm oil-based biofuel from eligibility to count towards renewable energy targets, the high ILUC-risk cap and phase-out modifies the conditions of competition to the detriment of this biofuel."<sup>41</sup>

29. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel found that the measure had a *de facto* detrimental impact on the product at issue:

"The Panel observes that the European Union is not only an importer but also a producer of palm oil-based biofuel (but not of palm oil as such). In that sense, the Panel agrees with the European Union that the high ILUC-risk cap and phase-out also affects some of its domestic production. However, as noted above, an important factual consideration is that among all the biofuel products that compete in the market and which the European Union imports or produces itself, palm oil-based biofuel is the only one that Malaysia exports to that market. This means that the measure, while neutral on its face, disproportionately affects products imported from Malaysia.

This is the essence of *de facto* discrimination. Under these circumstances, the Panel must compare the treatment of the only product imported from the complainant with all domestic products and products of other origin found to be like. Although Malaysia has demonstrated that palm oil-, rapeseed oil- and soybean oil-based biofuels are like, the European Union seems to be comparing only the treatment of domestically produced and imported palm oil-based biofuel."<sup>42</sup>

30. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel rejected the European Union's argument that any detrimental on palm oil-based biofuel should not be attributed to the challenged EU measure because member states had discretion in determining their energy mix and their national contribution to the EU's renewable energy target:

"The Panel now turns to the European Union's argument that any detrimental impact on the palm oil-based biofuel should not be attributed to the EU measure, as the EU member States enjoy discretion in determining their energy mix and national contributions to the EU renewable energy target.

It is true that some of the EU member States' measures submitted as evidence go further than appears to be required by RED II. However, there is no doubt that they seek to implement, among other provisions, Article 26(2) of RED II. RED II and the Delegated Regulation impose binding obligations on the EU member States, which they cannot derogate from and which have regulatory effects throughout the EU territory. Therefore, while EU member States may enjoy some margin of discretion in adopting support schemes for renewable energy or regulate the use of certain fuels, they cannot count palm oil-based biofuel towards the renewable energy targets to the same extent as rapeseed oil- and soybean oil-based biofuel.

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<sup>41</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.483-7.484.

<sup>42</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.487-7.488.

...

Therefore, the Panel finds that the detrimental impact on palm oil-based biofuel can clearly be attributed to the high ILUC-risk cap and phase-out."<sup>43</sup>

#### **1.2.4.4.2 Relevant groups of like products**

31. The Appellate Body in *US – Clove Cigarettes* disagreed with the Panel's finding that its terms of reference limited the scope of its analysis to the comparison of treatment accorded to the groups of products identified by the complainant.<sup>44</sup> The Appellate Body explained that Article 2.1 rather "requires the panel to identify the domestic products that stand in a sufficiently close competitive relationship with the products imported from the complaining Member to be considered like products within the meaning of that provision".<sup>45</sup> In the Appellate Body's view, once the imported and domestic like products have been properly identified, a panel dealing with a national treatment claim is required to compare the treatment accorded to all like products imported from the complaining Member with that accorded to all like domestic products.<sup>46</sup> The Appellate Body noted, however, that this does not preclude any regulatory distinctions between like products:

"However, the national treatment obligation of Article 2.1 does not require Members to accord no less favourable treatment to each and every imported product as compared to each and every domestic like product. Article 2.1 does not preclude any regulatory distinctions between products that are found to be like, as long as treatment accorded to the *group* of imported products is no less favourable than that accorded to the group of like domestic products."<sup>47</sup>

32. In its assessment of the impact of the measures on the conditions of competition of Mexican tuna products, the Panel in *US – Tuna II (Mexico) (Article 21.5 – Mexico)* compared the costs and burdens that the different certification and tracking and verification requirements entail for, on the one hand, Mexican tuna products derived from tuna caught other than by setting on dolphins, and, on the other hand, tuna products of US or other origin derived from tuna caught other than by setting on dolphins. The Appellate Body disagreed and held that the Panel had employed an incorrect analytical approach by engaging in a "comparison of the treatment accorded to subsets of the relevant groups of like products".<sup>48</sup> The Appellate Body considered that, in order to reach its conclusions on detrimental impact, the Panel was called upon to compare the treatment that the labelling conditions under the amended tuna measure accorded to "the *group* of Mexican tuna products, on the one hand, with the treatment accorded to the *groups* of like tuna products from the United States and other countries, on the other hand".<sup>49</sup>

#### **1.2.4.5 Legitimate regulatory distinctions**

33. In *US – Clove Cigarettes*, the measure at issue prohibited primarily clove cigarettes imported from Indonesia, while permitting primarily domestically-produced menthol cigarettes. Upholding the Panel's finding that the measure accorded to clove cigarettes imported from Indonesia less favourable treatment than that accorded to domestic like products, the Appellate Body elaborated on why it was not persuaded that the detrimental impact of the measure on competitive opportunities for imported clove cigarettes stemmed from a legitimate regulatory distinction. First, the Appellate Body noted that, from the perspective of the objective of the measure, menthol cigarettes had the same product characteristic that justified the prohibition of clove cigarettes:

"We recall that the stated objective of Section 907(a)(1)(A) is to reduce youth smoking. One of the particular characteristics of flavoured cigarettes that makes them appealing to young people is the flavouring that masks the harshness of the tobacco, thus making

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<sup>43</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.489-7.490 and 7.492.

<sup>44</sup> Appellate Body Report, *US – Clove Cigarettes*, paras. 185 and 191.

<sup>45</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 185.

<sup>46</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 193.

<sup>47</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 193.

<sup>48</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.75.

<sup>49</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.72.

them more pleasant to start smoking than regular cigarettes. To the extent that this particular characteristic is present in both clove and menthol cigarettes, menthol cigarettes have the same product characteristic that, from the perspective of the stated objective of Section 907(a)(1)(A), justified the prohibition of clove cigarettes."<sup>50</sup>

34. The Appellate Body then considered that the reasons presented by the United States for the exemption of menthol cigarettes from the ban on flavoured cigarettes did not demonstrate that the detrimental impact on competitive opportunities for imported clove cigarettes stemmed from a legitimate regulatory distinction:

"The United States argues that the exemption of menthol cigarettes from the ban on flavoured cigarettes aims at minimizing: (i) the impact on the US health care system associated with treating 'millions' of menthol cigarette smokers affected by withdrawal symptoms; and (ii) the risk of development of a black market and smuggling of menthol cigarettes to supply the needs of menthol cigarette smokers. Thus, according to the United States, the exemption of menthol cigarettes from the ban on flavoured cigarettes is justified in order to avoid risks arising from withdrawal symptoms that would afflict menthol cigarette smokers in case those cigarettes were banned. We note, however, that the addictive ingredient in menthol cigarettes is nicotine, not peppermint or any other ingredient that is exclusively present in menthol cigarettes, and that this ingredient is also present in a group of products that is likewise permitted under Section 907(a)(1)(A), namely, regular cigarettes. Therefore, it is not clear that the risks that the United States claims to minimize by allowing menthol cigarettes to remain in the market would materialize if menthol cigarettes were to be banned, insofar as regular cigarettes would remain in the market."<sup>51</sup>

35. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel stated that "[w]hether the detrimental impacts stems exclusively from a particular legitimate regulatory distinction needs to be considered in light of the nature and object of the distinction at issue and the manner in which it operates."<sup>52</sup>

36. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel noted that the methodology that the challenged measure entailed for risk analysis was, in part, based on assumptions and therefore not perfect. However, the Panel, after its detailed assessment of that methodology, concluded that there was a rational connection between the methodology and the measure's objective. In so doing, the Panel underlined the importance of WTO members' right to regulate in respect of risks that are not quantifiable:

"The Panel does not consider this aspect of the methodology to be problematic. The Panel recalls that the measure does not attempt to attribute to biofuel feedstocks any specific levels of ILUC-related GHG emissions. Instead, the measure seeks to estimate the pressure that an increased demand for a particular biofuel feedstock exerts on existing non-biofuel agricultural production. This pressure reflects the degree of the risk of causing ILUC. Estimating such a degree of risk does not require attributing land use change to the expansion of any particular feedstock displacing non-biofuel agricultural production. Rather, there appears to be a reasonable basis for focusing on that feedstock's own land use change effects reflecting its propensity to expand the production area in response to an increase in demand. This, in the Panel's view, confirms the existence of a rational connection between expansion of a feedstock's production area into land with high-carbon stock and the risk of ILUC-related GHG emissions.

The European Union acknowledges that addressing ILUC-related effects on the basis of the share of a feedstock's production area expansion is not a perfect methodology that is free from uncertainties. The Panel agrees and observes that the approach pursued by the measure requires making a number of assumptions concerning certain elements of the high ILUC-risk formula. The Panel notes, however, that the methodology is based on an observable phenomenon (the share of expansion into land with high-carbon stock), thereby increasing the probability that the formula captures the causal

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<sup>50</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 225.

<sup>51</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 225.

<sup>52</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.498.

connection between the demand for the crop in question and ILUC risk. Therefore, as long as the methodology as a whole bears a rational connection to the measure's objective, the regulatory distinction cannot be said to be *a priori* not legitimate solely on the grounds that the European Union has decided to use observable land use change effects as a proxy of ILUC.

Accepting a contrary proposition would *de facto* deprive WTO Members of the right to regulate risks that do not lend themselves to quantitative analysis, or which are not sufficiently studied, even though such risks constitute a genuine cause of concern. Nothing in the text of the TBT Agreement supports such an interpretation of Article 2.1. To the contrary, the Preamble to the TBT Agreement expressly recognizes that 'no country should be prevented from taking measures necessary ... for the protection ... of the environment'. To that end, Article 2.2 lists as a relevant consideration for assessing regulatory risks '*available* scientific and technical information'. This confirms, in the Panel's view, that the TBT Agreement does not require WTO Members to regulate only where perfect data is available."<sup>53</sup>

37. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel disagreed with Malaysia's argument that the EU measure's global approach to the risk was flawed because it failed to take into consideration the circumstances prevailing in Malaysia:

"The Panel disagrees with Malaysia's argument that such a global approach to the risk of ILUC is flawed because it fails to consider the conditions 'of biofuel production' prevailing in Malaysia. The Panel recalls in this regard that its determination of whether the relevant regulatory distinction is applied in a manner that constitutes arbitrary or unjustifiable discrimination involves consideration of the conditions that are 'relevant' for that purpose. The relevant condition in the high ILUC-risk cap and phase-out is the degree of ILUC risk posed by the biofuel feedstock. This degree of risk is estimated on the basis of the share of that feedstock's production area expansion into high-carbon stock land. The country-specific approach implied by Malaysia's argument disregards the fact that the concept of ILUC-risk is global in nature. The global ILUC-risk profile of each crop distinguishes this case from certain prior cases (such as *US – Shrimp*) in which the regulating Member's failure to adequately account for country-specific circumstances was found to constitute arbitrary or unjustifiable discrimination between countries where different 'conditions prevail[ed]' within the meaning of the chapeau of Article XX of the GATT 1994. Further, any regional differences affecting such expansion would be reflected in the data that is fed into the high ILUC-risk formula. As such, the measure thus reflects the conditions of biofuel feedstock production, including in Malaysia. Therefore the Panel considers that the evidence submitted by the parties provides a reasonable basis for designating a global ILUC-risk profile of a crop rather than determining it on a country-by-country basis."<sup>54</sup>

38. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel found that the difficulty in quantifying the risk associated with each feedstock used for the production of biofuels did not necessarily preclude a finding that the level of the risk may vary from one feedstock to the other:

"The Panel considers that the difficulties in quantifying ILUC-related GHG-emissions for each feedstock with precision do not in and of themselves preclude the possibility that the degree of ILUC risk may vary from one feedstock to another. As observed by the Panel in this Report, quantifying ILUC-related GHG emissions and estimating the *risk* of ILUC and related GHG emissions are different issues that raise different sets of questions and cannot be approached from the same methodological perspective. Indeed, evidence submitted by the parties indicates that ILUC-related GHG emissions factors have been studied on a crop-by-crop basis. The Impact Assessment prepared for the ILUC Directive confirms that 'models tend to allocate different (indirect) land-use change emissions to different feedstocks'. Therefore, the fact that upon adoption of the ILUC Directive in 2015 the European Union decided not to differentiate at that time between different feedstocks based on the levels of their ILUC-related GHG emissions does not now preclude it from attributing different degrees of ILUC risk on a feedstock-by-feedstock

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<sup>53</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.525-7.527.

<sup>54</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.535.

basis. For the same reasons, the Panel is unconvinced that it is generally agreed that effects of ILUC are not crop-specific. Such an assertion does not find support in the evidence submitted by the parties."<sup>55</sup>

39. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel stated that WTO members can regulate in areas in respect of which scientific information is not readily available:

"The Panel recalls that nothing in the TBT Agreement precludes WTO Members from regulating areas in respect of which scientific information is not readily available. Indeed, Article 2.2 recognizes Members' right to address regulatory risks upon consideration of, *inter alia*, 'available scientific and technical information'."<sup>56</sup>

40. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel disagreed with Malaysia's argument that the challenged measure was deficient because it relied on relevant feedstocks' relative shares of expansion into land with high-carbon stock, rather than their absolute expansion:

"Since each unit of additional biofuel consumed will lead to a corresponding additional unit of feedstock produced (adjusted for productivity), identifying which crop has a higher risk of leading to land use change will also help determine which crop would lead to higher absolute amounts of land use change *for the same increase in units of additional biofuel consumed*. This is the case regardless of the current size of the feedstock's global production area. Relying on the 'relative' share of expansion places the focus on the crop's propensity to expand into land with high-carbon stock, which is commensurate with the logic of the approach adopted in the measure. Malaysia's argument, and the conclusions of the expert report it relies on, appear thus to be based on an incorrect understanding of the operation of the measure. Therefore, the Panel observes that using a relative share of expansion into land with high-carbon stock is better suited to reflect the risk of ILUC related to a marginal increase in production of a given crop."<sup>57</sup>

41. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel stressed the importance of using the most recent available data in the risk analysis:

"However, the Panel stresses the importance of grounding the high ILUC-risk determination in the most recent available data to ensure a balanced and coherent application of the measure in its current design. The share of feedstock's production area expansion into land with high-carbon stock is a central element in the high ILUC-risk formula and one of the most significant factors that can impact the classification of a biofuel feedstock as high ILUC risk. A balanced and coherent operation of the high ILUC-risk cap and phase-out is therefore premised on the accuracy of the data on expansion into land with high-carbon stock. This is all the more true given that the measure uses information on past trends to address current and future concerns. These trends may be subject to dynamic changes driven by market forces and the regulatory landscape, among other factors. The Panel considers particularly relevant in this context the efforts by Malaysia aimed at limiting the expansion of oil palm plantations, including into land with high-carbon stock, and deforestation more generally. It is therefore of paramount importance that the underlying data, as well as the related estimates and assumptions, are regularly reviewed to take due account of changes in the relevant circumstances.

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Therefore, insofar as the review of data used as basis for the classification of feedstock(s) as high ILUC-risk is not undertaken in a regular and timely manner, the measure cannot be said to be applied in an even-handed manner. This is because the situation relevant to the assessment of the share of expansion into land with high-carbon stock may have changed since the determination was made on the basis of the 2008-2016 reference period. This finding of the Panel should not be understood as

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<sup>55</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.540.

<sup>56</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.550.

<sup>57</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.556.



requiring the measure to be continuously updated to take account of any relevant new data sources that becomes available and that might change the measure's accuracy in determining high-ILUC risks and, consequently, its even-handedness. Rather, the regulatory design of the measure, with its heavy reliance on data and assumptions reflecting past events in order to address current and future risks requires the European Union to verify on a regular and timely basis whether the data supports the high ILUC-risk classification. Finally, the Panel notes that while its findings regarding the review of data take into account developments taking place after panel establishment, both parties, in particular the European Union, relied on such developments to support their respective positions.

The Panel therefore finds that the European Union has applied the high ILUC-risk cap and phase-out inconsistently with Article 2.1 of the TBT Agreement by failing to conduct a timely review of the data used to determine which biofuels are high ILUC risk, as this results in arbitrary or unjustifiable discrimination between countries where the same conditions prevail."<sup>58</sup>

42. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel explained the importance of addressing claims regarding the nature of the data underlying the challenged measure, as follows:

"Insofar as Malaysia's arguments contest the data that serves as the basis for the calculation of these values, the Panel recalls its finding above regarding the absence of a timely review of the data on the share of expansion into land with high-carbon stock, which implies that the data in question might have required revisions. Nevertheless, the Panel considers that addressing arguments of the parties relating to the nature of such data and their use in the high ILUC-risk formula is appropriate in the circumstances of this dispute. Assessing these arguments is relevant to the question whether the regulatory distinction has been applied in an even-handed manner and is therefore necessary to assist the DSB in making recommendations and providing rulings in these proceedings. The Panel is also of the view that such findings will be relevant for the implementation of the recommendations and rulings of the DSB."<sup>59</sup>

43. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel found that certain elements of the exception provided in the challenged technical regulation were "overly vague and ambiguous" or disadvantaged feedstocks made from perennial crops, and concluded, on that basis, that the measure was applied in a manner that constituted arbitrary and unjustifiable discrimination.<sup>60</sup>

#### **1.2.4.5.1 Interpretative concepts utilized by the Appellate Body and panels: "even-handedness", "calibration"**

44. In conducting its own analysis of whether the US "dolphin-safe" labelling provisions stemmed exclusively from a legitimate regulatory distinction, the Appellate Body in *US – Tuna II (Mexico)* stated that it "will scrutinize, in particular, whether ... the US measure is even-handed in the manner in which it addresses the risks to dolphins arising from different fishing methods in different areas of the ocean".<sup>61</sup> In assessing whether the measure at issue was even-handed, the Appellate Body examined whether the differences in access to the dolphin-safe label prescribed by the measure were "calibrated" to the risk that dolphins may be killed or seriously injured when tuna is caught. Based on its analysis, the Appellate Body rejected the United States' arguments that the US "dolphin-safe" labelling provisions were "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean and reasoned as follows:

"In the light of the above, we conclude that the United States has not demonstrated that the difference in labelling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand, is 'calibrated' to

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<sup>58</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.566 and 7.571-7.572.

<sup>59</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.574.

<sup>60</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.609, 7.614 and 7.625.

<sup>61</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 232 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 182).

the risks to dolphins arising from different fishing methods in different areas of the ocean. It follows from this that the United States has not demonstrated that the detrimental impact of the US measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction. We note, in particular, that the US measure *fully* addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it does 'not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP'. In these circumstances, we are not persuaded that the United States has demonstrated that the measure is even-handed in the relevant respects, even accepting that the fishing technique of setting on dolphins is particularly harmful to dolphins."<sup>62</sup>

45. In *US – COOL*, the Appellate Body considered that the Panel's findings provided a sufficient basis for it to determine whether the detrimental impact on Canadian and Mexican livestock stemmed exclusively from a legitimate regulatory distinction. The Appellate Body indicated that its assessment would include an inquiry into whether the COOL measure lacked even-handedness because it was designed or applied in a manner that constituted a means of arbitrary or unjustifiable discrimination:

"In our view, these findings provide a sufficient basis for us to determine whether the detrimental impact on Canadian and Mexican livestock stems exclusively from a legitimate regulatory distinction. That is, these findings allow us to pronounce on whether the COOL measure is designed and applied in an even-handed manner, or whether it lacks even-handedness, for example, because it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination, and thus reflects discrimination in violation of Article 2.1 of the *TBT Agreement*. If we determine that the regulatory distinctions drawn by the COOL measure are designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination, those distinctions cannot be considered 'legitimate', and the COOL measure will be inconsistent with Article 2.1. In order to make this determination, we proceed to scrutinize 'the particular circumstances' of this case, including 'the design, architecture, revealing structure, operation, and application' of the COOL measure."<sup>63</sup>

46. The Appellate Body found that the detrimental impact of the COOL measure on Canadian and Mexican livestock did not stem exclusively from a legitimate regulatory distinction because the manner in which the COOL measure sought to provide information to consumers on origin was arbitrary, and the disproportionate burden imposed on upstream producers and processors was unjustifiable:

"For all of these reasons, the informational requirements imposed on upstream producers under the COOL measure are disproportionate as compared to the level of information communicated to consumers through the mandatory retail labels. That is, a large amount of information is tracked and transmitted by upstream producers for purposes of providing consumers with information on origin, but only a small amount of this information is actually communicated to consumers in an understandable manner, if it is communicated at all. Yet, nothing in the Panel's findings or on the Panel record explains or supplies a rational basis for this disconnect. Therefore, we consider the manner in which the COOL measure seeks to provide information to consumers on origin, through the regulatory distinctions described above, to be arbitrary, and the disproportionate burden imposed on upstream producers and processors to be unjustifiable."<sup>64</sup>

47. Similarly, in *US – COOL (Article 21.5 – Canada and Mexico)*, the Appellate Body agreed with the Panel that the detrimental impact on imported livestock arising from the amended COOL measure did not stem exclusively from legitimate regulatory distinctions:

"As we see it, the discrete findings made by the Panel outlined above support the conclusion that the recordkeeping and verification requirements of the amended COOL measure impose a disproportionate burden on producers and processors of livestock

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<sup>62</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 297.

<sup>63</sup> Appellate Body Reports, *US – COOL*, para. 340.

<sup>64</sup> Appellate Body Reports, *US – COOL*, para. 347.

that cannot be explained by the need to provide consumers with information regarding where livestock were born, raised, and slaughtered. Accordingly, the detrimental impact on imported livestock arising from these same recordkeeping and verification requirements does not stem exclusively from legitimate regulatory distinctions."<sup>65</sup>

48. The Panel in *US – Tuna II (Mexico) (Article 21.5 – US)* understood the Appellate Body's position in the previous compliance proceedings to mean "that (a) the *form* and *content* of the calibration test must be appropriately informed by the objectives pursued by the measure, and (b) the calibration test should itself be applied taking account of the measure's objectives".<sup>66</sup>

49. In *US – Tuna II (Mexico) (Article 21.5 – US)*, the Appellate Body underlined that the calibration test is a means to assess whether the detrimental impact stems exclusively from a legitimate regulatory distinction:

"Thus, rather than being a separate legal test, calibration is *the means* to assess whether the detrimental impact of the measure at issue in this dispute stems exclusively from a legitimate regulatory distinction, in the context of the second step of the 'treatment no less favourable' analysis under Article 2.1. As we explain in greater detail in section 6.1.3 below, if done *properly*, the calibration analysis should encompass consideration of the rational relationship between the regulatory distinctions and the objectives of the 2016 Tuna Measure. Thus, if calibrated properly, these regulatory distinctions will not amount to arbitrary or unjustifiable discrimination and will thus comply with the requirements of Article 2.1 of the TBT Agreement."<sup>67</sup>

50. In *US – Tuna II (Mexico) (Article 21.5 – US)*, the Appellate Body pointed out that "the nature of the calibration analysis is defined by the nature of the regulatory distinctions under the measure itself."<sup>68</sup> The Appellate Body also made the following observation as to whether a calibration analysis should involve a separate assessment of the nexus between the relevant regulatory distinctions and the objectives of the challenged measure:

"As discussed above, the Appellate Body's findings in the first compliance proceedings indicate that considerations regarding label accuracy are encompassed in a proper calibration analysis. Accordingly, we disagree that a calibration analysis, on the basis of risks to dolphins, would fail to ascertain whether the labels granted under the relevant labelling conditions are accurate and, as a consequence, whether the regulatory distinctions in such conditions are rationally related to the measure's objectives.

Instead, we consider that, where the calibration analysis is conducted properly, taking account of the objectives pursued by the 2016 Tuna Measure, this exercise should also ascertain whether the label granted under the measure at issue conveys the information regarding the dolphin-safe nature of the tuna products to consumers. This is because, if the calibration analysis shows that the strictness of the different labelling conditions is indeed commensurate with the risks of harms to dolphins, it indicates that the labels granted under these conditions would allow consumers to obtain information regarding whether the tuna in the tuna products is harvested in a manner that harms dolphins. Therefore, we agree with the Panels that a proper calibration to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean would take into account the objectives of the 2016 Tuna Measure, and would help to ascertain the nexus between such objectives and the different labelling conditions under the measure. In the same vein, we also agree with the Panels that the existence of a rational relationship between the regulatory distinctions and the objectives of the 2016 Tuna Measure need not be assessed *as a separate or distinct step* in their analysis."<sup>69</sup>

51. In *US – Tuna II (Mexico) (Article 21.5 – US)*, the Appellate Body clarified that the calibration analysis does not test for uniformity in assessing the relevant regulatory distinctions:

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<sup>65</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.47.

<sup>66</sup> Panel Reports, *US – Tuna II (Mexico) (Article 21.5 – US)*, para. 7.116.

<sup>67</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – US)*, para. 6.13.

<sup>68</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – US)*, para. 6.108.

<sup>69</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – US)*, paras. 6.45-6.46.

"[T]he calibration analysis is not intended to test for uniformity in the requirements applicable to the different fisheries. Rather, the sensitivity of the labelling conditions under the 2016 Tuna Measure should be calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean. Thus, requiring the 2016 Tuna Measure to be calibrated to the risks to dolphins does not mean that the differences between the AIDCP regime and the NOAA regime must be eliminated under the 2016 Tuna Measure, given that the ETP large purse seine fishery has a special risk profile that distinguishes it from other fisheries."<sup>70</sup>

#### **1.2.4.5.2 Relevance of the jurisprudence under the chapeau of Article XX of the GATT 1994**

52. Reviewing the Panel's articulation of the legal standard for determining whether the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction, the Appellate Body in *US – Tuna II (Mexico) (Article 21.5 – Mexico)* observed as follows:

"[G]iven that the sixth recital of the preamble of the TBT Agreement serves as relevant context for understanding Article 2.1, and the language of that recital has important commonalities with the chapeau of Article XX of the GATT 1994, the jurisprudence under the chapeau of Article XX is not irrelevant to understanding the content of the second step of the 'treatment no less favourable' requirement under Article 2.1 of the TBT Agreement. Indeed, previous Appellate Body decisions concerning one provision of a covered agreement may shed light on a proper understanding of the scope and meaning of a different provision in another agreement where the same or similar language is used in both provisions<sup>71</sup>, provided always that due account is taken of more immediate context, and of the function of each provision."<sup>72</sup>

53. In considering whether the detrimental impact caused by a technical regulation can be reconciled with, or is rationally related to, the policy objective pursued by the technical regulation, the Appellate Body in *US – Tuna II (Mexico) (Article 21.5 – Mexico)* opined as follows:

"As regards the specific insight that the Panel drew from the jurisprudence under the chapeau of Article XX, we recall that, in the context of its analysis of Article XX, in *EC – Seal Products*, the Appellate Body stated that '[o]ne of the most important factors in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX.'<sup>73</sup> This was the test adopted by the Panel for purposes of the second step of its 'treatment no less favourable' analysis under Article 2.1 of the TBT Agreement, to which the United States now objects. In the context of the chapeau of Article XX, the Appellate Body has explained that the reason why the assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure is that it is difficult to understand 'how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX'.<sup>74</sup> The same considerations, in our view, are valid in the context of the second step of the analysis of "treatment no less favourable" under Article 2.1 of the TBT Agreement."<sup>75</sup>

54. The Appellate Body cautioned, however, that, as recognized by the Panel, "merely inquiring into whether the detrimental impact of the amended tuna measure can be reconciled with the objectives of that measure might not, alone, be sufficient to ascertain whether the amended tuna

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<sup>70</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – US)*, para. 6.236.

<sup>71</sup> (*footnote original*) For instance, the Appellate Body has highlighted that, in view of the similarities between the language of Article XIV of the GATS and Article XX of the GATT 1994, previous decisions under each provision may be relevant in understanding the scope and meaning of the other. (Appellate Body Reports, *US – Gambling*, para. 291; *China – Publications and Audiovisual Products*, fn 452 to para. 239)

<sup>72</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.88.

<sup>75</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.92.

measure discriminates against Mexican tuna products in an arbitrary or unjustifiable manner".<sup>76</sup> The Appellate Body also noted that, as acknowledged by the Panel, an examination of whether a measure is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination is "one" but not the "only" way to assess whether a measure lacks even-handedness.<sup>77</sup>

#### **1.2.4.5.3 Elements of a technical regulation relevant for a panel's analysis**

55. In *US – COOL (Article 21.5 – Canada and Mexico)*, the Panel considered that the exemptions under the COOL measure were relevant for its analysis of whether the detrimental impact of the amended COOL measure stemmed exclusively from legitimate regulatory distinctions.<sup>78</sup> On appeal, the United States argued that the Panel had erred in finding that the exemptions were relevant for its analysis, submitting that only regulatory distinctions that account for the detrimental impact on like imported products can answer the question of whether such detrimental impact reflects discrimination. Upholding the Panel's finding, the Appellate Body explained that while a panel's analysis must focus on those regulatory distinctions that account for the detrimental impact of a technical regulation on like products, other elements of the technical regulation may also be relevant:

"We consider, therefore, that the inquiry into whether the detrimental impact of a technical regulation on like imported products stems exclusively from legitimate regulatory distinctions must focus on those regulatory distinctions that account for such detrimental impact. Further, the legitimacy of such regulatory distinctions, for the purposes of Article 2.1, is a function of whether they are designed and applied in an even-handed manner. While the assessment of even-handedness focusses on the regulatory distinction(s) causing the detrimental impact on imported products, other elements of the technical regulation are relevant for that assessment to the extent that they are probative of whether such detrimental impact stems exclusively from legitimate regulatory distinctions. Indeed, as the Appellate Body explained in the original disputes, a panel, in assessing even-handedness for the purposes of Article 2.1, must 'carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue'.<sup>79</sup>

Thus, the inquiry under Article 2.1 must situate the regulatory distinctions that account for the detrimental impact on imported products within the overall design and application of the technical regulation at issue. In this way, a determination can be made as to whether these distinctions are designed and applied in an even-handed manner such that they may be considered 'legitimate' for the purposes of Article 2.1, or whether, instead, they lack even-handedness because, for example, they are designed and applied in a manner that constitutes arbitrary or unjustifiable discrimination in violation of Article 2.1."<sup>80</sup>

### **1.3 Article 2.2**

#### **1.3.1 Relationship between the first and the second sentences**

56. The Appellate Body in *US – COOL* observed as follows:

"The first two sentences of Article 2.2 establish certain obligations with which WTO Members must comply when preparing, adopting, and applying technical regulations. In accordance with the first sentence, they must ensure that such preparation, adoption, and application is not done 'with a view to or with the effect of creating unnecessary obstacles to international trade'; and, in accordance with the second sentence, they must ensure that their technical regulations are 'not ... more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the

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<sup>76</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.93.

<sup>77</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.94 (referring to Appellate Body Reports, *US – COOL*, para. 271).

<sup>78</sup> Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.203.

<sup>80</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.93-5.94.

risks non-fulfilment would create'. The words '[f]or this purpose' linking the first and second sentences suggest that the second sentence informs the scope and meaning of the obligation contained in the first sentence.<sup>81</sup><sup>82</sup>

### 1.3.2 Second sentence

#### 1.3.2.1 "legitimate objective"

##### 1.3.2.1.1 The identification of the objective(s) of the measure

57. The Appellate Body in *US – Tuna II (Mexico)* provided the following guidance to panels adjudicating claims under Article 2.2 of the TBT Agreement:

"Accordingly, in adjudicating a claim under Article 2.2 of the *TBT Agreement*, a panel must assess what a Member seeks to achieve by means of a technical regulation. In doing so, it may take into account the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure. A panel is not bound by a Member's characterization of the objectives it pursues through the measure, but must independently and objectively assess them. Subsequently, the analysis must turn to the question of whether a particular objective is legitimate, pursuant to the parameters set out above."<sup>83</sup>

58. In *US – COOL*, the Appellate Body found that the Panel had correctly identified the provision of consumer information on origin as the objective pursued through the COOL measure:

"Because, however, the Panel ultimately evaluated all relevant features relating to the COOL measure's objective, including evidence and arguments presented by the parties relating to the measure's text, design, architecture, structure, and legislative history, as well as its operation, we do not agree with Canada and Mexico that the Panel erred in its application of Article 2.2 of the TBT Agreement by determining the objective of the COOL measure in the 'abstract', and solely on the basis of the United States' declared objective."<sup>84</sup>

59. The Panel in *US – Clove Cigarettes* considered that "it would be entirely possible, both as a factual and a legal matter, for a single technical regulation to pursue more than one objective"<sup>85</sup>, while the Panel in *US – Tuna II (Mexico)* concluded that the measures at issue in that dispute had two different objectives, namely consumer information and dolphin protection.<sup>86</sup>

60. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel stated that the multiplicity of the objectives pursued by the challenged measure is a factor to be taken into account in assessing the measure under the relevant legal provisions:

"The Panel also accepts that, in circumstances where a measure pursues a multiplicity of objectives, those different objectives may reflect competing interests, and that, where this is so, it may be relevant to the assessment of the measure under the TBT Agreement and the GATT 1994. For instance, where a measure pursues more than one objective, it will in principle be necessary for a complaining Member to identify a less trade-restrictive alternative measure that makes an equivalent contribution to each of those objectives (and not merely one of them) in order to establish a violation of Article 2.2. The assessment of whether a detrimental impact on imports 'stems exclusively from a legitimate regulatory distinction' under Article 2.1, and the assessment of whether discrimination is 'arbitrary or unjustifiable' under the *chapeau*

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<sup>82</sup> Appellate Body Reports, *US – COOL*, para. 369.

<sup>83</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 314. See also Appellate Body Reports, *US – COOL*, paras. 371-372.

<sup>84</sup> Appellate Body Reports, *US – COOL*, para. 396. See also paras. 391 and 424.

<sup>85</sup> Panel Report, *US – Clove Cigarettes*, para. 7.342.

<sup>86</sup> Panel Report, *US – Tuna II (Mexico)*, para. 7.407. See also Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.236.

of Article XX of the GATT 1994, could likewise be distorted if a measure with multiple competing objectives is analysed as though it had a monolithic objective."<sup>87</sup>

61. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel noted that the challenged measure could be said to pursue multiple objectives, but found it immaterial, in the circumstances of the case, to treat them as being separate from one another:

"However, while the Panel does not exclude the possibility that the 7% maximum share and the high ILUC-risk cap and phase-out could be demonstrated to have more than one objective, and possibly competing objectives, it is not persuaded that, for the purposes of settling this dispute, it would be material to consider that the measures pursue the protection of biodiversity and EU public moral concerns as separate objectives from the objective to limit the risk of ILUC-related GHG emissions.

According to the logic of the European Union's own explanations of how these three objectives are interlinked, it would appear that any measure that addressed ILUC-related GHG emissions associated with crop-based biofuels would necessarily address the relevant biodiversity and EU public morals objectives at the same time and with the same degree of contribution to each separate objective. Therefore, to the extent that the EU concerns relating to climate change, biodiversity and EU public morals are properly characterized as different objectives, from the perspective of the measures at issue these objectives would be entirely complementary.

The Panel is not persuaded by the European Union's argument that it must consider how the measures pursue the protection of biodiversity and EU public moral concerns as separate objectives from the objective to limit the risk of ILUC-related GHG emissions."<sup>88</sup>

62. According to the Panel in *Australia – Tobacco Plain Packaging*, the identification of the objective of a challenged measure is designed to clarify its "underlying purpose."<sup>89</sup> In that case, the Panel was careful to distinguish between the identification of the objective that is pursued by or through a measure, on the one hand, and the level at which a Member aims to achieve that objective, which is a separate question, on the other hand.<sup>90</sup> Additionally, the Panel explained that the identification of the objective of a measure is distinct from the question of how or through what means that objective is to be pursued.<sup>91</sup>

63. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel noted that the objectives of a measure can be formulated in a narrow or wider manner, and explained the interlinkage between narrowly-defined objectives of a measure and its higher-level objectives:

"The Panel notes that the objective of any challenged measure in WTO dispute settlement proceedings could in principle be formulated and understood either in terms of its relatively narrow and direct objective, or in terms of one or more higher level objectives which are one or more steps removed from that relatively narrow and direct objective. For instance, in this case the objective of the specific measures at issue could in principle be formulated and understood in terms of the relatively narrow and direct objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. However, that relatively narrow and direct formulation of the objective of the specific measures at issue can be understood not as an end in and of itself, but as a means towards fulfilling the higher-level objective of mitigating climate change, which may in turn be understood as a means to fulfilling further higher-level objectives relating to the consequences of climate change on the planet and human, animal or plant life or health."<sup>92</sup>

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<sup>87</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.237.

<sup>88</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.238-7.239 and 7.242.

<sup>89</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.198 and 7.229.

<sup>90</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.196 and 7.231.

<sup>91</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.197.

<sup>92</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.220.



64. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel noted that in certain past disputes the objectives of the challenged measures had been defined at a high level of generality and *vice versa*<sup>93</sup>, and concluded that there is no requisite level of specificity in this regard:

"Additionally, as already noted, the Appellate Body has stated that the identification of a measure's objective serves as 'the benchmark against which a panel must assess the degree of contribution made by a challenged technical regulation, as well as by proposed alternative measures'. The Appellate Body stressed that because the identification of the objective pursued serves that function, 'the importance of a panel identifying with sufficient clarity and consistency the objective or objectives pursued by a Member through a technical regulation cannot be overemphasized'. These considerations do not necessarily support an approach of identifying a measure's objective at a high level of generality.

In light of the foregoing, the Panel does not consider that there is some requisite level of specificity with which the relevant 'objective' must always be defined for the purposes of Article 2.2. Instead, the Panel will ground its approach on the particular circumstances of this case.

For the reasons elaborated below, the Panel considers it appropriate to seek to identify the particular objective of the specific measures at issue, as opposed to the wider objectives of the RED II as a whole."<sup>94</sup>

65. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel clarified that "the identification of the objective of the specific measures at issue is separate from the issue of whether that objective, once identified, falls within the broader objectives of conserving exhaustible natural resources, protecting human, animal or plant life or health, or the environment more generally."<sup>95</sup>

#### **1.3.2.1.2 The legitimacy of the objective**

66. Appellate Body in *US – Tuna II (Mexico)* noted:

"[T]he word 'objective' describes a 'thing aimed at or sought; a target, a goal, an aim'. The word 'legitimate', in turn, is defined as 'lawful; justifiable; proper'. Taken together, this suggests that a 'legitimate objective' is an aim or target that is lawful, justifiable, or proper. Furthermore, the use of the words '*inter alia*' in Article 2.2 suggests that the provision does not set out a closed list of legitimate objectives, but rather lists several examples of legitimate objectives. We consider that those objectives expressly listed provide a reference point for which other objectives may be considered to be legitimate in the sense of Article 2.2. In addition, we note that the sixth and seventh recitals of the preamble of the *TBT Agreement* specifically recognize several objectives, which to a large extent overlap with the objectives listed in Article 2.2. Furthermore, we consider that objectives recognized in the provisions of other covered agreements may provide guidance for, or may inform, the analysis of what might be considered to be a legitimate objective under Article 2.2 of the *TBT Agreement*."<sup>96</sup>

67. The Panel in *US – Clove Cigarettes* considered it to be self-evident that the objective of reducing youth smoking is a "legitimate" one:

"We have already concluded that the objective of the ban on clove cigarettes is to reduce youth smoking. It is self-evident that measures to reduce youth smoking are aimed the protection of human health, and Article 2.2 of the *TBT Agreement* explicitly mentions the 'protection of human health' as one of the 'legitimate objectives' covered by that provision. In *EC – Asbestos*, the Appellate Body stated that 'the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres.

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<sup>93</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.221-7.223.

<sup>94</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.224-7.226.

<sup>95</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.231.

<sup>96</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 313.



The value pursued is both vital and important in the highest degree.<sup>97</sup> In addition, we recall that in *Brazil – Retreaded Tyres*, the Appellate Body agreed with the panel that 'few interests are more 'vital' and 'important' than protecting human beings from health risks'.<sup>98</sup><sup>99</sup>

68. Similarly, the Panel in *US – Tuna II (Mexico)* found that the objectives of the measure at issue in that dispute (consumer information and dolphin protection) were "legitimate":

"Article 2.2 of the TBT Agreement provides a non-exhaustive list of legitimate objectives under this provision.<sup>100</sup> This list includes, as the United States has pointed out, the 'prevention of deceptive practices' and the 'protection of ... animal or plant life or health, or the environment'. We are satisfied that the objectives of the US dolphin-safe provisions, as described in the previous section, fall within the scope of these two categories of legitimate objectives. The objective of preventing consumers of tuna products from being deceived by false dolphin-safe allegations falls within the broader goal of preventing deceptive practices. Similarly, the protection of dolphins may be understood as intended to protect animal life or health or the environment. In this respect, a measure that aims at the protection of animal life or health need not, in our view, be directed exclusively to endangered or depleted species or populations, to be legitimate. Article 2.2 refers to 'animal life or health' in general terms, and does not require that such protection be tied to a broader conservation objective. We therefore read these terms as allowing Members to pursue policies that aim at also protecting individual animals or species whose sustainability as a group is not threatened."<sup>101</sup>

69. The Panel in *US – COOL* considered that providing consumer information on origin is a legitimate objective within the meaning of Article 2.2:

"We are persuaded, based on the evidence before us regarding US consumer preferences as well as the practice in a considerable proportion of WTO Members, that consumers generally are interested in having information on the origin of the products they purchase. We also observe that many WTO Members have responded to that interest by putting measures in place to require the provision of such information, albeit with different definitions of 'origin'. In this regard, we once again recall the words of the panel in *EC – Sardines* referring to the conclusion of the panel in *Canada – Pharmaceutical Patents* that a legitimate objective refers to 'protection of interests that are 'justifiable' in the sense that they are supported by relevant public policies or other social norms'. In our view, whether an objective is legitimate cannot be determined in a vacuum, but must be assessed in the context of the world in which we live. Social norms must be accorded due weight in considering whether a particular objective pursued by a government can be considered legitimate. It seems to us, based on the evidence before us, that providing consumers with information on the origin of the products they purchase is in keeping with the requirements of current social norms in a considerable part of the WTO Membership."<sup>102</sup>

70. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel disagreed with Malaysia's argument that the EU's use of trade remedies on the imports of the product that was also the subject of the measure challenged as a technical measure under the TBT Agreement demonstrated the protectionist intent behind that measure:

"The Panel considers that any connection between the trade defence measures referenced by Malaysia and the high ILUC-risk cap and phase-out is very attenuated if it exists at all. The Panel notes that trade defence measures follow investigations that are typically initiated by the domestic industry and are imposed based on methodologies specifically prescribed by the relevant national legislation and regulated by the Anti-Dumping and SCM Agreements. The Panel recognizes that the trade defence measures

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<sup>99</sup> Panel Report, *US – Clove Cigarettes*, para. 7.347.

<sup>101</sup> Panel Report, *US – Tuna II (Mexico)*, para. 7.437.

<sup>102</sup> Panel Reports, *US – COOL*, para. 7.650.

on imported biofuels taken by the European Union can be viewed as evidence that domestic EU producers have, at various points, sought protection from imports of biofuels, including (but not limited to) palm oil-based biofuel. However, there appears to be no evidence on record of any link between EU trade defence measures and the high ILUC-risk cap and phase-out. Indeed, according to Malaysia, the effect of the European Union's imposition of anti-dumping duties on imports of biofuel from Indonesia and Argentina was an increase in Malaysia's exports of palm oil to the European Union. For these reasons, the Panel does not consider that past trade defence measures adopted by the European Union on imports of biodiesel suggest a protectionist objective in respect of the high ILUC-risk cap and phase-out, in contradiction of the stated objective of limiting the risk of ILUC-related GHG emission associated with crop-based biofuels."<sup>103</sup>

71. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel acknowledged the importance of the legislative history of a measure in assessing its design, structure, and intended operation, but indicated that the usefulness of legislative history would depend on the circumstances of each case:

"The Panel recalls that the legislative history of a measure is a source of information that may be taken into account to inform a panel's assessment of its design, structure, and intended operation. However, where evidence is submitted to reflect the subjective intent of legislators as distinct from the motivations expressed in the resulting legal instrument, an appropriate degree of caution needs to be exercised in relying on such evidence. Nonetheless, depending on the circumstances of the case, the declared intention of legislators can play an important role."<sup>104</sup>

Turning to the case at hand, the Panel found that the objective revealed in the negotiating history of the challenged measure was fully consistent with the objective discerned from its text.<sup>105</sup>

72. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel recalled the Appellate Body's finding that the objectives set out in WTO Agreements other than the TBT Agreement could provide guidance to the analysis into the legitimacy of an objective for purposes of the TBT Agreement, and noted that "the provisions of other covered agreements that may provide guidance and inform the analysis in this regard would include, most notably, the objectives set out in the general exceptions of Article XX of the GATT 1994."<sup>106</sup>

73. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel reasoned that measures taken for the purpose of conserving exhaustible natural resources within the meaning of Article XX(g) of the GATT 1994 could be considered as measures taken to protect the environment within the meaning of the TBT Agreement:

"The Panel notes that the conservation of exhaustible natural resources is not specifically mentioned as a legitimate objective in either Article 2.2 or the Preamble to the TBT Agreement. However, both refer to the 'the protection of ... the environment' and Article XX(g) covers measures directed at the 'the preservation of the environment, especially of natural resources'. In other words, measures taken with the objective of conserving exhaustible natural resources in the sense of Article XX(g) would in principle fall within the scope of measures to taken to protect 'the environment' in the sense of Article 2.2 and the Preamble to the TBT Agreement."<sup>107</sup>

74. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel explained the parallel between the objective of the challenged measure and the objective set out in Article XX(b) of the GATT 1994, as follows:

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<sup>103</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.253.

<sup>104</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.256.

<sup>105</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.257.

<sup>106</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.271.

<sup>107</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.275.

"The Panel recalls that as set out in Recitals 80 and 81 of RED II, the measures at issue are aimed at limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels. In *Brazil – Retreaded Tyres*, the Appellate Body suggested that 'measures adopted in order to attenuate global warming and climate change' would fall within the scope of Article XX(b) in the context of providing guidance on how panels should assess certain 'complex public health or environmental problems' under the necessity test in Article XX(b). In *Brazil – Taxation*, the panel found that 'the reduction of CO<sub>2</sub> emissions is one of the policies covered by subparagraph (b) of Article XX, given that it can fall within the range of policies that protect human life or health'. The Panel sees no reason to disagree, considering that global warming and climate change pose one of the greatest threats to life and health on the planet. The objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels therefore *prima facie* relates to the protection of human, animal or plant life or health."<sup>108</sup>

75. The Panel in *EU and Certain Member States – Palm Oil (Malaysia)*, in the context of assessing the legitimacy of the challenged measure's objective, identified a connection between the demand for crop-based biofuel and the need for agricultural land:

"In sum, crop-based biofuel is a product from food and feed crops, using agricultural land, that can also be used for other purposes (e.g. food). If biofuel is produced from food or feedstock and/or agricultural land previously used for food production, the demand in food must then be met by food production that expands into non-agricultural land or displaces other crop production, which in turn expands into non-agricultural land, if global food demand does not decrease, and/or the productivity does not increase, by a corresponding amount.

...

The question of whether ILUC can be directly measured, observed or precisely quantified does not speak to whether the production of crop-based biofuels creates a *risk* of ILUC-related GHG emissions. If an increase in crop-based biofuel is produced from crop land previously used for food production, demand in food must then be met by food production that expands into non-agricultural land or displaces other crop production which in turn expands into non-agricultural land, if global food demand does not decrease, and/or the productivity does not increase, by a corresponding amount. The existence of a causal link between the risk of ILUC-related GHG emissions and crop-based biofuel production, and more specifically, the existence of a risk of ILUC-related GHG emissions arising from increasing EU demand for crop-based biofuels, is more than 'theoretical' in the Panel's view."<sup>109</sup>

76. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel noted that the objectives expressly listed in Article 2.2 of the TBT Agreement and Article XX of the GATT 1994, provides a reference point to assess the legitimacy of other objectives, and that such objectives do not necessarily entail a jurisdictional or territorial limitation:

"The Panel recalls that the objectives expressly listed in Article 2.2, and also those in Article XX, provide a reference point for which other objectives may be considered to be legitimate in the sense of Article 2.2. In this connection, the Panel notes that none of the examples of 'legitimate objectives' listed in the text of Article 2.2 necessarily have any inherent jurisdictional or territorial limitation, and it may be difficult to reconcile such a limitation with such objectives as 'the environment'. Likewise, the objectives in Article XX(g) (the 'conservation of exhaustible natural resources') and (b) (the protection of 'human, animal or plant life or health'), which the Panel considers particularly relevant to its analysis for reasons already given earlier in this section, do not have any inherent jurisdictional or territorial limitation. The Panel further notes that while Annex A(1)(a), (b) and (c) of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) specify that SPS measures only include those measures applied to protect human, animal or plant life or health 'within the territory of the Member', there is no similar textual qualification in Article 2.2 or Article XX (nor,

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<sup>108</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.281.

<sup>109</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.303 and 7.306.

more broadly, is there such a qualification in the definition of TBT measures in Annexes 1.1, 1.2 and 1.3)."<sup>110</sup>

77. The Panel in *EU and Certain Member States – Palm Oil (Malaysia)* noted the global nature of climate change, and, on that basis, found a nexus between the EU territory and the EU's measures that were at issue:

"The Panel notes that the measures at issue in this dispute are concerned with land use change as an issue related to GHG emissions, which are linked to climate change. Climate change is inherently global in nature. Therefore, there is a nexus between EU territory and the objective of limiting the risk of ILUC-related GHG emissions.

Moreover, the Panel does not consider that the measures can be characterized as regulating GHG emissions outside the European Union. The measures seek to regulate whether and to what extent products supplying the EU transport fuel market can be counted towards the EU renewable energy targets, and to address the adverse ILUC impacts that *EU demand* for crop-based biofuels could have. In this respect, the objective of RED II is to promote the use of renewable green energy in the EU transportation sector for environmental reasons and in particular to lower GHG emissions and to combat climate change; the European Union has assessed that the resulting increase in EU demand for crop-based biofuel could undermine that objective; and the measures therefore regulate EU demand for those products. Finally, the Panel observes that the ILUC-related GHG emissions from crop-based biofuels that the European Union is seeking to limit do not exclusively arise outside the European Union's borders and may very well occur also within the European Union's own territory.

The Panel finds that there is a sufficient nexus between the regulating Member and the activities being regulated."<sup>111</sup>

### 1.3.2.2 "more trade-restrictive than necessary to fulfil a legitimate objective"

#### 1.3.2.2.1 General

78. In *US – Tuna II (Mexico)*, the Appellate Body explained that, in the context of Article 2.2, "the assessment of 'necessity' involves a relational analysis of the trade-restrictiveness of the technical regulation, the degree of contribution that it makes to the achievement of a legitimate objective, and the risks non-fulfilment would create".<sup>112</sup> The Appellate Body also observed that this assessment also involves "a comparison of the trade-restrictiveness and the degree of achievement of the objective by the measure at issue with that of possible alternative measures that may be reasonably available *and* less trade restrictive than the challenged measure, taking account of the risks non-fulfilment would create".<sup>113</sup> The Appellate Body further found that the obligation to consider "the risks non-fulfilment would create" suggests another element of this analysis – the determination of whether a reasonably available and less trade restrictive alternative measure would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create.<sup>114</sup>

79. The Appellate Body in *US – Tuna II (Mexico)* summarized the steps involved in an assessment of whether a technical regulation is "more trade-restrictive than necessary" within the meaning of Article 2.2:

"In sum, we consider that an assessment of whether a technical regulation is 'more trade-restrictive than necessary' within the meaning of Article 2.2 of the *TBT Agreement* involves an evaluation of a number of factors. A panel should begin by considering factors that include: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-

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<sup>110</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.311.

<sup>111</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.314-7.316.

<sup>112</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 318.

<sup>113</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 320.

<sup>114</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 321.

fulfilment of the objective(s) pursued by the Member through the measure. In most cases, a comparison of the challenged measure and possible alternative measures should be undertaken.<sup>115</sup> In particular, it may be relevant for the purpose of this comparison to consider whether the proposed alternative is less trade restrictive, whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and whether it is reasonably available."<sup>116</sup>

80. Elaborating on its prior jurisprudence, the Appellate Body in *US – COOL* set out the following considerations on the meaning of the word "fulfil" in Article 2.2:

"The Appellate Body in *US – Tuna II (Mexico)* found that, while, read in isolation, the word 'fulfil' could be understood to signify the *complete* achievement of something, as used in Article 2.2 this term is concerned with the *degree* of contribution that the technical regulation makes towards the achievement of the legitimate objective. The Appellate Body found relevant contextual support for this reading in the sixth recital of the preamble of the *TBT Agreement*, which provides that, subject to certain qualifications, a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives 'at the levels it considers appropriate'. The degree or level of contribution of a technical regulation to its objective is not an abstract concept, but rather something that is revealed through the measure itself. In preparing, adopting, and applying a measure in order to pursue a legitimate objective, a WTO Member articulates, either implicitly or explicitly, the level at which it pursues that objective. Thus, a panel adjudicating a claim under Article 2.2 must seek to ascertain—from the design, structure, and operation of the technical regulation, as well as from evidence relating to its application—to what degree, if at all, the challenged technical regulation, as written and applied, actually contributes to the achievement of the legitimate objective pursued by the Member."<sup>117</sup>

81. In *US – COOL*, the Appellate Body found that the Panel had erred in its interpretation of Article 2.2 because it had "considered it necessary for the COOL measure to have fulfilled the objective completely, or satisfied some minimum level of fulfilment to be consistent with Article 2.2, it erred in its interpretation of Article 2.2".<sup>118</sup> The Appellate Body observed that, in *US – Tuna II (Mexico)*, it "did not find or imply that, in order for a measure to comply with Article 2.2, it must meet some minimum threshold of fulfilment".<sup>119</sup>

82. The Panel in *US – Clove Cigarettes* agreed with the parties that the concept of the "level of protection" is related to the question of whether a measure is "more trade-restrictive than necessary" within the meaning of Article 2.2:

"In this case, both parties agree that the 'level of protection' sought is directly connected to the question of whether a measure is 'more trade-restrictive than necessary' within the meaning of Article 2.2 of the *TBT Agreement*. We see no reason to disagree. Although the concept is not explicitly referred to in the text of Article 2.2 of the *TBT Agreement*, the sixth recital to the preamble of the *TBT Agreement* states no country should be prevented from taking measures 'necessary ... for the protection of human ... life or health ... at the levels it considers appropriate'. In addition, panels and the Appellate Body have considered the 'level of protection' in the context of analysing measures under Article XX(b) of the GATT 1994, notwithstanding that these words are not found in that provision either. Among other things, the Appellate Body has explained that 'in order to qualify as an alternative, a measure proposed by the complaining Member must be not only less trade restrictive than the measure at issue, but should

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<sup>115</sup> (*footnote original*) We can identify at least two instances where a comparison of the challenged measure and possible alternative measures may not be required. For example, it would seem to us that if a measure is not trade restrictive, then it may not be inconsistent with Article 2.2. Conversely, if a measure is trade restrictive and makes *no* contribution to the achievement of the legitimate objective, then it may be inconsistent with Article 2.2.

<sup>116</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 322. See also Appellate Body Reports, *US – COOL*, paras. 374-378; and *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.197.

<sup>117</sup> Appellate Body Reports, *US – COOL*, para. 373.

<sup>118</sup> Appellate Body Reports, *US – COOL*, para. 468.

<sup>119</sup> Appellate Body Reports, *US – COOL*, para. 461.

also 'preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued'.<sup>120</sup>

83. Recalling the sixth recital of the preamble to the TBT Agreement, the Appellate Body in *US – Tuna II (Mexico)* considered that "a WTO Member, by preparing, adopting, and applying a measure in order to pursue a legitimate objective, articulates either implicitly or explicitly the level at which it seeks to pursue that particular legitimate objective".<sup>121</sup>

84. In *US – COOL (Article 21.5 – Canada and Mexico)*, the Appellate Body observed that, while "Article 2.2 does not explicitly prescribe, in rigid terms, the sequence and order of analysis in assessing whether the technical regulation at issue is more trade restrictive than necessary", "a certain sequence and order of analysis may, nonetheless, flow logically from the nature of the examination under Article 2.2".<sup>122</sup> The Appellate Body further explained that "panels are afforded a certain degree of latitude to tailor the sequence and order of analysis", which is "informed by the specific claims, measures, facts, and arguments at issue".<sup>123</sup>

85. The absence of any required order of analysis was noted by the Panel in *Australia – Tobacco Plain Packaging*, which stated that there is no *a priori* order of analysis that must be followed. Rather, the appropriate order of analysis will depend on the circumstances of the case at hand.<sup>124</sup>

86. The Appellate Body in *US – COOL (Article 21.5 – Canada and Mexico)* also made several observations regarding a panel's assessment of the various factors involved in the determination of whether the measure is more trade-restrictive than necessary. Concerning the relevant factors in respect of the technical regulation itself, the Appellate Body opined that it will not always be possible to quantify a particular factor, or to do so with precision.<sup>125</sup> The Appellate Body recalled that it had previously "considered that the demonstration of a limiting effect on competitive opportunities in qualitative terms might suffice in the particular circumstances of a given case."<sup>126</sup>

87. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel pointed out that regardless of whether WTO disciplines, in particular Articles 2.1 and 2.2 of the TBT Agreement and those of Article III:4 of the GATT 1994 apply regardless of whether the market at issues has been created by the government:

"Second, the European Union argues that insofar as it is correct that there is no real market for biofuel in the European Union outside the RED II regime, such that the biofuels market was created by the RED regime itself, it follows that the measures are part of a regime that has a trade restricting effect only for *fossil fuels*, and a trade *enhancing* effect for *biofuels*. It follows from this, the European Union argues, that the measures set a cap on the trade-restrictiveness of the public intervention with respect to *fossil fuels*. It cannot be the case, the European Union argues, that 'once a Member alters the functioning of the market and restricts trade in certain products [i.e. fossil fuels] it should do that without *any* limitation for the trade which was *artificially created* for other products' [i.e. biofuels].

The Panel considers that the logical implication of the European Union's argument is that where a Member artificially creates a market for certain products (e.g. biofuels), any limitation on the eligibility of which products have access to that market, including through a total ban, would not have any 'limiting effect on trade' in those products. By this logic, an amended version of RED II that immediately set a 0% share for all crop-based biofuels would not be trade-restrictive, and thus could not be said to be any more 'trade-restrictive' than the current measure. The Panel considers that the disciplines under Article 2.2, and for that matter under Article 2.1 and Article III:4, apply in the

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<sup>120</sup> Panel Report, *US – Clove Cigarettes*, 7.370.

<sup>121</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 316.

<sup>122</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.202.

<sup>123</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.206.

<sup>124</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.420.

<sup>125</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208.

<sup>126</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208. See also *ibid.* fn 643.

same way irrespective of whether a given market exists only because the government created it."<sup>127</sup>

#### **1.3.2.2.2 Contribution of the challenged measure to the objective**

88. In *Australia – Tobacco Plain Packaging*, the Panel examined Article 2.2 of the TBT Agreement in extensive detail.<sup>128</sup> The Panel first focused on identifying the degree to which the challenged measure contributed to its objective. The Panel explained that it needed to determine, based on the arguments and evidence before it, to what degree, if at all, the tobacco plain packaging measures contributed to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products. It noted that it needed to focus on ascertaining the actual contribution of the measures, as written and applied, to the objective.<sup>129</sup>

89. The Panel considered it appropriate to begin its examination by analysing the "design, structure, and operation of the measures".<sup>130</sup> In this connection, it noted the importance of examining the actual "impact" of the measure on smokers' behaviour, because modification of such behaviour was the measure's objective.<sup>131</sup> With respect to the relative value of evidence concerning the measure as written, on the one hand, and the actual impact of the measure, on the other hand, the Panel explained that:

"[T]he relative weight to be attributed to specific evidence, including evidence relating to the design, structure and intended operation of the measures, on the one hand, and evidence relating to their application, on the other hand, will depend on the nature and quality of such evidence and its probative value for the question before us."<sup>132</sup>

90. The Panel also emphasized the importance of examining the contribution of the challenged measures within their broader regulatory context. However, the Panel noted that examining the challenged measures in their context does not reduce the need for a panel to identify as precisely as possible the contribution made by the challenged measures themselves.<sup>133</sup>

91. Additionally, the Panel noted that the contribution to an objective made by a measure will sometimes only be measurable over the medium or long term.<sup>134</sup> The Panel explained that the available evidence, as well as possible limitations in, or unavailability of, certain evidence, may need to be understood in the light of that possibility.<sup>135</sup> The Panel noted that, in such circumstances, not only data relating to the past and the present, but also "quantitative projections" and "qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence" may be relevant to a panel's assessment.<sup>136</sup>

92. The Panel in *EU and Certain Member States – Palm Oil (Malaysia)* found immaterial, in assessing a measure's contribution to its objective, that the measure only focuses on a narrow aspect of the overall risk:

"The Panel does not consider that the contribution that the 7% maximum share and the high ILUC-risk cap and phase-out are apt to make to their objective (i.e. limiting ILUC-related GHG emissions associated with crop-based biofuels) is undermined by the fact that the measures focus only on a relatively narrow aspect of the problem of GHG emissions, and directed only at the European Union's own demand and consumption of biofuels. It is often the case that a given measure will 'only address[] a specific component of the overall risk' it pertains to. *A fortiori*, in the context of a global issues like climate change and GHG emissions the assessment of whether a single measure

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<sup>127</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.328-7.329.

<sup>128</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.483-7.1732.

<sup>129</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.483.

<sup>130</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.488.

<sup>131</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.495.

<sup>132</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.499.

<sup>133</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.506.

<sup>134</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.938.

<sup>135</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.940.

<sup>136</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.982.

taken by a single Member is apt to make a material contribution to its objective cannot be directed at the global impact of the measure in quantitative terms.

...

The Panel concludes that, while it is not possible to quantify the extent to which the 7% maximum share and the high ILUC-risk cap and phase-out contribute to the objective of limiting the risk of ILUC-related GHG emissions associated with crop-based biofuels, the measures are apt to make a material contribution to the objective of limiting ILUC-related GHG emissions associated with crop-based biofuels. The conclusion follows from the fact that the 7% maximum share has, by design, a limiting effect on EU demand for and consumption of all crop-based biofuels, and from the fact that the high ILUC-risk cap and phase-out has, by design, a limiting effect on EU demand for and consumption of those crop-based biofuels deemed to be high ILUC risk."<sup>137</sup>

### **1.3.2.2.3 Trade restrictiveness of the challenged measure**

93. Regarding the meaning of trade restrictiveness, the Appellate Body in *US – Tuna II (Mexico)* stated as follows:

"We recall that the Appellate Body has understood the word 'restriction' as something that restricts someone or something, a limitation on action, a limiting condition or regulation. Accordingly, it found, in the context of Article XI:2(a) of the GATT 1994, that the word 'restriction' refers generally to something that has a limiting effect. As used in Article 2.2 in conjunction with the word 'trade', the term means something having a limiting effect on trade."<sup>138</sup>

94. In *Australia – Tobacco Plain Packaging*, the Panel noted that the way in which trade restrictiveness is demonstrated to exist will depend on the circumstances of a given case. The Panel noted that such demonstration "could be based on qualitative or quantitative arguments and evidence, or both, including evidence relating to the characteristics of the challenged measure as revealed by its design and operation".<sup>139</sup> The Panel also explained that there is no need for a complaining party to demonstrate the existence of a trade-restrictive effect on the trade of *all* WTO Members in *all* products that are subject to the technical regulation. Thus, according to the Panel, a Member could demonstrate the existence of a trade restriction on a particular product in which it trades, even if the trade(s) of other Member(s) has increased.<sup>140</sup>

95. The Panel next observed that "demonstration that the challenged measures may result in some alteration of the overall competitive environment for suppliers on the market would not, in itself, demonstrate their trade-restrictiveness within the meaning of Article 2.2".<sup>141</sup> According to the Panel, the existence of some modification "of the conditions under which all manufacturers will compete against each other on the market, would [not], in itself, be sufficient to demonstrate the[] trade-restrictiveness" of the measures at issue. Rather, what must be established is that the challenged measures have a "limiting effect on international trade".<sup>142</sup> Thus, according to the Panel, a complainant needs to show how any modification of the conditions of competition give rise to a limiting effect on international trade.<sup>143</sup> In this connection, the Panel further explained that:

"[A]ppropriate evidence of such limiting effect will in particular be required in the case of a non-discriminatory internal measure. We do not consider, however, that this demonstration must be based on actual trade effects. Rather, it could in principle be based on a qualitative assessment, taking into account in particular the design and

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<sup>137</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.357 and 7.359.

<sup>138</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

<sup>139</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1076.

<sup>140</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1078. See also Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.331 and 7.655.

<sup>141</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1166.

<sup>142</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1166.

<sup>143</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1167.



operation of the measures, or on a quantitative assessment of its actual trade effects, or both".<sup>144</sup>

96. On appeal, the Appellate Body in *Australia – Tobacco Plain Packaging* upheld the Panel's findings regarding a "limiting effect on trade", and elaborated on the relationship between conditions of competition and trade-restrictiveness:

"[T]he legal standard under Article 2.2 entails demonstrating that the technical regulation at issue imposes a limiting effect on international trade. The question therefore arises as to whether a demonstration of a modification in the conditions of competition (or a limitation on the competitive opportunities of certain products) suffices to demonstrate a limiting effect on international trade. ...

We recall the Appellate Body's prior statement that in 'assessing the trade-restrictiveness of a technical regulation under Article 2.2 ... [a] demonstration of a limiting effect on competitive opportunities in qualitative terms *might suffice in the particular circumstances of a given case*'. The Appellate Body has generally relied on the term 'competitive opportunities' to refer to the conditions of competition of imported products vis-à-vis domestic products (i.e. national treatment) or as between imported products from one Member and imported products from another Member (i.e. most-favoured-nation treatment). In the specific context of Article 2.2, the Appellate Body has indicated that a panel's determination that a measure modifies the conditions of competition for imported products as a group vis-à-vis domestic products as a group (for instance, in the context of assessing a claim under Article 2.1 of the TBT Agreement) would suffice to indicate that the technical regulation is trade-restrictive within the meaning of Article 2.2. However, 'evidence of actual trade effects may also be probative' to a panel's determination of trade restrictiveness and, while 'a detrimental modification of competitive opportunities may be self-evident in respect of certain *de jure* discriminatory measures, ... supporting evidence and argumentation of actual trade effects might be required to demonstrate the existence and extent of trade-restrictiveness in respect of *non-discriminatory* internal measures'.

Thus, a showing of a reduction in the competitive opportunities of imported products is only relevant to the assessment of trade restrictiveness to the extent that it reveals a limiting effect on international trade. For instance, where a measure is shown to reduce the competitive opportunities of *imported products* as a group, from a Member, vis-à-vis competing *domestic products*, that would suffice for a panel to conclude that the measure is indeed trade-restrictive."<sup>145</sup>

97. The Appellate Body in *Australia – Tobacco Plain Packaging* proceeded to reject the appellants' argument that "a showing of a reduction in the competitive opportunities of some imported products vis-à-vis all other products in the market, including *other imported products from the same Member*, suffices to demonstrate trade restrictiveness":

"We agree with the Panel that the mere fact of a modification of the conditions of competition in a market would not necessarily suffice for a panel to conclude on the degree of trade restrictiveness, if any, of a particular technical regulation. We recall that a determination of the degree of trade restrictiveness requires a panel to assess the degree to which the measure causes a *limiting effect on international trade*. We note the Panel's interpretative finding that, 'when considering the effects of a technical regulation (including whether the technical regulation has a *limiting* effect on trade), consideration might be given to ... 'both import-enhancing and import-reducing effects on the trade of other Members'.' None of the participants has appealed this finding, and, in response to questioning at the first hearing, all participants agreed with this finding. In our view, a non-discriminatory modification of conditions of competition in a market may have both trade-enhancing and trade-reducing effects on trade, such that it could plausibly have a net *positive* effect on trade between Members. In a situation where a measure merely modifies the conditions of competition of individual producers within a market, and a panel is unable to anticipate the impact of the measure on the conditions

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<sup>144</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1168.

<sup>145</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.384-6.386.

of competition for *imported products, as a group*, from a Member, we do not see how the panel could conclude that the measure will necessarily have a limiting effect on international trade, much less determine the overall degree of trade restrictiveness of the measure in question, which could in turn inform the panel's assessment of whether there is a possible alternative measure that is less trade-restrictive than that measure.<sup>146</sup> We therefore consider that the Panel did not err in considering that a demonstration of a reduction in the competitive opportunities of certain imported products vis-à-vis all other products in the market (including other imported products) would not necessarily suffice to demonstrate the degree of trade restrictiveness of a measure."<sup>147</sup>

98. The appellants in *Australia – Tobacco Plain Packaging* also argued that the Panel erred in its interpretation and application of Article 2.2 of the TBT Agreement by holding non-discriminatory measures to a higher standard than discriminatory measures, such that trade restrictiveness in respect of non-discriminatory measures could only be demonstrated on the basis of actual trade effects. The Appellate Body rejected these arguments. Regarding the interpretation of Article 2.2<sup>148</sup>, the Appellate Body stated that:

"[B]oth appellants consider that the Panel erred by effectively requiring that, in situations where a non-discriminatory measure is challenged under Article 2.2, it is necessary for a complainant to provide evidence of actual trade effects in order to demonstrate the trade restrictiveness of the measure. The Panel found that, '[h]ow the existence and extent of trade-restrictiveness is to be demonstrated in respect of technical regulations that are not alleged to be discriminatory will depend, as is the case for other technical regulations, on the circumstances of a given case.' The Panel elaborated that a demonstration of trade restrictiveness 'could be based on qualitative or quantitative arguments and evidence, or both, including evidence relating to the characteristics of the challenged measure as revealed by its design and operation'. In our view, these statements by the Panel are accurate in describing the legal standard under Article 2.2, as articulated by the Appellate Body in *US – COOL (Article 21.5 – Canada and Mexico)*. Indeed, there is little disagreement amongst the participants that how to demonstrate trade restrictiveness depends on the circumstances of each case. We therefore consider that the Panel did *not* interpret Article 2.2 such that evidence of 'actual trade effects' is always required for a complainant to demonstrate the trade restrictiveness of a non-discriminatory measure."<sup>149</sup>

99. In that context, the Appellate Body also rejected the argument that a complainant could never be required to submit evidence other than merely the design and structure of the measure in order to demonstrate the trade restrictiveness of the challenged measure:

"[C]ertain statements by Honduras might be read as suggesting that there is *no* circumstance in which any evidence other than the design and structure of a measure is necessary for a complainant to demonstrate the trade restrictiveness of the measure within the meaning of Article 2.2. We disagree. In certain circumstances, a measure's design and structure may be insufficient for a panel to anticipate whether and to what extent the measure will have a limiting effect on international trade. If a panel is unable to anticipate whether and to what extent a measure is trade-restrictive based exclusively on its examination of the design and structure of the measure (for instance, because the measure's design and structure leads the panel to conclude that the measure could have both trade-enhancing and trade-reducing effects), then the panel *must* take into account the additional evidence and arguments adduced by the parties. Such additional evidence might include evidence of actual trade effects or evidence of a qualitative or quantitative nature that may inform the panel's determination of the anticipated effects of the measure.

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<sup>146</sup> (footnote original) The essential question is whether the panel is able to determine, or anticipate, the limiting effect of the measure on international trade.

<sup>147</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.389.

<sup>148</sup> See Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.409.

<sup>149</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.391.

In any event, there is no obligation on a panel to cease its analysis of the trade restrictiveness of a measure after examining only a subset of the evidence (such as the design and structure of the measure, or more generally the evidence related to the anticipated effects of the measure). Indeed, it is appropriate for panels to take into account all relevant evidence adduced by the parties before concluding on the degree of trade restrictiveness. For instance, in *US – COOL*, the Appellate Body considered the Panel's examination of the actual trade effects to be relevant to the determination of the degree of trade restrictiveness, notwithstanding that the design and structure of the measure revealed that it was trade-restrictive. In short, there is no obligation on a panel to exclude any evidence in assessing the trade restrictiveness of the measure and an examination of additional available evidence (such as evidence of actual trade effects) may be necessary in order for the panel to determine the trade restrictiveness of the measure."<sup>150</sup>

100. The Appellate Body proceeded to reject the appellants' claims that the Panel erred in its application of Article 2.2 by failing to conclude that a reduction in the opportunity to differentiate products on the basis of brands sufficed to demonstrate the trade restrictiveness of the challenged measures, or by applying a higher evidentiary standard on the basis that the TPP measures were non-discriminatory. In particular, the Appellate Body recalled the Panel's finding that, although the TPP measures limited the opportunity for producers to differentiate their products and thereby limited the opportunity for tobacco manufacturers to compete on the basis of such brand differentiation, the Panel was not persuaded that this modification of the competitive environment for all tobacco products on the entire market constituted, in itself, a restriction on competitive opportunities for imported tobacco products that must be assumed to have a limiting effect on international trade.<sup>151</sup> The Appellate Body highlighted that:

"[I]n forming this conclusion, the Panel highlighted that brand differentiation is valuable in international trade because 'differentiation engenders consumer loyalty and increases consumers' willingness to pay.' This indicates that the impact of the reduction in the opportunity to differentiate will be different for different producers depending on the specific degree of customer loyalty associated with different producers' brands. Thus, while a reduction in the opportunity to differentiate might harm the competitive opportunities of some products, it would necessarily seem to improve the competitive opportunities of other competing products. These findings by the Panel indicate that, to the extent that the competitive opportunities of some imported products might be adversely affected by a reduction in the opportunity to brand-differentiate, the competitive opportunities of other imported products (including other imported products from the same Member) that compete with such products would simultaneously benefit. We therefore do not consider that, on appeal, the appellants have demonstrated that the Panel erred by failing to find that the reduction in the opportunity to differentiate between different products caused by the TPP measures necessarily amounts to a limiting effect on international trade.

Having upheld the Panel's determination that it was unable to conclude on the degree of trade restrictiveness on the basis of its examination of the design and structure of the TPP measures, we also disagree with the appellants that the Panel required evidence of 'actual trade effects' or applied a 'higher evidentiary burden' on the basis that the TPP measures were not shown to be discriminatory. There is no indication that the Panel's conclusions with respect to brand differentiation were exclusively based on the fact that the TPP measures were non-discriminatory. To the contrary, the Panel's rejection of the argument that the reduction in the opportunity to brand-differentiate demonstrated trade restrictiveness was on the basis that this fact alone was insufficient for it to anticipate whether the net effect of the TPP measures would be trade-restrictive. For this reason, the Panel proceeded to examine the additional evidence and arguments adduced by the parties. Furthermore, the Panel did not require such additional evidence or argumentation to be in the form of 'actual trade effects' (by which we understand the parties to refer to evidence of 'actual' effects to date, as opposed to evidence of an 'anticipated' effect in the future). To the contrary, having rejected the parties'

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<sup>150</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.392-6.393.

<sup>151</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.407 (referring to Panel Reports, para. 7.1167).

arguments based exclusively on the design and structure of the measure, the Panel examined all evidence regarding both the actual effects to date as well as evidence informing the expected operation of the measure (i.e. the anticipated effects of the measure). This included both quantitative and qualitative evidence regarding the anticipated impact of the measures. The Panel therefore did not require evidence of actual trade effects or apply a different legal standard to non-discriminatory measures than that applicable to discriminatory measures. Rather, the Panel correctly sought to determine the extent to which the TPP measures have a limiting effect on international trade."<sup>152</sup>

101. In *Australia – Tobacco Plain Packaging*, the Panel found that the complainants had failed to show that the TPP measures reduced the value of imported tobacco products as a consequence of consumers downtrading from higher- to lower-priced cigarette brands. The Panel acknowledged that the TPP measures had contributed to causing such a downtrading effect, but noted that prices had, on average, increased sufficiently to offset the decline in sales of high-end cigarettes.<sup>153</sup> On appeal, the Dominican Republic argued that the Panel erred because, *inter alia*, the Panel took into account price increases in assessing trade restrictiveness. The Dominican Republic referred to certain Appellate Body and panel findings standing for the proposition that actions by private actors to mitigate the harmful effects of a measure will not preclude a finding of WTO-inconsistency, and argued that the Panel erred by allowing for the conduct of private actors to be a means for undoing, or mitigating, the trade-restrictive effects of a measure.<sup>154</sup> The Appellate Body rejected this argument:

"In our view, the jurisprudence cited by the Dominican Republic stands for the principle that a determination of a measure's consistency must be based on all relevant facts, such that the fact that private actors may adapt their behaviour in order to mitigate negative consequences does not alter a finding of inconsistency when the facts indicate that a measure is WTO-inconsistent. In other words, the application of any provision of a covered agreement should be based on the facts of the case, and, where the application of the relevant legal standard reveals that its constituent elements have been satisfied, other factors (such as possible actions by private actors) do not trump, mitigate, or offset the ensuing finding of inconsistency.

In the present dispute, in light of the complainants' own arguments that the value of trade had decreased as a result of the measure, the Panel considered it relevant to examine the impact of the measure on prices. This followed from the fact that import value is a function of the quantity of imported products multiplied by the average price of those products. Thus, it is inescapable that price is a relevant consideration in assessing value. Price, for its part, is a function of market dynamics, including the maximum price that consumers are willing to pay and the minimum price that producers are willing to accept. It seems clear that a measure can have a causal impact on price by affecting various actors in the market. Consequently, in our view, by looking at the impact of the TPP measures on prices, the Panel was effectively examining the relevant facts in order to conclude on the degree of trade restrictiveness of the TPP measures, based on the complainants' own arguments that the TPP measures led to a decrease in value.

With this in mind, the jurisprudence cited by the Dominican Republic regarding the possible actions of private entities to mitigate a finding of WTO-inconsistency does not appear to be relevant. Rather, the Panel simply examined the facts of the case in order to determine whether and to what extent the TPP measures are trade-restrictive, for the purpose of assessing whether the TPP measures are inconsistent with Article 2.2. Indeed, the Dominican Republic's arguments imply that the Panel should have ignored the actual dynamics of the marketplace and formed a factual conclusion regarding either prices in the marketplace or value (which itself represents price multiplied by quantity) without examining the actual effect of the TPP measures on prices. We disagree. We also note that, if the Panel had found that prices had remained constant or declined, then it seems that the Panel would indeed have found that the measure reduced the

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<sup>152</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.408-6.409.

<sup>153</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.1196, 7.1221, and 7.1225.

<sup>154</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.444.

value of trade and was trade-restrictive in this way. Thus, far from 'immunizing' the measure from a finding of trade restrictiveness (or inconsistency with Article 2.2), the Panel, in examining the impact of the TPP measures on prices, simply examined whether the evidence and facts supported the assertions made by the complainants that the TPP measures had reduced the value of trade."<sup>155</sup>

102. In findings that were not appealed, the Panel in *Australia – Tobacco Plain Packaging* also observed that, in assessing whether a restriction exists, the standard applied in determining the existence of a restriction under Article XI of the GATT 1994 may be relevant.<sup>156</sup> In this connection, the Panel observed that under certain circumstances, the adoption of a technical regulation may impose costs that are not, or not exclusively, ongoing in nature. In the Panel's view, such "initial compliance costs"<sup>157</sup> could be of such a magnitude or nature as to limit the competitive opportunities available to imported products and thereby have a limiting effect on trade.<sup>158</sup> However, the Panel was not persuaded that the existence of *any* level of costs associated with initial compliance with a technical regulation will be sufficient, in and of itself, to demonstrate that a technical regulation is trade-restrictive.<sup>159</sup> The Panel explained:

"[A] technical regulation may create costs of such a magnitude or nature as to have a limiting effect on trade. However, it may also create a regulatory environment in which operating costs are *reduced*, thereby *enhancing* competitive opportunities and *facilitating* trade. For these reasons, we are not satisfied that the existence of some initial adaptation costs would in all cases be sufficient, in and of itself, to indicate that a technical regulation has a limiting effect on trade. The extent to which such costs may be trade-restrictive must, in our view, be assessed on a case-by-case basis."<sup>160</sup>

103. Additionally, the Panel stated that a technical regulation imposing costly penalties on importation may, in the circumstances of a given case, have a limiting effect on trade and, as a result, be trade-restrictive.<sup>161</sup> However, the Panel did not consider that:

"[T]he imposition of penalties to ensure compliance with the requirements of the TPP measures results, in itself, in an "additional" limiting effect on imports beyond what would be induced by full compliance with the TPP requirements themselves, which is what the penalties seek to ensure. We are not persuaded, therefore, that the existence of these penalties, or their level, lead to a greater degree of trade-restrictiveness than that arising from compliance with the relevant requirements of the TPP measures (which we have concluded, above, have not been demonstrated to be trade-restrictive)."<sup>162</sup>

#### **1.3.2.2.4 Comparison with proposed alternative measures**

104. Regarding the factors pertaining to the comparison with alternative measures, the Appellate Body in *US – COOL (Article 21.5 – Canada and Mexico)* did not consider that a complainant must demonstrate that its proposed alternative measure achieves a degree of contribution "*identical* to that achieved by the challenged technical regulation in order for it to be found to achieve an *equivalent* degree".<sup>163</sup> The Appellate Body further explained that:

"[F]or the purpose of assessing the equivalence between the respective degrees of contribution of the challenged technical regulation and the proposed alternative measures, it is the *overall* degree of contribution that the technical regulation makes to

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<sup>155</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.446-6.448.

<sup>156</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1230.

<sup>157</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1242.

<sup>158</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1234.

<sup>159</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1235.

<sup>160</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1235.

<sup>161</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1248.

<sup>162</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1254.

<sup>163</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.215.

the objective pursued that is relevant, rather than any individual isolated aspect or component of contribution.<sup>164"165</sup>

105. The Panel in *Australia – Tobacco Plain Packaging* examined the importance of comparing the challenged measures with possible alternative measures. The Panel observed that:

"[F]or a proposed alternative measure to form the basis of a determination that the challenged measure is more trade-restrictive than necessary, it would need to cumulatively satisfy all of the elements of the comparative analysis. It would thus need to be demonstrated that a proposed alternative measure would not only be less trade-restrictive than the challenged measures, but also that it would make at least an equivalent contribution to the objective being pursued through the challenged measure, and be 'reasonably available' to the Member as an alternative to the challenged measures."<sup>166</sup>

106. With respect to identifying valid alternative measures, the Panel in *Australia – Tobacco Plain Packaging* observed that a proposed measure may be a valid alternative even if it already exists in some form in the legal system of the responding Member. According to the Panel:

"[W]here it exists in the responding Member, albeit in a different form from that proposed by the complainant. In such a case, it is the *variation* proposed by the complainants as a substitute for the challenged measure that would be the subject of the comparative analysis under Article 2.2 of the TBT Agreement, including of whether that variation of an existing measure would make an equivalent contribution to the objective pursued by the responding Member."<sup>167</sup>

107. The Panel explained that where such a variation is proposed, the responding Member will bear the burden of showing why such variation is *not* a valid alternative.<sup>168</sup>

108. With respect to the degree of contribution that a proposed alternative must be apt to make, the Panel in *Australia – Tobacco Plain Packaging* stated that a proposed alternative measure may achieve an equivalent degree of contribution in ways different from the technical regulation at issue. In the view of the Panel, what is relevant is the *overall* degree of contribution that the technical regulation makes to the objective pursued, rather than any individual isolated aspect or component of contribution.<sup>169</sup>

109. With respect to assessing whether a proposed alternative makes an equivalent contribution to the objectives, the Panel stated that the time-frame within which the effects of a measure may be expected to arise could be pertinent in assessing the degree of contribution that a proposed alternative may make.<sup>170</sup> It also suggested that a proposed alternative may not make an equivalent contribution to the challenged measure if the alternative entails greater risks of non-fulfilment of the relevant objectives.<sup>171</sup>

110. Moreover, the Panel emphasized that, in assessing proposed alternative measures, regard must be had to the broader regulatory context in which the challenged measures exist, and how the challenged measures work together with other measures to achieve the desired objective.<sup>172</sup> In this connection, the Panel stated:

"While different measures may have the capacity to contribute through various means to the same objective of reducing the use of, and exposure to, tobacco products, this

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<sup>164</sup> (footnote original) In stating this, we do not exclude that there may be aspects of a technical regulation that may be manifestly immaterial in a given case in the light of the specific products, processes, or labels at issue, or that a technical regulation may operate as part of a more complex suite of measures directed at the same objective. (See Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151)

<sup>165</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.216.

<sup>166</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1364.

<sup>167</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1682.

<sup>168</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1573.

<sup>169</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1454.

<sup>170</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1462.

<sup>171</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1528.

<sup>172</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1391.

does not imply that they would be interchangeable or substitutable, and thereby constitute 'alternatives' to each other, where each measure is intended to address a distinct aspect of a multifaceted problem, and where the comprehensive and complementary nature of the measures is an integral part of the approach pursued. In such a context, the removal of one element of the comprehensive policy may, as the Appellate Body has described it, weaken the policy by reducing the synergies between its components, as well as its total effect."<sup>173</sup>

111. With respect to the reasonable availability of proposed alternatives, the Panel noted past Appellate Body jurisprudence that "undue burdens and prohibitive" costs may limit the availability of an alternative. The Panel further explained that:

"The relevant costs that may be taken into consideration include the enforcement and implementation costs incurred by the regulating Member, but may also include 'significant costs or difficulties faced by the affected industry, in particular where such costs or difficulties could affect the ability or willingness of the industry to comply with the requirements of that measure'."<sup>174</sup>

112. Summarizing its extensive discussion under Article 2.2, the Panel reiterated the following guidelines with respect to reviewing proposed alternative measures:

"[A] proposed alternative measure need not contribute to the objective to a degree that is identical to the measure at issue, and that a proposed alternative measure may achieve an equivalent degree of contribution in ways different from the technical regulation at issue. However, as discussed above, we do not understand this to imply that, where the concern being addressed is of a multifaceted nature and legitimately involves a multidimensional response, one aspect of a comprehensive strategy could be substituted for another, where they would address different aspects of the problem. In addition, a panel's 'margin of appreciation' in assessing equivalence should be informed by the risks that non-fulfilment of the technical regulation's objective would create, the nature of the risks and the gravity of the consequences arising from the non-fulfilment of the technical regulation's objective, the characteristics of the technical regulation at issue as revealed through its design and structure, the nature of the objective pursued, and the nature, quantity and quality of the evidence available."<sup>175</sup>

113. On appeal, the appellants in *Australia – Tobacco Plain Packaging* argued that the Panel erred in applying Article 2.2 by finding that the challenged TPP measures as well as two of the proposed alternative measures were all capable of making a "meaningful" contribution to Australia's objective, but then concluding, on the basis of alleged synergies between the TPP measures and other tobacco control measures, that the alternative measures could not make an equivalent contribution to that of the TPP measures. The Appellate Body first agreed with the appellants that the Panel Report could be read as indicating that although the TPP measures and proposed alternatives were all apt to make a "meaningful" contribution to the objective, the alternative measures did not make an equivalent contribution because they: (i) did not address the design features of tobacco packaging; and (ii) undermined the comprehensive nature of Australia's policy by leaving unaddressed the particular aspect of the multifaceted problem that the TPP measures seek to address.<sup>176</sup>

114. The Appellate Body considered that the Panel erred in its application of the legal standard under Article 2.2 with respect to both of these points. First, regarding the point that the alternative measures did not address the design features of tobacco packaging, the Appellate Body stated that:

"[W]e recall that what is relevant to an assessment of equivalence is 'the overall degree of contribution that the technical regulation makes to the objective pursued' and that 'a proposed alternative measure may achieve an equivalent degree of contribution in ways different from the technical regulation at issue.' We have also noted that the Panel identified the relevant objective of the TPP measures to be 'to improve public health by reducing the use of, and exposure to, tobacco products'. In this regard, as noted, the

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<sup>173</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1528.

<sup>174</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1709.

<sup>175</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1722.

<sup>176</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.496.

Panel expressly rejected the proposition that the relevant objective encompasses the three specific 'mechanisms' of the TPP measures, which relate to addressing the design features of tobacco packaging. Under these circumstances, we see no reason why, despite the uncontested finding that these mechanisms are not part of the objective pursued by the TPP measures, the proposed alternative measures would not make an equivalent contribution because they do not address the design features of tobacco packaging."<sup>177</sup>

115. The Appellate Body also considered that the second aspect of the Panel's reasoning, that substituting one of the alternative measures for the TPP measures would undermine the comprehensiveness of Australia's policy and reduce the synergies, was in error:

"[W]e have noted the participants' general agreement that, even in the context of a comprehensive policy, what is relevant for assessing equivalence remains the overall degrees of contribution that the challenged and alternative measures make to the relevant objective. This objective was identified by the Panel to be 'to improve public health by reducing the use of, and exposure to, tobacco products' or, put more simply, reducing smoking. Therefore, if the alternative measure in question is found apt to achieve, in addition to any reduction in smoking attributable to Australia's other existing tobacco control measures, a degree of reduction in smoking similar or comparable to the degree of reduction achieved by the TPP measures, then whether the TPP measures form part of Australia's broader policy and whether their contribution arises partly from synergistic effects with the other components of that policy should not have been a decisive consideration in determining equivalence.

In this context, we consider highly relevant the Panel's qualification of its finding of 'meaningful' contribution for the TPP measures, namely, that these measures are apt to, and do, make a meaningful contribution 'as applied *in combination* with the comprehensive range of other tobacco control measures maintained by Australia'. As we see it, this indicates that the 'meaningful' contribution found with respect to the TPP measures already reflects, and captures, any synergistic effects arising from their interactions with Australia's other measures. This is contrasted with the Panel's findings of 'meaningful' contribution for the alternative measures, which – as the appellants correctly observe – were reached *without* referring to any potential interactions of these measures with Australia's other existing measures. In this regard, we do not see any indication in the Panel's analysis that the effectiveness of each alternative measure would somehow be undermined (or become less than 'meaningful') if it were to operate in the presence of Australia's other existing measures. Under these circumstances, we find it difficult to understand, from the Panel's reasoning, how the overall degree of contribution of the TPP measures, which the Panel found to be 'meaningful' by taking into account their synergies with Australia's other existing measures, is necessarily greater than that of each alternative measure, which the Panel found 'meaningful' without referring to any potential interaction with the same existing measures."<sup>178</sup>

116. The Appellate Body in *Australia – Tobacco Plain Packaging* further addressed the Panel's reliance on the Appellate Body's statements in *Brazil – Retreaded Tyres*:

"We also do not consider that the Appellate Body's statement in *Brazil – Retreaded Tyres*, on which the Panel relied, offers conclusive guidance for assessing equivalence in these proceedings. To recall, the Appellate Body stated that '[s]ubstituting one element of [Brazil's] comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect.' At the same time, we note that this statement was offered with respect to certain measures, proposed by the European Communities, that the Appellate Body observed 'already figure[d] as elements of a comprehensive strategy designed by Brazil to deal with waste tyres'. Moreover, the Appellate Body's statement was offered in the context of upholding the panel's finding that these measures, as existing elements of Brazil's policy, did not constitute valid 'alternatives' to the challenged import ban. By contrast, in the present disputes, the Panel found that both an increase in the MLPA and an increase in taxation,

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<sup>177</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.498.

<sup>178</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.499-6.500.



as strengthened variations of Australia's existing measures, qualify as 'alternatives' in that they 'do not yet exist in the Member in question, or at least not in the particular form proposed by the complainant'. These findings are not contested on appeal. Under these circumstances, we consider that the Panel's reliance on the Appellate Body's statement in *Brazil – Retreaded Tyres* is inapposite.

Moreover, while the above statement by the Appellate Body can be read to suggest that whether a measure operates in such a manner as to create synergies with other measures in the context of a Member's broader policy is a *relevant* consideration in a panel's assessment of the overall effectiveness of that measure, we do not consider it to be a *decisive* consideration in such an assessment, or in a panel's determination of equivalence. Rather, in our view, whether and to what extent a measure creates synergies with other measures is one of the factors informing the overall degree of contribution that a measure makes to a legitimate objective, which all participants agree is the central question in determining equivalence. Thus, even where the challenged measure is implemented as part of a Member's comprehensive policy, a panel assessing equivalence will not be relieved from its duty to objectively ascertain, and compare, the overall degrees of contribution that the challenged and alternative measures make to the legitimate objective by taking into account all pertinent factors. Depending on the case, such factors may include the relevant objective pursued by a Member's policy, the overall level of protection that the Member seeks to achieve through that policy, the respective degrees of contribution that the challenged and alternative measures are apt make to the relevant objective, and whether and to what extent the contribution of each measure would be enhanced (or diminished) in the presence of the other existing measures, including due to the synergies created between different measures."<sup>179</sup>

6.60. The Appellate Body further clarified that it agreed with the Panel that the synergies between the TPP measures and other tobacco control measures were relevant and appropriate in the context of the Panel's determination of the degree of contribution of the TPP measures. The Appellate Body highlighted, however, that it was illogical for the Panel to then again take those same synergies into account when deciding that the meaningfulness of the TPP measures' contribution was not equivalent to the meaningfulness of the alternatives' potential contribution:

[T]he Panel in these disputes took into account the synergies between the TPP measures and Australia's other control measures in reaching its finding of a 'meaningful' contribution for the TPP measures. At the same time, this could possibly suggest that the TPP measures' contribution might be less than 'meaningful' absent the measures' interaction with Australia's other measures. Under these circumstances, we consider it illogical for the Panel to have found that the TPP measures are necessarily more effective than the alternative measures (that the Panel found to be apt to make a 'meaningful' contribution on their own) because of the very synergies that make the TPP measures' contribution 'meaningful'.<sup>180</sup>

117. The Panel in *EU and Certain Member States – Palm Oil (Malaysia)* made a distinction between alternative and complementary measures, and reasoned that the focus of the analysis under Article 2.2 of the TBT Agreement and Article XX of the GATT 1994 is "alternative", as opposed to "complementary" measures:

"While the Appellate Body has not had occasion to elaborate further on the distinction between alternative and complementary measures, the distinction would seem to be reasonably straightforward. Necessity tests under Article 2.2 and Article XX do not prevent a regulating Member from taking more than one measure at the same time to fulfil any given objective. By way of illustration, a technical regulation that laid down GHG emissions standards for scooters that have a limiting effect on trade (in respect of non-compliant scooters) could not be shown to be more trade-restrictive than necessary via a demonstration that introducing a subsidy for homeowners to install solar panels (or purchase electric bikes, or electric cars) would make at least an equivalent

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<sup>179</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.501-6.502.

<sup>180</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.503.

contribution to the reduction of GHG emissions. Such measures would in principle be complementary, not alternative, measures.

An alternative measure is therefore one that either could not co-exist with a challenged measure as it currently stands, or that could co-exist but whose implementation alongside the challenged measure would negate or render redundant or immaterial the contribution that the challenged measure is apt to make to its objective. A complementary measure is one that could co-exist with a challenged measure as it currently stands, and whose implementation alongside the challenged measure would not negate or render redundant or immaterial the contribution that the challenged measure is apt to make to its objective."<sup>181</sup>

#### **1.3.2.2.5 The risks non-fulfilment would create**

118. With respect to the obligation to "take account of the risks non-fulfilment would create", the Appellate Body in *US – COOL (Article 21.5 – Canada and Mexico)* opined that "the nature of the risks and the gravity of the consequences that would arise from non-fulfilment would themselves, in the first place, need to be identified".<sup>182</sup> In this regard, the Appellate Body noted that:

"Article 2.2 does not prescribe further a particular methodology for assessing 'the risks non-fulfilment would create' or define how they should be 'tak[en] account of'. However, in the context of Article XX of the GATT 1994, the Appellate Body has recognized that risks may be assessed in either qualitative or quantitative terms. Some kinds of risks might not be susceptible to quantification, and some types of risk assessment methods might not be of assistance in respect of particular kinds of objectives listed in Article XX of the GATT 1994."<sup>183</sup>

119. In the context of assessing whether the technical regulation at issue was more trade-restrictive than necessary, the Panel in *US – Clove Cigarettes* rejected the alternative measures proposed by the complainant because all of them involved a greater risk of non-fulfilment of the objective pursued by the technical regulation (reducing youth smoking):

"In addition, each of the alternative measures suggested by Indonesia appears to involve a greater risk of non-fulfilment of the objective of reducing youth smoking, as compared with the outright ban currently in place. In analysing the existence of alternative measures, we are required by the terms of Article 2.2 to take into account 'the risks that non-fulfilment would create'. Thus, Article 2.2 suggests that if an alternative means of achieving the objective of reducing youth smoking would involve greater 'risks of non-fulfilment', this may not be a legitimate alternative. This is consistent with the jurisprudence developed under Article XX(b) of the GATT 1994, pursuant to which the relevant question is, as explained above, whether there is one or more alternative measures that would make an 'equivalent' contribution to the achievement of the objective at the level sought. In our view, where an alternative measure would entail a greater risk of non-fulfilment of the objective, it would be difficult to find that it would make an 'equivalent' contribution to the achievement of the objective, at the level of protection sought."<sup>184</sup>

120. The Panel in *Australia – Tobacco Plain Packaging* examined "the gravity of the consequences of non-fulfilment". It observed that:

"[A] Panel's assessment of 'the risks non-fulfilment would create' entails, in the first place, *identifying* the nature and gravity of the 'risks non-fulfilment would create', and that this does not entail a comparison of the challenged measures and possible alternative measures, or a consideration of their respective degrees of contribution to the objective. Rather, such identification involves assessing the following two key

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<sup>181</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.373-7.374.

<sup>182</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.217.

<sup>183</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.218. See also Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.341.

<sup>184</sup> Panel Report, *US – Clove Cigarettes*, para. 7.424.

aspects: the nature of the risks and the gravity of the consequences of non-fulfilment of the objective of the challenged measures".<sup>185</sup>

#### **1.3.2.2.6 Burden of proof**

121. The Appellate Body in *US – COOL* elaborated on the burden of proof under Article 2.2 of the TBT Agreement as follows:

"In order to demonstrate that a technical regulation is inconsistent with Article 2.2, the complainant must make a *prima facie* case by presenting evidence and arguments sufficient to establish that the challenged measure is more trade restrictive than necessary to achieve the contribution it makes to the legitimate objective, taking account of the risks non-fulfilment would create. A complainant may, and in most cases will, also seek to identify a possible alternative measure that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available. It is then for the respondent to rebut the complainant's *prima facie* case by presenting evidence and arguments showing that the challenged measure is not more trade restrictive than necessary to achieve the contribution it makes toward the objective pursued, for example, by demonstrating that the alternative measure identified by the complainant is not, in fact, 'reasonably available', is not less trade restrictive, or does not make an equivalent contribution to the achievement of the relevant legitimate objective."<sup>186</sup>

122. The Appellate Body in *Australia – Tobacco Plain Packaging* noted that, before the Panel, the complainants had submitted two sets of arguments in support of their claims under Article 2.2 of the TBT Agreement:

"In their main set of arguments, the complainants asserted that the TPP measures are not apt to contribute and make no contribution to Australia's objective. In their alternative set of arguments, the complainants contended that, even if the TPP measures make some contribution to Australia's objective, the TPP measures are more trade-restrictive than necessary because 'certain *less* trade-restrictive alternative measures would be reasonably available to Australia to achieve an equivalent contribution to its objective, taking account of the risks that non-fulfilment of the objective would create.'"<sup>187</sup>

123. The Appellate Body in *Australia – Tobacco Plain Packaging* proceeded to comment on the burden of proof on the complainants with respect to both the main and alternate set of arguments:

"It is well settled that 'the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof.' Thus, the burden of proving that the TPP measures are inconsistent with Article 2.2 of the TBT Agreement rested on the complainants. An implication of this allocation of the burden of proof is that, with respect to their main set of arguments, the complainants were required to adduce sufficient evidence to persuade the Panel that the TPP measures are *not* apt to, and do *not*, make any contribution to Australia's legitimate objective."<sup>188</sup>

In their alternative set of arguments, the complainants contended that, even if the TPP measures make some contribution to Australia's objective, the TPP measures are more trade-restrictive than necessary because 'certain *less* trade-restrictive alternative measures would be reasonably available to Australia to achieve an equivalent contribution to its objective, taking account of the risks that non-fulfilment of the objective would create.' We recall that the degree of contribution is only one factor of a panel's overall weighing and balancing for determining 'necessity' under Article 2.2, and

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<sup>185</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1321.

<sup>186</sup> Appellate Body Reports, *US – COOL*, para. 379.

<sup>187</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para. 6.33.

<sup>188</sup> (footnote original) This is in line with the Appellate Body's explanation that "under the usual allocation of the burden of proof, a responding Member's measure will be treated as WTO-consistent, until sufficient evidence is presented to prove the contrary." (Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66) (emphasis original))

there is no predetermined threshold of contribution for purposes of demonstrating an inconsistency with Article 2.2. A panel's overall weighing and balancing exercise need not be quantitative, and is often a qualitative assessment. Indeed, the Appellate Body has said that '[i]n assessing the relevant factors with respect to the technical regulation itself, ... while a complainant must be held to fulfil its burden to present a *prima facie* case that the technical regulation is more trade restrictive than necessary under Article 2.2, it will not always be possible to quantify a particular factor, or to do so with precision.' Thus, with respect to the complainants' alternative set of arguments, we do not consider that the complainants needed to demonstrate a precise quantifiable degree of contribution that the TPP measures make to Australia's objective, in order to meet their burden of demonstrating that the TPP measures are 'more trade-restrictive than necessary'. Rather, the complainants had to demonstrate that the TPP measures are more trade-restrictive than necessary because an equivalent degree of contribution could be achieved through less trade-restrictive alternative means."<sup>189</sup>

#### 1.4 Article 2.3

124. In the context of interpreting Article 2.4 of the TBT Agreement, the Panel in *EC – Sardines* noted with respect to Article 2.3:

"The language of Article 2.3 suggests that Members are to eliminate technical regulations that no longer serve their purpose or amend them if the changed circumstances or objectives can be addressed in a less trade-restrictive manner. This requirement also applies to technical regulations that were enacted before the TBT Agreement came into force. Thus, Members would be under an obligation to periodically evaluate their technical regulations and either discontinue them if they no longer serve their objectives or change them if there is a less trade-restrictive manner in which to achieve the underlying objectives of the regulations."<sup>190</sup>

#### 1.5 Article 2.4

##### 1.5.1 General

##### 1.5.1.1 Three-step analysis

125. Referring to the findings of the Panel and the Appellate Body *EC – Sardines*, the Panel in *US – Tuna II (Mexico)* considered the following three elements in its assessment of Mexico's claim under Article 2.4 of the TBT Agreement: (i) the existence or imminent completion of a relevant international standard; (ii) whether the international standard has been used as a basis for the technical regulation; and (iii) whether the international standard is an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, taking into account fundamental climatic or geographical factors or fundamental technological problems.<sup>191</sup>

##### 1.5.1.2 Temporal scope of application

126. In *EC – Sardines*, the Appellate Body upheld the panel's finding that Article 2.4 applies not only to the "preparation and adoption" of technical regulations, but also to the "application" of *existing* measures adopted *prior to* 1 January 1995, such as the EC regulations that were adopted in June 1989 and continued to exist.<sup>192</sup> In reviewing the Panel's reasoning, the Appellate Body agreed with the following analysis:

"Article 2.4 of the TBT Agreement starts with the language 'where technical regulations are required'. We construe this expression to cover technical regulations that are already in existence as it is entirely possible that a technical regulation that is already in existence can continue to be required. ... Moreover, we note that the first part of the sentence of Article 2.4 is in the present tense ('exist') and not in the past tense –

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<sup>189</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.34-6.35.

<sup>190</sup> Panel Report, *EC – Sardines*, para. 7.81.

<sup>191</sup> Panel Report, *US – Tuna II (Mexico)*, para. 7.627 (referring to Panel Report, *EC – Sardines*, paras. 7.61-7.139; Appellate Body Report, *EC – Sardines*, paras. 217-291).

<sup>192</sup> Appellate Body Report, *EC – Sardines*, para. 216.

'[w]here technical regulations are required and relevant international standards *exist or their completion is imminent*', Members are obliged to use such international standards as a basis. This supports the view that Members have to use relevant international standards that currently exist or whose completion is imminent with respect to the technical regulations that are already in existence. We do not consider that the word 'imminent', the ordinary meaning of which is 'likely to happen without delay', is intended to limit the scope of the coverage of technical regulations to those that have yet to be adopted. Rather, the use of the word 'imminent' means that Members cannot disregard a relevant international standard whose completion is imminent with respect to their existing technical regulations."<sup>193</sup>

127. In *EC – Sardines*, the Appellate Body also agreed with the Panel that the Appellate Body's findings in *EC – Hormones* with respect to the applicability of the SPS Agreement to measures enacted before 1995 that continue to be in force thereafter were relevant to its analysis.<sup>194</sup>

128. In *EC – Sardines*, the Appellate Body further agreed with the Panel's reliance on Articles 2.5 and 2.6 as relevant context in the interpretation of Article 2.4, supporting the conclusion that Article 2.4 is applicable to measures enacted before the TBT Agreement that continue to be in force thereafter.<sup>195</sup> In this regard, the Panel had noted that Article 2.5 speaks of "preparing, adopting or *applying*" a technical regulation, while Article 2.6 states that Members are to participate in preparing international standards by the international standardizing bodies for products which they have either "*adopted*", or expect to adopt technical regulations."<sup>196</sup> The Appellate Body found additional contextual support in the object and purpose of the TBT Agreement, title of Article 2 of the TBT Agreement, which reads "Preparation, Adoption and *Application* of Technical Regulations by Central Government Bodies", as well as Article XVI:4 of the WTO Agreement, which requires that "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."<sup>197</sup>

## **1.5.2 Relevant international standard**

### **1.5.2.1 "International standard"**

129. The Appellate Body in *US – Tuna II (Mexico)* provided a number of clarifications with respect to the meaning of the concept of "international standard" in Article 2.4, based on the contextual elements of the TBT Agreement, the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities<sup>198</sup> (the "ISO/IEC Guide 2: 1991"), and taking into account the TBT Committee Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5, and Annex 3 to the Agreement (the "TBT Committee Decision")<sup>199</sup>.

130. The Appellate Body began its analysis by observing that the composite term "international standard" is not defined in Annex 1 of the TBT Agreement. The Appellate Body noted, however, that Annex 1.2 to the TBT Agreement defines a "standard" as follows:

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal

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<sup>193</sup> Panel Report, *EC – Sardines*, para. 7.74.

<sup>194</sup> Appellate Body Report, *EC – Sardines*, paras. 206-208 (referring to Appellate Body Report, *EC – Hormones*, para. 128).

<sup>195</sup> Appellate Body Report, *EC – Sardines*, para. 212.

<sup>196</sup> Panel Report, *EC – Sardines*, paras. 7.75-7.76.

<sup>197</sup> Appellate Body Report, *EC – Sardines*, paras. 212-215.

<sup>198</sup> International Organization for Standardization (ISO) / International Electrotechnical Commission (IEC) Guide 2, General Terms and Their Definitions Concerning Standardization and Related Activities, sixth edition (1991).

<sup>199</sup> 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, in WTO document G/TBT/1/Rev.10, Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995, 9 June 2011, pp. 46-48.

exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

*Explanatory note*

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.<sup>200</sup>

131. The Appellate Body then turned to the definition of "international standard" in the ISO/IEC Guide 2: 1991 and observed:

"The introductory clause of Annex 1 to the *TBT Agreement* provides that terms used in the *TBT Agreement* that are also 'presented' in the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities (the 'ISO/IEC Guide 2: 1991') 'shall ... have the same meaning as given in the definitions in the said Guide'. The term 'international standard' is defined in the ISO/IEC Guide 2: 1991 as a 'standard that is adopted by an international standardizing/standards organization and made available to the public.' This definition suggests that it is primarily the characteristics of the entity approving a standard that lends the standard its 'international' character."<sup>201</sup>

132. The Appellate Body noted that the use of the word "however" in the introductory clause of Annex 1 to the TBT Agreement indicates that the definitions contained in that Annex prevail to the extent that they depart from the definitions set out in the ISO/IEC Guide 2: 1991. Because the definition of a "standard" in Annex 1.2 of the TBT Agreement refers to a "body" and Annex 1.4 of the TBT Agreement defines an "international body or system", the Appellate Body found that "in order to constitute an 'international standard', a standard has to be adopted by an 'international standardizing body' for the purposes of the *TBT Agreement*".<sup>202</sup>

133. On the basis of other contextual elements of ISO/IEC Guide 2: 1991 and Article 1.5 of the TBT Agreement, the Appellate Body further considered that:

"[A] required element of the definition of an 'international' standard for the purposes of the *TBT Agreement* is the approval of the standard by an 'international standardizing body', that is, a body that has recognized activities in standardization and whose membership is open to the relevant bodies of at least all Members."<sup>203</sup>

134. With respect to the question of what it means for the activities of an international standardizing body to be "recognized", the Appellate Body observed that the definitions of the term "recognize" "fall along a spectrum that ranges from a factual end (acknowledgement of the existence of something) to a normative end (acknowledgement of the validity or legality of something)" and noted that the former "would appear to require, at a minimum, that WTO Members are aware, or have reason to expect, that the international body in question is engaged in standardization activities".<sup>204</sup>

135. Regarding the requirement in Annex 1.4 of the TBT Agreement that the membership in an international standardizing body must be "open to the relevant bodies of at least all Members", the Appellate Body noted that:

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<sup>200</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 350.

<sup>201</sup> Appellate Body Report, *US – Tuna II (Mexico)*, paras. 351-353.

<sup>202</sup> Appellate Body Report, *US – Tuna II (Mexico)*, paras. 354-356.

<sup>203</sup> Appellate Body Report, *US – Tuna II (Mexico)*, paras. 357-359.

<sup>204</sup> Appellate Body Report, *US – Tuna II (Mexico)*, paras. 361-362.

"The term 'open' is defined as 'accessible or available without hindrance', 'not confined or limited to a few; generally accessible or available'. Thus, a body will be open if membership to the body is not restricted. It will not be open if membership is *a priori* limited to the relevant bodies of only some WTO Members."<sup>205</sup>

136. With reference to the TBT Committee Decision, which it considered to be a "subsequent agreement" within the meaning of Article 31(3)(a) of the Vienna Convention<sup>206</sup>, the Appellate Body additionally clarified that:

"[I]n order for a standardizing body to be considered 'international' for the purposes of the *TBT Agreement*, it is not sufficient for the body to be open, or have been open, at a particular point in time. Rather, the body must be open 'at every stage of standards development'.

Moreover, the TBT Committee Decision clarifies that a standardizing body must be open 'on a non-discriminatory basis'. Thus, provisions for accession that *de jure* or *de facto* disadvantage the relevant bodies of some Members as compared to other Members would tend to indicate that a body is not an 'international' standardizing body for the purposes of the *TBT Agreement*."<sup>207</sup>

137. In applying this interpretation of the terms "international standard" to the case at hand, the Appellate Body in *US – Tuna II (Mexico)* concluded that the Panel had erred in finding that the Agreement on the International Dolphin Conservation Program (AIDCP) was open to the relevant bodies of at least all Members, on the ground that the invitation to accede to the AIDCP was not issued automatically to a WTO Member interested in joining but required instead a decision by consensus of the parties to the AIDCP.<sup>208</sup> The Appellate Body also considered that the Panel had erred in finding that it had to consider whether the AIDCP standard was adopted by an international standardizing "organization", rather than by an international standardizing "body".<sup>209</sup>

138. In *EC – Sardines*, the Appellate Body upheld the Panel's conclusion that even if not adopted by consensus, a standard adopted by a "recognized body" of the international standardization community can constitute a "relevant international standard".<sup>210</sup> The Appellate Body agreed with the following interpretation by the Panel of the last two sentences of the Explanatory note to the definition of the term "standard" contained in Annex 1.2:

"The first sentence reiterates the norm of the international standardization community that standards are prepared on the basis of consensus. The following sentence, however, acknowledges that consensus may not always be achieved and that international standards that were not adopted by consensus are within the scope of the TBT Agreement. This provision therefore confirms that even if not adopted by consensus, an international standard can constitute a relevant international standard."<sup>211</sup>

139. Based on its own textual interpretation of the Explanatory note to the definition of the term "standard" contained in Annex 1.2, the Appellate Body considered that consensus is not required for standards adopted by the international standardizing community.<sup>212</sup> The Appellate Body also found that the Panel's interpretation gave effect to the chapeau of Annex 1 to the TBT Agreement, which provides that the terms defined in Annex 1 apply for the purposes of the TBT Agreement if their definitions *depart* from those in the ISO/IEC Guide 2:1991. The Appellate Body observed that, as the definition of a "standard" in the ISO/IEC Guide includes a consensus requirement, "the *omission* of a consensus requirement in the definition of a "standard" in Annex 1.2 of the *TBT Agreement* was

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<sup>205</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 364.

<sup>206</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 372.

<sup>207</sup> Appellate Body Report, *US – Tuna II (Mexico)*, paras. 374-375.

<sup>208</sup> Appellate Body Report, *US – Tuna II (Mexico)*, paras. 398-399.

<sup>209</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 395.

<sup>210</sup> Appellate Body Report, *EC – Sardines*, para. 227.

<sup>211</sup> Panel Report, *EC – Sardines*, para. 7.90 and fn 86.

<sup>212</sup> Appellate Body Report, *EC – Sardines*, paras. 222-223.



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 effect to this choice".<sup>213</sup>

#### 1.5.2.2 "Relevant"

140. In *EC – Sardines*, the Panel adopted the following analysis of whether the standard at issue in that dispute (Codex Stan 94) was a "relevant" international standard:

"Having determined that Codex Stan 94 is an international standard, the analysis turns to whether Codex Stan 94 is a 'relevant' international standard in respect of the EC Regulation. We note that the ordinary meaning of the term 'relevant' is 'bearing upon or relating to the matter in hand; pertinent'. Based on the ordinary meaning, Codex Stan 94 must bear upon, relate to or be pertinent to the EC Regulation for it to be a relevant international standard."<sup>214</sup>

141. Given that both the EC Regulation and Codex Stan 94 dealt with the same product, namely preserved sardines, the Panel in *EC – Sardines* found that Codex Stan 94 was a relevant international standard.<sup>215</sup> The Appellate Body agreed with the Panel's interpretation of the ordinary meaning of the term "relevant" and its conclusion that that Codex Stan 94 was a "relevant international standard" for purposes of Article 2.4 of the TBT Agreement in that dispute.<sup>216</sup>

142. In *US – COOL*, the Panel noted the parties' disagreement on whether CODEX-STAN 1-1985 was a "relevant" international standard within the meaning of Article 2.4 and observed:

"In this context, we also recall that the SPS Agreement recognizes the relevance of the Codex Alimentarius Commission by acknowledging that for food safety, international standards, guidelines and recommendations are the ones established by the Codex Alimentarius Commission. We also recognize that CODEX plays a crucial role in food safety and quality."<sup>217</sup>

143. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel agreed with the Appellate Body's narrow approach to "relevant" for purposes of Article 2.4, and applied it to the standards at issue:

"The Panel agrees with this interpretation and considers that it reflects a narrow approach to 'relevant' by linking it directly to the challenged aspect of the measure at issue. Thus, the 'matter' that a standard 'bears upon or relates to' is the challenged prescription or requirement itself, not just the product scope or general subject-matter of the measure at issue.

Applying this interpretation to the case at hand, the Panel considers that the relevance of the four ISO standards for the purposes of the claim under Article 2.4 is not determined by the fact that they apply to biofuel which is the product at issue or that they deal with sustainability issues. Moreover, their relevance is not determined by the fact that these standards apply to aspects of the EU Biofuels regime that are not challenged in this proceeding, or that they contain provisions that define or directly mention ILUC. Instead, their relevance depends on whether they address that which the Panel understands is being addressed by the challenged measure, namely the taking into account of ILUC effects. As the Panel has found above, this is not the case as the standards make clear that they do not cover ILUC.

In light of this, the Panel finds that the four ISO standards are not 'relevant' international standards for the purposes of Malaysia's claim under Article 2.4. This claim must therefore fail."<sup>218</sup>

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<sup>213</sup> Appellate Body Report, *EC – Sardines*, paras. 224–225.

<sup>214</sup> Panel Report, *EC – Sardines*, para. 7.68.

<sup>215</sup> Panel Report, *EC – Sardines*, paras. 7.69–7.70.

<sup>216</sup> Appellate Body Report, *EC – Sardines*, paras. 228–233.

<sup>217</sup> Panel Report, *US – COOL*, para. 7.729.

<sup>218</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.184–7.186.



144. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel underlined that the absence of international harmonization does not stop WTO members from regulating the relevant area:

"Second, as the findings in this section confirm, the absence of international harmonization does not mean that countries are prevented from taking action and developing their own approaches to issues of concern. However, the fact that such national approaches do not fall under the disciplines of international standards does not mean that they do not fall under any WTO disciplines in terms of the scientific and evidentiary basis of the measure. In particular, Articles 2.2 and 2.1 which Malaysia has also raised in this proceeding, impose their own disciplines on technical regulations.

Third, the Panel observes that its findings under Article 2.4 are based on international standards that currently exist. The Panel agrees with a previous panel's view that Article 2.4 is 'not a static obligation and that there is an ongoing obligation to reassess technical regulations in light of new international standards that are adopted or revised', and that the obligation in Article 2.3 of the TBT Agreement contextually supports that view."<sup>219</sup>

### 1.5.3 "Shall use them ... as a basis for"

145. In *EC – Sardines*, the Appellate Body considered the European Union's argument on appeal concerning the finding by the Panel that the relevant international standard (Codex Stan 94) was not used as a basis for the technical regulation at issue (EC Regulation). The European Union argued on appeal that a rational relationship between an international standard and a technical regulation is sufficient to conclude that the former is used "as a basis for" the latter.

146. In the course of its analysis, the Panel had noted that Article 2.4 states that Members "shall use" international standards "as a basis" for their technical regulation and considered that the word "shall" denotes a requirement that is obligatory in nature and that goes beyond mere encouragement.<sup>220</sup> While this statement by the Panel was not appealed, the Appellate Body recalled, at the outset of its own analysis, that "Article 2.4 of the *TBT Agreement* requires Members to use relevant international standards 'as a basis for' their technical regulations under certain circumstances".<sup>221</sup> In reviewing the analysis conducted by the Panel, the Appellate Body agreed with the Panel's conclusion that an international standard is used "as a basis for" a technical regulation "when it is used as the principal constituent or fundamental principle for the purpose of enacting the technical regulation".<sup>222</sup> Having noted other similar dictionary definitions of the word "basis", the Appellate Body observed:

"From these various definitions, we would highlight the similar terms 'principal constituent', 'fundamental principle', 'main constituent', and 'determining principle' – all of which lend credence to the conclusion that there must be a very strong and very close relationship between two things in order to be able to say that one is 'the basis for' the other."<sup>223</sup>

147. Turning to the European Union's contention, the Appellate Body considered that, while it did not need "to define in general the nature of the relationship that must exist for an international standard to serve 'as a basis for' a technical regulation", there was also no support for the European Union's argument that the existence of a "rational relationship" is the appropriate criterion for determining whether something has been used "as a basis for" something else.<sup>224</sup> The Appellate Body, however, opined as follows:

"In our view, it can certainly be said – at a minimum – that something cannot be considered a 'basis' for something else if the two are *contradictory*. Therefore, under Article 2.4, if the technical regulation and the international standard *contradict* each

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<sup>219</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.188-7.189.

<sup>220</sup> Panel Report, *EC – Sardines*, para. 7.110.

<sup>221</sup> Appellate Body Report, *EC – Sardines*, para. 234.

<sup>222</sup> Appellate Body Report, *EC – Sardines*, paras. 240-245.

<sup>223</sup> Appellate Body Report, *EC – Sardines*, para. 245.

<sup>224</sup> Appellate Body Report, *EC – Sardines*, paras. 247-248.

other, it cannot properly be concluded that the international standard has been used 'as a basis for' the technical regulation."<sup>225</sup>

148. With regard to the requirement in Article 2.4 that Members use relevant international standards "or the relevant parts of them" as a basis for their technical regulations, the Appellate Body further observed:

"In our view, the phrase '*relevant parts of them*' defines the appropriate focus of an analysis to determine whether a relevant international standard has been used 'as a basis for' a technical regulation. In other words, the examination must be limited to those parts of the relevant international standards that relate to the subject-matter of the challenged prescriptions or requirements. In addition, the examination must be broad enough to address all of those relevant parts; the regulating Member is not permitted to select only *some* of the 'relevant parts' of an international standard. If a part is relevant, then it must be one of the elements which is a basis for the technical regulation."<sup>226</sup>

### **1.5.4 Ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued**

#### **1.5.4.1 "Legitimate objectives pursued"**

149. In *EC – Sardines*, the Panel noted that the "'legitimate objectives' referred to in Article 2.4 must be interpreted in the context of Article 2.2", which provides an illustrative, open list of objectives considered "legitimate".<sup>227</sup> The Panel then considered that, while "it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them", panels are required to determine the legitimacy of those objectives.<sup>228</sup> The Appellate Body agreed with the Panel that "the 'legitimate objectives' referred to in Article 2.4 must be interpreted in the context of Article 2.2" and also shared the Panel's view that Article 2.4 implies that there must be an examination and a determination on the legitimacy of the objectives of the measure.<sup>229</sup>

#### **1.5.4.2 "Ineffective or inappropriate means"**

150. In considering the meaning of the terms "ineffective" and "inappropriate", the Panel in *EC – Sardines* noted that "ineffective" refers to something which is not "having the function of accomplishing", "having a result", or "brought to bear", whereas "inappropriate" refers to something which is not "specially suitable", "proper", or "fitting".<sup>230</sup> The Panel thus held that in the context of Article 2.4 of the TBT Agreement:

"[A]n ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not specially suitable for the fulfilment of the legitimate objective pursued. An inappropriate means will not necessarily be an ineffective means and vice versa. That is, whereas it may not be *specially suitable* for the fulfilment of the legitimate objective, an inappropriate means may nevertheless be *effective* in fulfilling that objective, despite its 'unsuitability'. Conversely, when a relevant international standard is found to be an effective means, it does not automatically follow that it is also an appropriate means. The question of effectiveness bears upon the *results* of the means employed, whereas the question of appropriateness relates more to the *nature* of the means employed."<sup>231</sup>

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<sup>225</sup> Appellate Body Report, *EC – Sardines*, para. 248.

<sup>226</sup> Appellate Body Report, *EC – Sardines*, para. 250.

<sup>227</sup> Panel Report, *EC – Sardines*, para. 7.118.

<sup>228</sup> Panel Report, *EC – Sardines*, paras. 7.120-7.121.

<sup>229</sup> Appellate Body Report, *EC – Sardines*, para. 286.

<sup>230</sup> Panel Report, *EC – Sardines*, para. 7.116.

<sup>231</sup> Panel Report, *EC – Sardines*, para. 7.116.

151. The Appellate Body agreed with the Panel's interpretation of the terms "ineffective" and "inappropriate" and "that it is conceptually possible that a measure could be effective but inappropriate, or appropriate but ineffective".<sup>232</sup>

152. In the context of its assessment of whether the relevant international standard (CODEX-STAN 1-1985) was an effective and appropriate means of fulfilling the objective pursued by the United States, the Panel in *US – COOL* followed the reasoning of the Panel in *EC – Sardines* and considered that "CODEX-STAN 1-1985 would be *effective* if it had the capacity to accomplish the objective, and it would be *appropriate* if it were suitable for the fulfilment of the objective".<sup>233</sup> Applying this analytical framework, the Panel found that CODEX-STAN 1-1985 was *ineffective* and *inappropriate* for the fulfilment of the specific objective as defined by the United States because it did not "have the function or capacity of accomplishing the objective of providing information to consumers about the countries in which an animal was born, raised and slaughtered".<sup>234</sup>

#### 1.5.4.3 Burden of proof

153. In *EC – Sardines*, the Appellate Body disagreed with the Panel that the burden of proof to demonstrate that the relevant international standard is an "ineffective or inappropriate" means to fulfil the "legitimate objectives" pursued rests with the respondent.<sup>235</sup> The Appellate Body criticised the Panel for not following the Appellate Body's reasoning in *EC – Hormones* on the allocation of the burden of proof under Article 3.3 of the SPS Agreement:

"Given the conceptual similarities between, on the one hand, Articles 3.1 and 3.3 of the *SPS Agreement* and, on the other hand, Article 2.4 of the *TBT Agreement*, we see no reason why the Panel should not have relied on the principle we articulated in *EC – Hormones* to determine the allocation of the burden of proof under Article 2.4 of the *TBT Agreement*. In *EC – Hormones*, we found that a 'general rule-exception' relationship between Articles 3.1 and 3.3 of the *SPS Agreement* does not exist, with the consequence that the complainant had to establish a case of inconsistency with *both* Articles 3.1 and 3.3. We reached this conclusion as a consequence of our finding there that 'Article 3.1 of the *SPS Agreement* simply excludes from its scope of application the kinds of situations covered by Article 3.3 of that Agreement'. Similarly, the circumstances envisaged in the second part of Article 2.4 are excluded from the scope of application of the first part of Article 2.4. Accordingly, as with Articles 3.1 and 3.3 of the *SPS Agreement*, there is no 'general rule-exception' relationship between the first and the second parts of Article 2.4."<sup>236</sup>

154. The Appellate Body therefore found that, in the case at hand, it was for Peru – "as the complaining Member seeking a ruling on the inconsistency with Article 2.4 of the *TBT Agreement* of the measure applied by the European Communities" – to bear the burden of establishing that Codex Stan 94 had not been used "as a basis for" the EC Regulation, as well as establishing that Codex Stan 94 was effective and appropriate to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation.<sup>237</sup>

## 1.6 Article 2.5

### 1.6.1 General

155. The Panel in *US – Clove Cigarettes* noted that:

"Article 2.5 contains two sentences: a first sentence regarding the explanation that Members are to provide, at the request of another Member, about the justification for their technical regulations; and a second sentence, which establishes a rebuttable presumption of compliance with the first sentence of Article 2.2 for those technical

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<sup>232</sup> Appellate Body Report, *EC – Sardines*, paras. 285 and 289.

<sup>233</sup> Panel Report, *US – COOL*, para. 7.732.

<sup>234</sup> Panel Report, *US – COOL*, paras. 7.734-7.735.

<sup>235</sup> Appellate Body Report, *EC – Sardines*, para. 282.

<sup>236</sup> Appellate Body Report, *EC – Sardines*, para. 275 (referring to Appellate Body Report, *EC – Hormones*, para. 104).

<sup>237</sup> Appellate Body Report, *EC – Sardines*, para. 282.

regulations that are prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in Article 2.2, and that are in accordance with relevant international standards."<sup>238</sup>

### 1.6.2 First sentence

156. The Appellate Body in *EC – Sardines* observed that Article 2.5 of the TBT Agreement "establishes a *compulsory* mechanism requiring the supplying of information by the regulating Member".<sup>239</sup>

157. The Panel in *US – Clove Cigarettes* considered that the first sentence of Article 2.5 includes the following four elements: "(i) the Member in question is 'preparing, adopting or applying a technical regulation'; (ii) this measure 'may have a significant effect on trade of other Members'; (iii) there is a 'request of another Member'; and (iv) the Member in question is to 'explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4' of Article 2".<sup>240</sup> In the course of its analysis of Indonesia's claim under Article 2.5, the Panel found that "Indonesia did *not* make a request pursuant to the first sentence of Article 2.5 of the *TBT Agreement*".<sup>241</sup> The Panel thus concluded that one of the necessary elements of Article 2.5 was missing, and rejected Indonesia's claim.<sup>242</sup>

158. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel observed that the statements made by Malaysia at the TBT Committee with regard to the EU's measure were more in the form of expressing concerns than seeking an explanation, and expressed doubt as to whether such statements amounted to a "request" within the meaning of Article 2.5.<sup>243</sup>

159. The Panel in *EU and Certain Member States – Palm Oil (Malaysia)* explained that "the procedural obligation in Article 2.5 is not an obligation to *justify* the measures to the satisfaction of the complainants or the wider membership – it is a procedural obligation to 'explain the justification' so as to enable other Members to better assess, for themselves, whether the technical regulation is consistent with Articles 2.2, 2.3 and 2.4."<sup>244</sup>

160. The Panel *EU and Certain Member States – Palm Oil (Malaysia)* reasoned that "the explanation of a technical regulation's 'objective' would appear to be central to understanding the reasons and rationale for the challenged measures, and ultimately its justification under paragraphs 2 to 4 of Article 2."<sup>245</sup>

161. The Panel *EU and Certain Member States – Palm Oil (Malaysia)* underlined the case-by-case nature of the inquiry that should be conducted under Article 2.5, first sentence:

"[T]he assessment of the adequacy of the form and content of a regulating Member's 'explanation of the justification' of a technical regulation 'in terms of the provisions of paragraphs 2 to 4' of Article 2 must necessarily be conducted on a case-by-case basis and will necessarily be informed by reference to the form and content of the request(s) that triggered the explanation. In this case, Malaysia's various statements to the TBT Committee did not specify in respect of which precise aspects of 'the provisions of paragraphs 2 to 4', if any, an explanation of the justification of the measures was being requested. In these circumstances, it would lack even-handedness to subject the European Union to an asymmetrically strict and formalistic standard for assessing whether the justification it provided is formulated 'in terms of the provisions of paragraphs 2 to 4' of Article 2."<sup>246</sup>

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<sup>238</sup> Panel Report, *US – Clove Cigarettes*, para. 7.447.

<sup>239</sup> Appellate Body Report, *EC – Sardines*, para. 277.

<sup>240</sup> Panel Report, *US – Clove Cigarettes*, para. 7.449.

<sup>241</sup> Panel Report, *US – Clove Cigarettes*, para. 7.460.

<sup>242</sup> Panel Report, *US – Clove Cigarettes*, paras. 7.461 and 7.463.

<sup>243</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, paras. 7.661-7.664.

<sup>244</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.673.

<sup>245</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.676. See also *ibid.* para. 7.677.

<sup>246</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.678.

### 1.6.3 Second sentence

1.1. In *Australia – Tobacco Plain Packaging*, the Panel considered in some detail the meaning of the second sentence of Article 2.5.<sup>247</sup> The Panel noted that, although Articles 2.4 and 2.5 of the TBT Agreement are similarly worded, the latter is narrower in scope than the former (since it only applies to technical regulations that pursue one of the legitimate objectives explicitly mentioned in Article 2.2)<sup>248</sup>, and also requires a closer connection between the measure at issue and the relevant international standard (since Article 2.5 requires that the measure at issue be "in accordance with" the relevant international standard, rather than merely relying on "the relevant parts" thereof).<sup>249</sup>

1.2. Despite these differences, the Panel held the guidance provided in previous cases concerning the meaning of the term "international standard" as used in Article 2.4 of the TBT Agreement would be "equally relevant" to the meaning of the term as used in Article 2.5.<sup>250</sup> Thus, according to the Panel, for an instrument to be considered an "international standard" under Article 2.5, it would need to (a) constitute a "standard" under Annex 1.2 of the TBT Agreement, and (b) be "international", a condition primarily predicated upon whether it was adopted by an "international standardizing body".<sup>251</sup>

1.3. With respect to point (a), the Panel emphasized that a clear and distinctive identification of all components of the instrument that comprise the standard is necessary to allow an assessment of whether a "standard" exists and whether a challenged measure is "in accordance with" it.<sup>252</sup>

1.4. The Panel also noted that the burden rests on the party invoking the presumption to demonstrate that all of the conditions under the second sentence of Article 2.5 are satisfied.<sup>253</sup>

### 1.6.4 Relationship with Articles 2.1 and 2.2

1.5. In *EU and Certain Member States – Palm Oil (Malaysia)*, the Panel explained the relationship between Article 2.5 on the one hand and Articles 2.1 and 2.2 on the other, as follows:

"[The Panel's] findings on whether a given measure is 'trade-restrictive' under Article 2.2 and/or have a 'detrimental impact' on imports under Article 2.1 would in principle be highly relevant to, if not determinative of, the question of whether the same measure 'may have a significant effect on the trade of other Members' within the meaning of Article 2.5."<sup>254</sup>

### 1.7 Article 2.6

162. In *EC – Sardines*, the Panel referred to Article 2.6 as providing contextual support for its conclusion that Article 2.4 applied to existing technical regulations:

"Article 2.6 provides another contextual support. It states that Members are to participate in preparing international standards by the international standardizing bodies for products which they have either '*adopted*, or expect to adopt technical regulations.' Those Members that have in place a technical regulation for a certain product are expected to participate in the development of a relevant international standard."<sup>255</sup>

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<sup>247</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.270-7.289.

<sup>248</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.272 and 7.275.

<sup>249</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.273 and 7.275.

<sup>250</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.288.

<sup>251</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.286.

<sup>252</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.295.

<sup>253</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.288.

<sup>254</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.650.

<sup>255</sup> Panel Report, *EC – Sardines*, para. 7.76.

## 1.8 Article 2.8

### 1.8.1 Object and purpose

163. The Panel in *US – Clove Cigarettes* considered that the object and purpose of Article 2.8 is to avoid the creation of unnecessary obstacles to trade by requiring that product requirements be laid down in "functional" terms, wherever appropriate:

"[T]he object and purpose of Article 2.8 is to avoid the creation of unnecessary obstacles to trade by requiring that product requirements be laid down in functional terms wherever appropriate. For example, an ISO/IEC Directive explains that:

'Whenever possible, requirements shall be expressed in terms of performance rather than design or descriptive characteristics. This approach leaves maximum freedom to technical development. Primarily those characteristics shall be included that are suitable for worldwide (universal) acceptance.'

Along the same lines, a Decision taken by the TBT Committee in 2000 reflects the understanding of WTO Members that:

'In order to serve the interests of the WTO membership in facilitating international trade and preventing unnecessary trade barriers, international standards need to be relevant and to effectively respond to regulatory and market needs, as well as scientific and technological developments in various countries. They should not distort the global market, have adverse effects on fair competition, or stifle innovation and technological development. In addition, they should not give preference to the characteristics or requirements of specific countries or regions when different needs or interests exist in other countries or regions. Whenever possible, international standards should be performance based rather than based on design or descriptive characteristics.'"<sup>256</sup>

164. The Panel in *EU and Certain Member States – Palm Oil (Malaysia)* pointed out that "the term 'product requirements' in Article 2.8 to refer to the 'product characteristics' laid down in a technical regulation."<sup>257</sup>

165. The Panel in *EU and Certain Member States – Palm Oil (Malaysia)* explained the link between the obligation under Article 2.8 and relevant international standards, as follows:

"While Article 2.8 is not about international standards *per se*, the Panel accepts that a complainant may establish a *prima facie* case under Article 2.8 by referring to relevant international standards as an argument for, and evidence of, why it is appropriate to specify a particular product characteristic in terms of performance."<sup>258</sup>

### 1.8.2 "Wherever appropriate"

166. In *US – Clove Cigarettes*, the United States (respondent) did not dispute that the technical regulation at issue was specified in terms of "design or descriptive characteristics", and not in terms of "performance". The Panel considered whether it would be "appropriate" to specify the ban on clove cigarettes imposed by that technical regulation in terms of "performance", rather than in terms of "design or descriptive characteristics". Relying on the ordinary meaning of the word "appropriate", as reflected in prior case law, the Panel considered that the relevant question before it was "whether Indonesia ha[d] demonstrated that it would be 'proper', 'fitting', and 'suitable' to formulate the technical regulation in Section 907(a)(1)(A) in terms of 'performance'".<sup>259</sup> The Panel ultimately

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<sup>256</sup> Panel Report, *US – Clove Cigarettes*, paras. 7.481-7.482.

<sup>257</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.693.

<sup>258</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.701.

<sup>259</sup> Panel Report, *US – Clove Cigarettes*, para. 7.491.



rejected Indonesia's claim under Article 2.8 because Indonesia had failed to demonstrate that it was "appropriate" to formulate the technical regulation in question in terms of "performance".<sup>260</sup>

## **1.9 Article 2.9**

### **1.9.1 "May have a significant effect on trade of other Members"**

167. In *US – Clove Cigarettes*, the Panel concluded that the technical regulation had "a significant effect" on Indonesia's trade in clove cigarettes because it prohibited the importation of those cigarettes into the United States. In reaching that conclusion, the Panel provided the following interpretation of the phrase "may have a significant effect on trade of other Members":

"We observe that the wording of this second condition for the applicability of Article 2.9 is that the technical regulation '*may* have a significant effect on trade of other Members' as opposed to '*will* have a significant effect' or '*has* a significant effect'. '*May*' is used to express a possibility as opposed to a certainty. We therefore interpret these terms to mean that Article 2.9 of the *TBT Agreement* does not require proving actual trade effects. Rather, this condition encompasses situations in which a technical regulation *may* have a significant effect on trade of other Members.

We further observe that Article 2.9 of the *TBT Agreement* refers to a 'significant' effect. Significant means 'sufficiently great or important to be worthy of attention; noteworthy'. We thus agree with the United States that a 'significant effect' encompasses all non *de minimis* effects on trade."<sup>261</sup>

### **1.9.2 Article 2.9.2**

168. In *US – Clove Cigarettes*, the Panel found that the United States had acted inconsistently with Article 2.9.2 by failing to notify the technical regulation at issue.<sup>262</sup> In the course of its analysis, the Panel made the following observations regarding the scope of the obligation under Article 2.9.2:

"We note that Article 2.9.2, unlike Article 2.9.3, does not link the obligation to notify to the request of a Member.

We also note that Article 2.9.2 of the *TBT Agreement* applies to 'proposed' technical regulations. Along the same lines, the French version of Article 2.9.2 of the *TBT Agreement* uses the terms '*le règlement technique projeté*', and the Spanish version of Article 2.9.2 of the *TBT Agreement* uses the terms '*el reglamento técnico en proyecto*'. 'To propose' can be defined as 'to put forward [a technical regulation] for consideration by others'. Article 2.9.2 of the *TBT Agreement* therefore applies to what we would refer to as legal instruments falling within the definition of a technical regulation that would still be in 'draft' form, i.e., not yet adopted or in force. The language of the second sentence of Article 2.9.2 of the *TBT Agreement* reinforces this conclusion as it indicates that the notification must take place 'at an early appropriate stage, when amendments can still be introduced and comments taken into account'. Therefore, since the provision foresees the possibility of amendments and comments, the technical regulation at issue cannot have been enacted or adopted before the notification takes place. In our view, Article 2.9.2 (as it is also the case with Article 5.6.2 for conformity assessment procedures) is at the core of the *TBT Agreement's* transparency provisions: the very purpose of the notification is to provide opportunity for comment before the proposed measure enters into force, when there is time for changes to be made before 'it is too late'."<sup>263</sup>

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<sup>260</sup> Panel Report, *US – Clove Cigarettes*, para. 7.469 and 7.485-7.497.

<sup>261</sup> Panel Report, *US – Clove Cigarettes*, paras. 7.529-7.530.

<sup>262</sup> Panel Report, *US – Clove Cigarettes*, para. 7.542.

<sup>263</sup> Panel Report, *US – Clove Cigarettes*, paras. 7.535-7.536. See also Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.876.

169. The Panel in *EU and Certain Member States – Palm Oil (Malaysia)* stated that the fact that the relevant information is available in the public domain is insufficient to discharge the obligation under Article 2.9.2.<sup>264</sup>

### 1.9.3 Article 2.9.3

170. In *US – Clove Cigarettes*, the Panel rejected a claim under Article 2.9.3 on the grounds that while there was a request to provide particulars or copies of the technical regulation, it was not made until after the technical regulation had been enacted. Accordingly, the Panel found that the situation fell outside the scope of Article 2.9.3, which applies only to "proposed" technical regulations:

"We note that, unlike the case of Article 2.9.2 of the *TBT Agreement*, the obligation to provide particulars or copies of a proposed technical regulation imposed by Article 2.9.3 of the *TBT Agreement* is only triggered by the request of a Member. However, as is the case with Article 2.9.2 of the *TBT Agreement*, such an obligation is limited to 'proposed technical regulations', i.e., technical regulations which are still in draft form and thus, as explained above, amendments can still be introduced and comments taken into account."<sup>265</sup>

### 1.9.4 Article 2.9.4

171. The Panel in *EU and Certain Member States – Palm Oil (Malaysia)* explained the linkage between the obligations in Article 2.9.2 and 2.9.4, in terms of chronology of relevant events, as follows:

"The Panel notes that Article 2.9.4 concerns a commenting period for proposed technical regulations. The sequence of obligations in Articles 2.9.2 (multilateral notification of a complete draft technical regulation) and 2.9.4 (the commenting process foreshadowed in Article 2.9.2) indicates that such a commenting period should take place after a complete draft technical regulation has been notified and before that draft is adopted and published pursuant to Article 2.11 of the TBT Agreement. This stems from the fact that the obligation to notify in Article 2.9.2 is concerned with and impacts the obligation to provide for a commenting period under Article 2.9.4. Thus, not notifying a draft technical regulation at an early stage, in the manner required by Article 2.9.2, impacts a Member's ability to discharge its obligations under Article 2.9.4."<sup>266</sup>

## 1.10 Article 2.10

### 1.10.1 Relationship with Article 2.9

172. In *US – Clove Cigarettes*, the Panel observed that "Article 2.10 of the *TBT Agreement* allows WTO Members to omit the requirements imposed by Article 2.9 of the *TBT Agreement* with respect to proposed technical regulations, where certain urgent problems arise or threaten to arise".<sup>267</sup> The Panel further noted that:

"[T]he obligations under Article 2.10 of the *TBT Agreement* are only applicable when a Member *omitted* the steps enumerated in Article 2.9 of the *TBT Agreement* because 'urgent problems of safety, health, environmental protection or national security arise or threaten to arise'. In our view, the fact that Article 2.10 of the *TBT Agreement* only applies when a Member is departing from the general obligations established in Article 2.9 of the *TBT Agreement* entails that these two provisions have two distinct and separate scopes. Indeed, we see no situation in which a WTO Member's actions would fall within the scope of both obligations at the same time. Either the Member in question follows the general requirements under Article 2.9 of the *TBT Agreement*, or it decides

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<sup>264</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.720.

<sup>265</sup> Panel Report, *US – Clove Cigarettes*, para. 7.545. See also *ibid.* paras. 7.547-7.549.

<sup>266</sup> Panel Report, *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.729.

<sup>267</sup> Panel Report, *US – Clove Cigarettes*, para. 7.505.



to omit those requirements owing to any of the listed 'urgent problems' described in Article 2.10 of the *TBT Agreement*."<sup>268</sup>

### 1.11 Article 2.12

173. In *US – Clove Cigarettes*, the Appellate Body agreed with the Panel that paragraph 5.2 of the Doha Ministerial Decision constitutes a subsequent agreement between the parties, within the meaning of Article 31(3)(a) of the Vienna Convention, on the interpretation of the term "reasonable interval" in Article 2.12 of the TBT Agreement.<sup>269</sup> The Appellate Body thus interpreted Article 2.12, taking into account paragraph 5.2 of the Doha Ministerial Declaration:

"Thus, we consider that, taking into account the interpretative clarification provided by paragraph 5.2 of the Doha Ministerial Decision, Article 2.12 of the *TBT Agreement* establishes a rule that 'normally' producers in exporting Members require a period of 'not less than 6 months' to adapt their products or production methods to the requirements of an importing Member's technical regulation."<sup>270</sup>

174. With regard to the interests of the importing Member, the Appellate Body observed:

"[T]he Doha Ministerial Decision tempers the obligation to provide a 'reasonable interval' of not less than six months between the publication and the entry into force of a technical regulation by stipulating that this obligation applies 'except when this would be ineffective in fulfilling the legitimate objectives pursued' by the technical regulation. Thus, while Article 2.12 of the TBT Agreement imposes an obligation on importing Members to provide a 'reasonable interval' of not less than six months between the publication and entry into force of a technical regulation, an importing Member may depart from this obligation if this interval 'would be ineffective to fulfil the legitimate objectives pursued' by the technical regulation."<sup>271</sup>

175. Regarding the burden of proof under Article 2.12, the Appellate Body explained:

"In sum, under Article 2.12 of the *TBT Agreement*, as clarified by paragraph 5.2 of the Doha Ministerial Decision, a complaining Member is required to establish a *prima facie* case that the responding Member has failed to allow for a period of at least six months between the publication and the entry into force of the technical regulation at issue. If the complaining Member establishes such a *prima facie* case, the burden rests on the responding Member that has allowed for an interval of less than six months between the publication and the entry into force of its technical regulation to establish *either*: (i) that the 'urgent circumstances' referred to in Article 2.10 of the *TBT Agreement* surrounded the adoption of the technical regulation at issue; (ii) that producers of the complaining Member could have adapted to the requirements of the technical regulation at issue within the shorter interval that it allowed; *or* (iii) that a period of 'not less than' six months would be ineffective to fulfil the legitimate objectives of its technical regulation."<sup>272</sup>

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<sup>268</sup> Panel Report, *US – Clove Cigarettes*, para. 7.502.

<sup>269</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 268.

<sup>270</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 272.

<sup>271</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 275.

<sup>272</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 290.