INTERNATIONAL AND REGIONAL TRADE LAW: THE LAW OF THE WORLD TRADE ORGANIZATION

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Unit IX: Technical Barriers to Trade (TBT)

International and Regional Trade Law:
The Law of World Trade Organization

Unit IX: Technical Barriers to Trade (TBT)

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Supplementary Reading

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Michael J. Trebilcock, Robert Howse, & Antonia Eliasson, The Regulation of International Trade, 4th ed. 2013, 309-332.

John H. Jackson, William J. Davey, Alan O. Sykes, International Economic Relations: Cases, Materials, and Text on the National and International Regulation of Transnational Economic Relations, 6th ed. 2013, 697-791.

John H. Jackson, The World Trading System, 2nd ed. 1997, 221-224.

1. Introduction

1-1. Overview

Technical Information on Technical barriers to trade: Technical Explanation

http://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm

WHY AN AGREEMENT?

High number of technical regulations and standards

In recent years, the number of technical regulations and standards adopted by countries has grown significantly. Increased regulatory policy can be seen as the result of higher standards of living worldwide, which have boosted consumers' demand for safe and high-quality products, and of growing problems of water, air and soil pollution which have encouraged modern societies to explore environmentally-friendly products.

Impact on international trade

Although it is difficult to give a precise estimate of the impact on international trade of the need to comply with different foreign technical regulations and standards, it certainly involves significant costs for producers and exporters. In general, these costs arise from the translation of foreign regulations, hiring of technical experts to explain foreign regulations, and adjustment of production facilities to comply with the requirements. In addition, there is the need to prove that the exported product meets the foreign regulations. The high costs involved may discourage manufacturers from trying to sell abroad. In the absence of international disciplines, a risk exists that technical regulations and standards could be adopted and applied solely to protect domestic industries.

From the Tokyo Round Standards Code to the WTO TBT Agreement

The provisions of the GATT 1947 contained only a general reference to technical regulations and standards in Articles III, XI and XX. A GATT working group, set up to evaluate the impact of non-tariff barriers in international trade, concluded that technical barriers were the largest category of non-tariff measures faced by exporters. After years of negotiations at the end of the Tokyo Round in 1979, 32 GATT Contracting Parties signed the plurilateral Agreement on Technical Barriers to Trade (TBT). The Standards Code, as the Agreement was called, laid down the rules for preparation, adoption and application of technical regulations, standards and conformity assessment procedures. The new WTO Agreement on Technical Barriers to Trade, or TBT Agreement, has strengthened and clarified the provisions of the Tokyo Round Standards Code. The TBT Agreement, negotiated during the Uruguay Round is an integral part of the WTO

Agreement. Before examining the Agreement in detail, it is necessary to define the meaning of "technical regulations", "standards" and "conformity assessment procedures".

DEFINITIONS

Technical regulations and standards in the TBT Agreement

Technical regulations and standards set out specific characteristics of a product — such as its size, shape, design, functions and performance, or the way it is labelled or packaged before it is put on sale. In certain cases, the way a product is produced can affect these characteristics, and it may then prove more appropriate to draft technical regulations and standards in terms of a product's process and production methods rather than its characteristics *per se*. The TBT Agreement makes allowance for both approaches in the way it defines technical regulations and standards (Annex 1).

Difference between a technical regulation and a standard

The difference between a standard and a technical regulation lies in compliance. While conformity with standards is voluntary, technical regulations are by nature mandatory. They have different implications for international trade. If an imported product does not fulfil the requirements of a technical regulation, it will not be allowed to be put on sale. In case of standards, non-complying imported products will be allowed on the market, but then their market share may be affected if consumers' prefer products that meet local standards such as quality or colour standards for textiles and clothing.

Conformity assessment procedures

Conformity assessment procedures are technical procedures — such as testing, verification, inspection and certification — which confirm that products fulfil the requirements laid down in regulations and standards. Generally, exporters bear the cost, if any, of these procedures. Non-transparent and discriminatory conformity assessment procedures can become effective protectionist tools.

OBJECTIVES

Protection of human safety or health

The largest number of technical regulations and standards are adopted to aim at protecting human safety or health. Numerous examples can be given. National regulations that require that motor vehicles be equipped with seat belts to minimise injury in the event of road accidents, or that sockets be manufactured in a way to protect users from electric shocks, fall under the first category. A common example of regulations whose objective is the protection of human health is labelling of cigarettes to indicate that they are harmful to health.

Protection of animal and plant life or health

Regulations that protect animal and plant life or health are very common. They include regulations intended to ensure that animal or plant species endangered by water, air and soil pollution do not become extinct. Some countries, for example require that endangered species of fish reach a certain length before they can be caught.

Protection of the environment

Increased environmental concerns among consumers, due to rising levels of air, water and soil pollution, have led many governments to adopt regulations aimed at protecting the environment. Regulations of this type cover for example, the re-cycling of paper and plastic products, and levels of motor vehicle emissions.

Prevention of deceptive practices

Most of these regulations aim to protect consumers through information, mainly in the form of labelling requirements. Other regulations include classification and definition, packaging requirements, and measurements (size, weight etc.), so as to avoid deceptive practices.

Other objectives

Other objectives of regulations are quality, technical harmonization, or simply trade facilitation. Quality regulations — e.g. those requiring that vegetables and fruits reach a certain size to be marketable — are very common in certain developed countries. Regulations aimed at harmonizing certain sectors, for example that of telecommunications and terminal equipment, are widespread in economically integrated areas such as the European Union and EFTA.

DIVERGENT REGULATIONS — COSTS FOR EXPORTERS

Loss of economies of scale

If a firm must adjust its production facilities to comply with diverse technical requirements in individual markets, production costs per unit are likely to increase. This imposes handicap particularly on small and medium enterprises.

Conformity assessment costs

Compliance with technical regulations generally needs to be confirmed. This may be done through testing, certification or inspection by laboratories or certification bodies, usually at the company's expense.

Information costs

These include the costs of evaluating the technical impact of foreign regulations, translating and disseminating product information, training of experts, etc.

Surprise costs

Exporters are normally at a disadvantage vis-à-vis domestic firms, in terms of adjustments costs, if confronted with new regulations.

THE AGREEMENT: PRINCIPLES

AVOIDANCE OF UNNECESSARY OBSTACLES TO TRADE

What are the sources of technical barriers to trade?

Technical barriers to trade generally result from the preparation, adoption and application of different technical regulations and conformity assessment procedures. If a producer in country A wants to export to country B, he will be obliged to satisfy the technical requirements that apply in country B, with all the financial consequences this entails. Differences between one country and another in their technical regulations and conformity assessment procedures may have legitimate origins such as differences in local tastes or levels of income, as well as geographical or other factors. For example, countries with areas prone to earthquakes might have stricter requirements for building products; others, facing serious air-pollution problems might want to impose lower tolerable levels of automobile emissions. High levels of per capita income in relatively rich countries result in higher demand for high-quality and safe products.

TBT provisions on technical regulations

The TBT Agreement takes into account the existence of legitimate divergences of taste, income, geographical and other factors between countries. For these reasons, the Agreement accords to Members a high degree of flexibility in the preparation, adoption and application of their national technical regulations. The Preamble to the Agreement states that “no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal, and plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate”. However, Members' regulatory flexibility is limited by the requirement that technical regulations “are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to trade”. (Article 2.2).

Avoidance of unnecessary obstacles to trade

For a government, avoiding unnecessary obstacles to trade means that when it is preparing a technical regulation to achieve a certain policy objective - whether protection of human health, safety, the environment, etc - the negotiations shall not be more trade-restrictive than necessary to fulfil the legitimate objective. According to the TBT Agreement, specifying, whenever

appropriate, product regulations in terms of performance rather than design or descriptive characteristics will also help in avoiding unnecessary obstacles to international trade (Article 2.8). For example, a technical regulation on fire-resistant doors should require that the door passes successfully all the necessary tests on fire resistance. Thus it could specify that "the door must be fire resistant with a 30-minute burn through time"; it should not specify how the product must be made, e.g., that "the door must be made of steel, one inch thick". Avoidance of trade obstacles means also that if the circumstances that led a country to adopt technical regulations no longer exist or have changed, or the policy objective pursued can be achieved by an alternative less trade-restrictive measure, they should not be maintained.

When is a technical regulation an unnecessary obstacle to trade?

Unnecessary obstacles to trade can result when (i) a regulation is more restrictive than necessary to achieve a given policy objective, or (ii) when it does not fulfil a legitimate objective. A regulation is more restrictive than necessary when the objective pursued can be achieved through alternative measures which have less trade-restricting effects, taking account of the risks non-fulfilment of the objective would create. Elements that Members can use for risk assessment are: available technical and scientific information, technology or end-uses of the products. Article 2.2 of the Agreement specifies that legitimate objectives include inter alia: national security requirements, prevention of deceptive practices, protection of human health or safety, protection of animal and plant life or health or the environment.

TBT provisions on conformity assessment procedures

The obligation to avoid unnecessary obstacles to trade applies also to conformity assessment procedures. An unnecessary obstacle to trade could result from stricter or more time-consuming procedures than are necessary to assess that a product complies with the domestic laws and regulations of the importing country. For instance, information requirements should be no greater than needed, and the siting of facilities to carry out conformity assessment, and the selection of samples should not create unnecessary inconvenience to the agents (Articles 5.2.3 and 5.2.6).

NON-DISCRIMINATION AND NATIONAL TREATMENT

Technical regulations

Like many other WTO Agreements, the TBT Agreement includes the GATT's Most Favoured Nation (MFN) and national treatment obligations. Article 2.1 of the Agreement states that "in respect of their technical regulations, products imported from the territory of any Member be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country".

Conformity Assessment Procedures

The MFN and national treatment provisions also apply to conformity assessment procedures. Procedures for conformity assessment shall be applied to products imported from other WTO

Members "in a manner no less favourable then that accorded to like products of national origin and to like products originating in any other country" (Article 5.1.1). This means that imported products must be treated equally with respect to any fees charged to assess their conformity with regulations. Similarly, Members must respect the confidentiality of information about the results of conformity assessment procedures for imported products in the same way as for domestic products so that commercial interests are protected (Articles 5.2.4 and 5.2.5).

HARMONIZATION

Producers' benefits

The arguments for harmonization of technical regulations are well-known. Harmonization is necessary for the connection and compatibility of parts of products, i.e. telecommunications equipment or car parts. Lack of technical compatibility might otherwise generate barriers to international trade. For example, television sets suitable for the US market would be unsaleable in Europe due to divergences in colour broadcasting formats (NTSC vs PAL or SECAM). Similarly, in order to be marketable in the United Kingdom, French or German motor vehicles need to be adjusted to right-hand drive. The costs of designing, manufacturing, and delivering the same product in various configurations may be high.

Consumers' benefits

Technical harmonization may increase consumer welfare. Within a harmonized regulatory environment, competition ensures that consumers have a wide and economically attractive choice of products. This presupposes, however, that harmonized standards do not go beyond fulfilling their legitimate regulatory objective, i.e. that they do not stifle innovation or otherwise discourage producers from introducing new products or product variants.

Introduction

For many years, technical experts have worked towards the international harmonization of standards. An important role in these efforts is played by the International Standardization Organization (ISO), the International Electrotechnical Commission (IEC) and the International Telecommunication Union (ITU). Their activities have had major impact on trade, especially in industrial products. For example, ISO has developed more than 9,600 international standards covering almost all technical fields.

Harmonization and the TBT Agreement

The Agreement encourages Members to use existing international standards for their national regulations, or for parts of them, unless "their use would be ineffective or inappropriate" to fulfil a given policy objective. This may be the case, for example, "because of fundamental climatic and geographical factors or fundamental technological problems" (Article 2.4). As explained

previously, technical regulations in accordance with relevant international standards are rebuttably presumed "not to create an unnecessary obstacle to international trade". Similar provisions apply to conformity assessment procedures: international guides or recommendations issued by international standardizing bodies, or the relevant parts of them, are to be used for national procedures for conformity assessment unless they are "inappropriate for the Members concerned for, inter alia, such reasons as national security requirements, prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or protection of the environment; fundamental climatic or other geographical factors; fundamental technological or infrastructural problems" (Article 5.4).

Participation in international standardizing bodies

Widespread participation in international standardizing bodies can ensure that international standards reflect country-specific production and trade interests. The TBT Agreement encourages Members to participate, within the limits of their resources, in the work of international bodies for the preparation of standards (Article 2.6) and guides or recommendations for conformity assessment procedures (Article 5.5).

Special and differential treatment

Implementing and enforcing international standards may require technical and financial resources beyond the capabilities of developing countries. The TBT Agreement eases the impact of certain provisions whose full application would not be compatible with developing country Members' development, financial and trade needs. Moreover, in view of their particular technological and socio-economic conditions, developing country Members may adopt technical regulations, standards or test methods aimed at preserving indigenous technologies and production methods and processes compatible with their development needs (Article 12.4). Finally, developing country Members may request international standardizing bodies to examine the possibility of, and if practicable, prepare international standards for products of special trade interest to them.

EQUIVALENCE

What is equivalence?

The process leading to the preparation of an international standard can be lengthy and costly. Reaching consensus on technical details can take several years. The time gap between the adoption of an international standard and its implementation by national regulators can also be significant. For these reasons, negotiators introduced in the TBT Agreement a complementary approach to technical harmonization, known as equivalence. Technical barriers to international trade could be eliminated if Members accept that technical regulations different from their own fulfil the same policy objectives even if through different means. This approach, based on the European Community's 1985"new approach" to standardization, is contained in Article 2.7 of the TBT Agreement.

How does equivalence work?

Let us assume that country A, wishing to protect its environment from high auto emission levels, requires that cars be equipped with a catalytic converter. In country B, the same objective is achieved through the use of diesel engines in motor vehicles. Since environmental concerns are identical in the two countries — to reduce the levels of pollutants in the air — A and B can agree that their technical regulations are essentially equivalent. Thus, if car manufacturers in country A want to export to B, they will not be obliged to satisfy country B's requirement to fit diesel engines, and vice versa. This will eliminate the costs of adjusting production facilities to fulfil foreign regulations.

MUTUAL RECOGNITION

Costs of multiple testing

As explained in the previous section, demonstrating compliance with technical regulations may impede international trade. In particular, if products are to be exported to multiple markets, multiple testing may be required. Manufacturers can have difficulties in securing approval for their products on foreign markets, for instance because testing experts disagree on optimal testing procedures, from bureaucratic inertia, or even from manipulation of the testing process by protectionist groups. Whatever the reason might be, such diversity of procedures and methods significantly increases the costs of producers who sell in multiple markets.

What is mutual recognition of conformity assessment procedures?

One of the main difficulties exporters face is costly multiple testing or certification of products. These costs would be drastically reduced if a product could be tested once and the testing results be accepted in all markets.

How does mutual recognition work?

In practice, countries would agree to accept the results of one another's conformity assessment procedures, although these procedures might be different.

Mutual recognition and the TBT Agreement

Article 6.3 of the TBT Agreement strongly encourages WTO Members to enter into negotiations with other Members for the mutual acceptance of conformity assessment results. The presence of a high degree of confidence in testing and certification bodies is, in fact, a prerequisite for the good functioning of an MRA. For this reason, Article 6.1 of the TBT Agreement recognizes that prior consultations may be necessary to arrive at a mutually satisfactory understanding regarding the competence of the conformity assessment bodies. It also points out that compliance by conformity assessment bodies with relevant guides or recommendations issued by international standardizing bodies can be regarded as an indication of adequate technical competence.

TRANSPARENCY

NOTIFICATIONS

Technical regulations and conformity assessment procedures

Members must notify when two conditions apply: (1) whenever a relevant international standard or guide or recommendation does not exist, or the technical content of a proposed or adopted technical regulation or procedure is not in accordance with the technical content of relevant international standards or guides of recommendations; and (2) if the technical regulation or conformity assessment procedure may have a significant effect on the trade of other Members (Articles 2.9 and 5.6). Draft regulations should be notified to the WTO Secretariat, if possible sixty days prior to their formal adoption so as to allow time for other Members to make comments. Regulations can also be notified ex-post whenever urgent problems of safety, health, environment protection arise (Articles 2.10 and 5.7). Local Governments at the level directly below central government are required to notify technical regulations and conformity assessment procedures which have not been previously notified by their central government authorities (Article 3.2 and 7.2).

Statements on the implementation and administration of the Agreement

Each WTO Member must, promptly after the Agreement enters into force for it, notify Members of the measures in existence or taken to ensure the implementation and administration of the Agreement and of any subsequent changes to them (Article 15.2). This written statement has to include, *inter alia*, all relevant laws, regulations, administrative orders, etc., to ensure that the provisions of the Agreement are applied; the names of the publications where draft and final technical regulations, standards and conformity assessment procedures are published; the expected length of time for the presentation of written comments on technical regulations, standards or conformity assessment procedures; and the name and address of the enquiry points established under Article 10.

Bilateral or plurilateral agreements

Under Article 10.7, a Member who has reached an agreement with any other country or countries on issues related to technical regulations, standards or conformity assessment procedures which may have a significant effect on trade must notify other Members through the WTO Secretariat of the products to be covered by the agreement, and provide a brief description of the agreement.

Code of good practice

The Code of Good Practice for the Preparation, Adoption and Application of Standards lays down disciplines in respect of central government, local government, non-governmental and regional standardizing bodies developing voluntary standards. The Code is open for acceptance by any of these standardizing bodies. Central government standardizing bodies must accept and comply with the provisions of the Code. A standardizing body wishing to adhere to, or withdraw from,

the Code has to notify its acceptance of, or withdrawal from, the Code using the appropriate notification format (paragraph C of the Code). Standardizing bodies which have accepted the Code must notify at least twice a year the existence of their work programme, and where details of this programme can be obtained (paragraph J). Notifications have to be sent either directly to the ISO/IEC Information Centre in Geneva, or to the national member of ISO/IEC or, preferably, to the relevant national member or international affiliate of ISONET.

Enquiry points

As a complement to the obligation to notify, each WTO Member must set up a national enquiry point. This acts as a focal point where other WTO Members can request and obtain information and documentation on a Member's technical regulations, standards and test procedures, whether impending or adopted, as well as on participation in bilateral or plurilateral standard-related agreements, regional standardizing bodies and conformity assessment systems (Article 10). Enquiry points are generally governmental agencies, but the relevant functions can also be assigned to private agencies. The obligation to set up enquiry points is particularly important for developing countries. On the one hand, it is the first step by a developing country Member towards implementation of the TBT Agreement. On the other, developing countries can acquire information from other Members' enquiry points on foreign regulations and standards affecting products in which they have a trade interest.

The Committee on Technical Barriers to Trade

Finally, transparency is also ensured through the existence of a TBT Committee. This allows WTO Members the possibility of consulting on any matters relating to the operation of the Agreement or the furtherance of its objectives. The Committee holds on average two to three meetings a year and, if necessary, can establish working parties to carry out specific functions.

THE CODE OF GOOD PRACTICE

Why a Code of Good Practice?

Product standards can be prepared by governmental or non-governmental standardizing bodies. Over the years there has been a proliferation of private standardizing bodies. The Code of Good Practice, contained in Annex 3 of the WTO TBT Agreement provides disciplines, including those related to transparency, for the preparation, adoption and application of standards by all central governmental, local government, non-governmental and regional standardizing bodies.

Who can accept the Code?

The Code is open for acceptance to any standardizing bodies, whether central government, local government or non-governmental and regional standardizing bodies. The Code of Good Practice contained in Annex 3 of the WTO TBT Agreement seeks to bring all standards within its purview and provides for [and gives] transparency in the preparation, adoption and application of standards.

What does membership entail?

Members of the TBT Agreement are responsible for the acceptance and compliance with the Code of Good Practice by their central government standardizing bodies. Furthermore, they are required to take such reasonable measures as may be available to them to ensure also that local government and non-governmental standardizing bodies within their territories, and regional standardizing bodies of which they are members, accept and comply with the Code.

TECHNICAL ASSISTANCE

Who has the right to technical assistance?

Any Member, and especially developing country Members, can request technical assistance from other Members or from the WTO Secretariat, on terms and conditions to be agreed by the Members concerned (Article 11). Requests for technical assistance received from least-developed Members have priority.

What type of assistance?

The coverage of technical assistance ranges from the preparation of technical regulations and the establishment of national standardizing bodies to the participation in international standardizing bodies and the steps to be taken by developing country Members to gain access to regional international conformity assessment systems. Technical assistance can help firms in developing country Members to manufacture products in accordance with the technical requirements existing in an importing country, thus ensuring that the products are accepted on the importing Member's market.

WTO Secretariat's technical assistance activities

The WTO Secretariat's assistance to developing and least-developing countries on TBT matters often takes the form of regional or sub-regional seminars. Recently, technical assistance seminars have been organized jointly with other international and regional organizations.

1-2. Legal Text

Read the TBT Agreement. Work through it slowly, making sure to ask yourself to understand its function in general, as well as the function of its component parts. To the general, ask yourself why the TBT was concluded. Why were GATT Arts. III & XX not considered sufficient? As to the specifics, try to identify and categorize each of the main innovations in the TBT. Ask yourself which obligations advance on the GATT and how far do they go? Which are the most important and / or innovative? Further, ask yourself in each case how "binding" the rule appears to be, and what interpretive difficulties the TBT language might pose.

AGREEMENT ON TECHNICAL BARRIERS TO TRADE

Members,

Having regard to the Uruguay Round of Multilateral Trade Negotiations;

Desiring to further the objectives of GATT 1994;

Recognizing the important contribution that international standards and conformity assessment systems can make in this regard by improving efficiency of production and facilitating the conduct of international trade;

Desiring therefore to encourage the development of such international standards and conformity assessment systems;

Desiring however to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade;

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

Recognizing that no country should be prevented from taking measures necessary for the protection of its essential security interest;

Recognizing the contribution which international standardization can make to the transfer of technology from developed to developing countries;

Recognizing that developing countries may encounter special difficulties in the formulation and application of technical regulations and standards and procedures for assessment of conformity with technical regulations and standards, and desiring to assist them in their endeavours in this regard;

Hereby *agree* as follows:

Article 1

General Provisions

1.1 General terms for standardization and procedures for assessment of conformity shall normally have the meaning given to them by definitions adopted within the United Nations system and by international standardizing bodies taking into account their context and in the light of the object and purpose of this Agreement.

1.2 However, for the purposes of this Agreement the meaning of the terms given in Annex 1 applies.

1.3 All products, including industrial and agricultural products, shall be subject to the provisions of this Agreement.

1.4 Purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies are not subject to the provisions of this Agreement but are addressed in the Agreement on Government Procurement, according to its coverage.

1.5 The provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures.

1.6 All references in this Agreement to technical regulations, standards and conformity assessment procedures shall be construed to include any amendments thereto and any additions to the rules or the product coverage thereof, except amendments and additions of an insignificant nature.

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.

Article 3

Preparation, Adoption and Application of Technical Regulations by Local Government Bodies and Non-Governmental Bodies

With respect to their local government and non-governmental bodies within their territories:

3.1 Members shall take such reasonable measures as may be available to them to ensure compliance by such bodies with the provisions of Article 2, with the exception of the obligation to notify as referred to in paragraphs 9.2 and 10.1 of Article 2.

3.2 Members shall ensure that the technical regulations of local governments on the level directly below that of the central government in Members are notified in accordance with the provisions of paragraphs 9.2 and 10.1 of Article 2, noting that notification shall not be required for technical regulations the technical content of which is substantially the same as that of previously notified technical regulations of central government bodies of the Member concerned.

3.3 Members may require contact with other Members, including the notifications, provision of information, comments and discussions referred to in paragraphs 9 and 10 of Article 2, to take place through the central government.

3.4 Members shall not take measures which require or encourage local government bodies or non-governmental bodies within their territories to act in a manner inconsistent with the provisions of Article 2.

3.5 Members are fully responsible under this Agreement for the observance of all provisions of Article 2. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Article 2 by other than central government bodies.

Article 4

Preparation, Adoption and Application of Standards

4.1 Members shall ensure that their central government standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to this Agreement (referred to in this Agreement as the "Code of Good Practice"). They shall take such reasonable measures as may be available to them to ensure that local government and non-governmental standardizing bodies within their territories, as well as regional standardizing bodies of which they or one or more bodies within their territories are members, accept and comply with this Code of Good Practice. In addition, Members shall not

take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the Code of Good Practice. The obligations of Members with respect to compliance of standardizing bodies with the provisions of the Code of Good Practice shall apply irrespective of whether or not a standardizing body has accepted the Code of Good Practice.

4.2 Standardizing bodies that have accepted and are complying with the Code of Good Practice shall be acknowledged by the Members as complying with the principles of this Agreement.

CONFORMITY WITH TECHNICAL REGULATIONS AND STANDARDS

Article 5

Procedures for Assessment of Conformity by Central Government Bodies

5.1 Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members:

5.1.1 conformity assessment procedures are prepared, adopted and applied so as to grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation; access entails suppliers' right to an assessment of conformity under the rules of the procedure, including, when foreseen by this procedure, the possibility to have conformity assessment activities undertaken at the site of facilities and to receive the mark of the system;

5.1.2 conformity assessment procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. This means, *inter alia*, that conformity assessment procedures shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create.

5.2 When implementing the provisions of paragraph 1, Members shall ensure that:

5.2.1 conformity assessment procedures are undertaken and completed as expeditiously as possible and in a no less favourable order for products originating in the territories of other Members than for like domestic products;

5.2.2 the standard processing period of each conformity assessment procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the assessment in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the conformity assessment if the applicant so requests; and that, upon request, the applicant is informed of the stage of the procedure, with any delay being explained;

5.2.3 information requirements are limited to what is necessary to assess conformity and determine fees;

5.2.4 the confidentiality of information about products originating in the territories of other Members arising from or supplied in connection with such conformity assessment procedures is respected in the same way as for domestic products and in such a manner that legitimate commercial interests are protected;

5.2.5 any fees imposed for assessing the conformity of products originating in the territories of other Members are equitable in relation to any fees chargeable for assessing the conformity of like products of national origin or originating in any other country, taking into account communication, transportation and other costs arising from differences between location of facilities of the applicant and the conformity assessment body;

5.2.6 the siting of facilities used in conformity assessment procedures and the selection of samples are not such as to cause unnecessary inconvenience to applicants or their agents;

5.2.7 whenever specifications of a product are changed subsequent to the determination of its conformity to the applicable technical regulations or standards, the conformity assessment procedure for the modified product is limited to what is necessary to determine whether adequate confidence exists that the product still meets the technical regulations or standards concerned;

5.2.8 a procedure exists to review complaints concerning the operation of a conformity assessment procedure and to take corrective action when a complaint is justified.

5.3 Nothing in paragraphs 1 and 2 shall prevent Members from carrying out reasonable spot checks within their territories.

5.4 In cases where a positive assurance is required that products conform with technical regulations or standards, and relevant guides or recommendations issued by international standardizing bodies exist or their completion is imminent, Members shall ensure that central government bodies use them, or the relevant parts of them, as a basis for their conformity assessment procedures, except where, as duly explained upon request, such guides or recommendations or relevant parts are inappropriate for the Members concerned, for, *inter alia*, such reasons as: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographical factors; fundamental technological or infrastructural problems.

5.5 With a view to harmonizing conformity assessment procedures 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 guides and recommendations for conformity assessment procedures.

5.6 Whenever a relevant guide or recommendation issued by an international standardizing body does not exist or the technical content of a proposed conformity assessment procedure is not in accordance with relevant guides and recommendations issued by international standardizing bodies, and if the conformity assessment procedure may have a significant effect on trade of other Members, Members shall:

5.6.1 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 conformity assessment procedure;

5.6.2 notify other Members through the Secretariat of the products to be covered by the proposed conformity assessment procedure, 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;

5.6.3 upon request, provide to other Members particulars or copies of the proposed procedure and, whenever possible, identify the parts which in substance deviate from relevant guides or recommendations issued by international standardizing bodies;

5.6.4 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.

5.7 Subject to the provisions in the lead-in to paragraph 6, 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 6 as it finds necessary, provided that the Member, upon adoption of the procedure, shall:

5.7.1 notify immediately other Members through the Secretariat of the particular procedure and the products covered, with a brief indication of

the objective and the rationale of the procedure, including the nature of the urgent problems;

5.7.2 upon request, provide other Members with copies of the rules of the procedure;

5.7.3 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.

5.8 Members shall ensure that all conformity assessment procedures 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.

5.9 Except in those urgent circumstances referred to in paragraph 7, Members shall allow a reasonable interval between the publication of requirements concerning conformity assessment procedures 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.

Article 6

Recognition of Conformity Assessment by Central Government Bodies

With respect to their central government bodies:

6.1 Without prejudice to the provisions of paragraphs 3 and 4, Members shall ensure, whenever possible, that results of conformity assessment procedures in other Members are accepted, even when those procedures differ from their own, provided they are satisfied that those procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to their own procedures. It is recognized that prior consultations may be necessary in order to arrive at a mutually satisfactory understanding regarding, in particular:

6.1.1 adequate and enduring technical competence of the relevant conformity assessment bodies in the exporting Member, so that confidence in the continued reliability of their conformity assessment results can exist; in this regard, verified compliance, for instance through accreditation, with relevant guides or recommendations issued by international standardizing bodies shall be taken into account as an indication of adequate technical competence;

6.1.2 limitation of the acceptance of conformity assessment results to those produced by designated bodies in the exporting Member.

6.2 Members shall ensure that their conformity assessment procedures permit, as far as practicable, the implementation of the provisions in paragraph 1.

6.3 Members are encouraged, at the request of other Members, to be willing to enter into negotiations for the conclusion of agreements for the mutual recognition of results of each other's conformity assessment procedures. Members may require that such agreements fulfil the criteria of paragraph 1 and give mutual satisfaction regarding their potential for facilitating trade in the products concerned.

6.4 Members are encouraged to permit participation of conformity assessment bodies located in the territories of other Members in their conformity assessment procedures under conditions no less favourable than those accorded to bodies located within their territory or the territory of any other country.

Article 7

Procedures for Assessment of Conformity by Local Government Bodies

With respect to their local government bodies within their territories:

7.1 Members shall take such reasonable measures as may be available to them to ensure compliance by such bodies with the provisions of Articles 5 and 6, with the exception of the obligation to notify as referred to in paragraphs 6.2 and 7.1 of Article 5.

7.2 Members shall ensure that the conformity assessment procedures of local governments on the level directly below that of the central government in Members are notified in accordance with the provisions of paragraphs 6.2 and 7.1 of Article 5, noting that notifications shall not be required for conformity assessment procedures the technical content of which is substantially the same as that of previously notified conformity assessment procedures of central government bodies of the Members concerned.

7.3 Members may require contact with other Members, including the notifications, provision of information, comments and discussions referred to in paragraphs 6 and 7 of Article 5, to take place through the central government.

7.4 Members shall not take measures which require or encourage local government bodies within their territories to act in a manner inconsistent with the provisions of Articles 5 and 6.

7.5 Members are fully responsible under this Agreement for the observance of all provisions of Articles 5 and 6. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Articles 5 and 6 by other than central government bodies.

Article 8

Procedures for Assessment of Conformity by Non-Governmental Bodies

8.1 Members shall take such reasonable measures as may be available to them to ensure that non-governmental bodies within their territories which operate conformity assessment procedures

comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such bodies to act in a manner inconsistent with the provisions of Articles 5 and 6.

8.2 Members shall ensure that their central government bodies rely on conformity assessment procedures operated by non-governmental bodies only if these latter bodies comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures.

Article 9

International and Regional Systems

9.1 Where a positive assurance of conformity with a technical regulation or standard is required, Members shall, wherever practicable, formulate and adopt international systems for conformity assessment and become members thereof or participate therein.

9.2 Members shall take such reasonable measures as may be available to them to ensure that international and regional systems for conformity assessment in which relevant bodies within their territories are members or participants comply with the provisions of Articles 5 and 6. In addition, Members shall not take any measures which have the effect of, directly or indirectly, requiring or encouraging such systems to act in a manner inconsistent with any of the provisions of Articles 5 and 6.

9.3 Members shall ensure that their central government bodies rely on international or regional conformity assessment systems only to the extent that these systems comply with the provisions of Articles 5 and 6, as applicable.

INFORMATION AND ASSISTANCE

Article 10

Information About Technical Regulations, Standards and Conformity Assessment Procedures

10.1 Each Member shall ensure that an enquiry point exists which is able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents regarding:

10.1.1 any technical regulations adopted or proposed within its territory by central or local government bodies, by non-governmental bodies which

have legal power to enforce a technical regulation, or by regional standardizing bodies of which such bodies are members or participants;

10.1.2 any standards adopted or proposed within its territory by central or local government bodies, or by regional standardizing bodies of which such bodies are members or participants;

10.1.3 any conformity assessment procedures, or proposed conformity assessment procedures, which are operated within its territory by central or local government bodies, or by non-governmental bodies which have legal power to enforce a technical regulation, or by regional bodies of which such bodies are members or participants;

10.1.4 the membership and participation of the Member, or of relevant central or local government bodies within its territory, in international and regional standardizing bodies and conformity assessment systems, as well as in bilateral and multilateral arrangements within the scope of this Agreement; it shall also be able to provide reasonable information on the provisions of such systems and arrangements;

10.1.5 the location of notices published pursuant to this Agreement, or the provision of information as to where such information can be obtained; and

10.1.6 the location of the enquiry points mentioned in paragraph 3.

10.2 If, however, for legal or administrative reasons more than one enquiry point is established by a Member, that Member shall provide to the other Members complete and unambiguous information on the scope of responsibility of each of these enquiry points. In addition, that Member shall ensure that any enquiries addressed to an incorrect enquiry point shall promptly be conveyed to the correct enquiry point.

10.3 Each Member shall take such reasonable measures as may be available to it to ensure that one or more enquiry points exist which are able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents or information as to where they can be obtained regarding:

10.3.1 any standards adopted or proposed within its territory by non-governmental standardizing bodies, or by regional standardizing bodies of which such bodies are members or participants; and

10.3.2 any conformity assessment procedures, or proposed conformity assessment procedures, which are operated within its territory by non-governmental bodies, or by regional bodies of which such bodies are members or participants;

10.3.3 the membership and participation of relevant non-governmental bodies within its territory in international and regional standardizing bodies and conformity assessment systems, as well as in bilateral and multilateral arrangements within the scope of this Agreement; they shall also be able

to provide reasonable information on the provisions of such systems and arrangements.

10.4 Members shall take such reasonable measures as may be available to them to ensure that where copies of documents are requested by other Members or by interested parties in other Members, in accordance with the provisions of this Agreement, they are supplied at an equitable price (if any) which shall, apart from the real cost of delivery, be the same for the nationals[1] of the Member concerned or of any other Member.

10.5 Developed country Members shall, if requested by other Members, provide, in English, French or Spanish, translations of the documents covered by a specific notification or, in case of voluminous documents, of summaries of such documents.

10.6 The Secretariat shall, when it receives notifications in accordance with the provisions of this Agreement, circulate copies of the notifications to all Members and interested international standardizing and conformity assessment bodies, and draw the attention of developing country Members to any notifications relating to products of particular interest to them.

10.7 Whenever a Member has reached an agreement with any other country or countries on issues related to technical regulations, standards or conformity assessment procedures which may have a significant effect on trade, at least one Member party to the agreement shall notify other Members through the Secretariat of the products to be covered by the agreement and include a brief description of the agreement. Members concerned are encouraged to enter, upon request, into consultations with other Members for the purposes of concluding similar agreements or of arranging for their participation in such agreements.

10.8 Nothing in this Agreement shall be construed as requiring:

10.8.1 the publication of texts other than in the language of the Member;

10.8.2 the provision of particulars or copies of drafts other than in the language of the Member except as stated in paragraph 5; or

10.8.3 Members to furnish any information, the disclosure of which they consider contrary to their essential security interests.

10.9 Notifications to the Secretariat shall be in English, French or Spanish.

10.10 Members shall designate a single central government authority that is responsible for the implementation on the national level of the provisions concerning notification procedures under this Agreement except those included in Annex 3.

10.11 If, however, for legal or administrative reasons the responsibility for notification procedures is divided among two or more central government authorities, the Member concerned shall provide to the other Members complete and unambiguous information on the scope of responsibility of each of these authorities.

[1] "Nationals" here shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.

Article 11

Technical Assistance to Other Members

11.1 Members shall, if requested, advise other Members, especially the developing country Members, on the preparation of technical regulations.

11.2 Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of national standardizing bodies, and participation in the international standardizing bodies, and shall encourage their national standardizing bodies to do likewise.

11.3 Members shall, if requested, take such reasonable measures as may be available to them to arrange for the regulatory bodies within their territories to advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding:

11.3.1 the establishment of regulatory bodies, or bodies for the assessment of conformity with technical regulations; and

11.3.2 the methods by which their technical regulations can best be met.

11.4 Members shall, if requested, take such reasonable measures as may be available to them to arrange for advice to be given to other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of bodies for the assessment of conformity with standards adopted within the territory of the requesting Member.

11.5 Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the steps that should be taken by their producers if they wish to have access to systems for conformity assessment operated by governmental or non-governmental bodies within the territory of the Member receiving the request.

11.6 Members which are members or participants of international or regional systems for conformity assessment shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of the institutions and legal framework which would enable them to fulfil the obligations of membership or participation in such systems.

11.7 Members shall, if so requested, encourage bodies within their territories which are members or participants of international or regional systems for conformity assessment to advise other Members, especially the developing country Members, and should consider requests for technical assistance from them regarding the establishment of the institutions which would enable the relevant bodies within their territories to fulfil the obligations of membership or participation.

11.8 In providing advice and technical assistance to other Members in terms of paragraphs 1 to 7, Members shall give priority to the needs of the least-developed country Members.

Article 12

Special and Differential Treatment of Developing Country Members

12.1 Members shall provide differential and more favourable treatment to developing country Members to this Agreement, through the following provisions as well as through the relevant provisions of other Articles of this Agreement.

12.2 Members shall give particular attention to the provisions of this Agreement concerning developing country Members' rights and obligations and shall take into account the special development, financial and trade needs of developing country Members in the implementation of this Agreement, both nationally and in the operation of this Agreement's institutional arrangements.

12.3 Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

12.4 Members recognize that, although international standards, guides or recommendations may exist, in their particular technological and socio-economic conditions, developing country Members adopt certain technical regulations, standards or conformity assessment procedures aimed at preserving indigenous technology and production methods and processes compatible with their development needs. Members therefore recognize that developing country Members should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs.

12.5 Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies and international systems for conformity assessment are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members.

12.6 Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies, upon request of developing country Members, examine the possibility of, and, if practicable, prepare international standards concerning products of special interest to developing country Members.

12.7 Members shall, in accordance with the provisions of Article 11, provide technical assistance to developing country Members to ensure that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing country Members. In determining the terms and conditions of the technical assistance, account shall be taken of the stage of development of the requesting Members and in particular of the least-developed country Members.

12.8 It is recognized that developing country Members may face special problems, including institutional and infrastructural problems, in the field of preparation and application of technical

regulations, standards and conformity assessment procedures. It is further recognized that the special development and trade needs of developing country Members, as well as their stage of technological development, may hinder their ability to discharge fully their obligations under this Agreement. Members, therefore, shall take this fact fully into account. Accordingly, with a view to ensuring that developing country Members are able to comply with this Agreement, the Committee on Technical Barriers to Trade provided for in Article 13 (referred to in this Agreement as the "Committee") is enabled to grant, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement. When considering such requests the Committee shall take into account the special problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures, and the special development and trade needs of the developing country Member, as well as its stage of technological development, which may hinder its ability to discharge fully its obligations under this Agreement. The Committee shall, in particular, take into account the special problems of the least-developed country Members.

12.9 During consultations, developed country Members shall bear in mind the special difficulties experienced by developing country Members in formulating and implementing standards and technical regulations and conformity assessment procedures, and in their desire to assist developing country Members with their efforts in this direction, developed country Members shall take account of the special needs of the former in regard to financing, trade and development.

12.10 The Committee shall examine periodically the special and differential treatment, as laid down in this Agreement, granted to developing country Members on national and international levels.

INSTITUTIONS, CONSULTATION AND DISPUTE SETTLEMENT

Article 13

The Committee on Technical Barriers to Trade

13.1 A Committee on Technical Barriers to Trade is hereby established, and shall be composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet as necessary, but no less than once a year, for the purpose of affording Members the opportunity of consulting on any matters relating to the operation of this Agreement or the furtherance of its objectives, and shall carry out such responsibilities as assigned to it under this Agreement or by the Members.

13.2 The Committee shall establish working parties or other bodies as may be appropriate, which shall carry out such responsibilities as may be assigned to them by the Committee in accordance with the relevant provisions of this Agreement.

13.3 It is understood that unnecessary duplication should be avoided between the work under this Agreement and that of governments in other technical bodies. The Committee shall examine this problem with a view to minimizing such duplication.

Article 14

Consultation and Dispute Settlement

14.1 Consultations and the settlement of disputes with respect to any matter affecting the operation of this Agreement shall take place under the auspices of the Dispute Settlement Body and shall follow, *mutatis mutandis*, the provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding.

14.2 At the request of a party to a dispute, or at its own initiative, a panel may establish a technical expert group to assist in questions of a technical nature, requiring detailed consideration by experts.

14.3 Technical expert groups shall be governed by the procedures of Annex 2.

14.4 The dispute settlement provisions set out above can be invoked in cases where a Member considers that another Member has not achieved satisfactory results under Articles 3, 4, 7, 8 and 9 and its trade interests are significantly affected. In this respect, such results shall be equivalent to those as if the body in question were a Member.

FINAL PROVISIONS

Article 15

Final Provisions

Reservations

15.1 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

Review

15.2 Each Member shall, promptly after the date on which the WTO Agreement enters into force for it, inform the Committee of measures in existence or taken to ensure the implementation

and administration of this Agreement. Any changes of such measures thereafter shall also be notified to the Committee.

15.3 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof.

15.4 Not later than the end of the third year from the date of entry into force of the WTO Agreement and at the end of each three-year period thereafter, the Committee shall review the operation and implementation of this Agreement, including the provisions relating to transparency, with a view to recommending an adjustment of the rights and obligations of this Agreement where necessary to ensure mutual economic advantage and balance of rights and obligations, without prejudice to the provisions of Article 12. Having regard, *inter alia,* to the experience gained in the implementation of the Agreement, the Committee shall, where appropriate, submit proposals for amendments to the text of this Agreement to the Council for Trade in Goods.

Annexes

15.5 The annexes to this Agreement constitute an integral part thereof.

ANNEX 1

TERMS AND THEIR DEFINITIONS FOR THE PURPOSE OF THIS AGREEMENT

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

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

1. *Technical regulation*

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Explanatory note

The definition in ISO/IEC Guide 2 is not self-contained, but based on the so-called "building block" system.

2. *Standard*

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 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.

3. *Conformity assessment procedures*

Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.

Explanatory note

Conformity assessment procedures include, *inter alia*, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations.

4. *International body or system*

Body or system whose membership is open to the relevant bodies of at least all Members.

5. *Regional body or system*

Body or system whose membership is open to the relevant bodies of only some of the Members.

6. *Central government body*

Central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question.

Explanatory note:

In the case of the European Communities the provisions governing central government bodies apply. However, regional bodies or conformity assessment systems may be established within the European Communities, and in such cases would be subject to the provisions of this Agreement on regional bodies or conformity assessment systems.

7. *Local government body*

Government other than a central government (e.g. states, provinces, Länder, cantons, municipalities, etc.), its ministries or departments or any body subject to the control of such a government in respect of the activity in question.

8. *Non-governmental body*

Body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation.

ANNEX 2

TECHNICAL EXPERT GROUPS

The following procedures shall apply to technical expert groups established in accordance with the provisions of Article 14.

1. Technical expert groups are under the panel's authority. Their terms of reference and detailed working procedures shall be decided by the panel, and they shall report to the panel.

2. Participation in technical expert groups shall be restricted to persons of professional standing and experience in the field in question.

3. Citizens of parties to the dispute shall not serve on a technical expert group without the joint agreement of the parties to the dispute, except in exceptional circumstances when the panel considers that the need for specialized scientific expertise cannot be fulfilled otherwise. Government officials of parties to the dispute shall not serve on a technical expert group. Members of technical expert groups shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or

organizations shall therefore not give them instructions with regard to matters before a technical expert group.

4. Technical expert groups may consult and seek information and technical advice from any source they deem appropriate. Before a technical expert group seeks such information or advice from a source within the jurisdiction of a Member, it shall inform the government of that Member. Any Member shall respond promptly and fully to any request by a technical expert group for such information as the technical expert group considers necessary and appropriate.

5. The parties to a dispute shall have access to all relevant information provided to a technical expert group, unless it is of a confidential nature. Confidential information provided to the technical expert group shall not be released without formal authorization from the government, organization or person providing the information. Where such information is requested from the technical expert group but release of such information by the technical expert group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information.

6. The technical expert group shall submit a draft report to the Members concerned with a view to obtaining their comments, and taking them into account, as appropriate, in the final report, which shall also be circulated to the Members concerned when it is submitted to the panel.

ANNEX 3

CODE OF GOOD PRACTICE FOR THE PREPARATION, ADOPTION AND APPLICATION OF STANDARDS

General Provisions

A. For the purposes of this Code the definitions in Annex 1 of this Agreement shall apply.

B. This Code is open to acceptance by any standardizing body within the territory of a Member of the WTO, whether a central government body, a local government body, or a non-governmental body; to any governmental regional standardizing body one or more members of which are Members of the WTO; and to any non-governmental regional standardizing body one or more members of which are situated within the territory of a Member of the WTO (referred to in this Code collectively as "standardizing bodies" and individually as "the standardizing body").

C. Standardizing bodies that have accepted or withdrawn from this Code shall notify this fact to the ISO/IEC Information Centre in Geneva. The notification shall include the name and address of the body concerned and the scope of its current and expected standardization activities. The notification may be sent either directly to the ISO/IEC Information Centre, or through the national member body of ISO/IEC or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.

D. In respect of standards, the standardizing body shall accord treatment to products originating in the territory of any other Member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country.

E. The standardizing body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

F. Where international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems.

G. With a view to harmonizing standards on as wide a basis as possible, the standardizing body shall, in an appropriate way, play a full part, within the limits of its resources, in the preparation by relevant international standardizing bodies of international standards regarding subject matter for which it either has adopted, or expects to adopt, standards. For standardizing bodies within the territory of a Member, participation in a particular international standardization activity shall, whenever possible, take place through one delegation representing all standardizing bodies in the territory that have adopted, or expect to adopt, standards for the subject matter to which the international standardization activity relates.

H. The standardizing body within the territory of a Member shall make every effort to avoid duplication of, or overlap with, the work of other standardizing bodies in the national territory or with the work of relevant international or regional standardizing bodies. They shall also make every effort to achieve a national consensus on the standards they develop. Likewise the regional standardizing body shall make every effort to avoid duplication of, or overlap with, the work of relevant international standardizing bodies.

I. Wherever appropriate, the standardizing body shall specify standards based on product requirements in terms of performance rather than design or descriptive characteristics.

J. At least once every six months, the standardizing body shall publish a work programme containing its name and address, the standards it is currently preparing and the standards which it has adopted in the preceding period. A standard is under preparation from the moment a decision has been taken to develop a standard until that standard has been adopted. The titles of specific draft standards shall, upon request, be provided in English, French or Spanish. A notice of the existence of the work programme shall be published in a national or, as the case may be, regional publication of standardization activities.

The work programme shall for each standard indicate, in accordance with any ISONET rules, the classification relevant to the subject matter, the stage attained in the standard's development, and the references of any international standards taken as a basis. No later than at the time of publication of its work programme, the standardizing body shall notify the existence thereof to the ISO/IEC Information Centre in Geneva.

The notification shall contain the name and address of the standardizing body, the name and issue of the publication in which the work programme is published, the period to which the

work programme applies, its price (if any), and how and where it can be obtained. The notification may be sent directly to the ISO/IEC Information Centre, or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.

K. The national member of ISO/IEC shall make every effort to become a member of ISONET or to appoint another body to become a member as well as to acquire the most advanced membership type possible for the ISONET member. Other standardizing bodies shall make every effort to associate themselves with the ISONET member.

L. Before adopting a standard, the standardizing body shall allow a period of at least 60 days for the submission of comments on the draft standard by interested parties within the territory of a Member of the WTO. This period may, however, be shortened in cases where urgent problems of safety, health or environment arise or threaten to arise. No later than at the start of the comment period, the standardizing body shall publish a notice announcing the period for commenting in the publication referred to in paragraph J. Such notification shall include, as far as practicable, whether the draft standard deviates from relevant international standards.

M. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or arrange to provide, a copy of a draft standard which it has submitted for comments. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.

N. The standardizing body shall take into account, in the further processing of the standard, the comments received during the period for commenting. Comments received through standardizing bodies that have accepted this Code of Good Practice shall, if so requested, be replied to as promptly as possible. The reply shall include an explanation why a deviation from relevant international standards is necessary.

O. Once the standard has been adopted, it shall be promptly published.

P. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or arrange to provide, a copy of its most recent work programme or of a standard which it produced. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.

Q. The standardizing body shall afford sympathetic consideration to, and adequate opportunity for, consultation regarding representations with respect to the operation of this Code presented by standardizing bodies that have accepted this Code of Good Practice. It shall make an objective effort to solve any complaints.

2. The "Technical Regulation" Threshold (TBT 1.1)

2-1. EC – Measures Affecting Asbestos and Asbestos-Containing Products (EC – Asbestos)

Reading EC—Asbestos, ask yourself the following questions: Was it in the interest of the EC to argue that the TBT Agreement does not apply? How broadly or narrowly does the Appellate Body understand the scope of the TBT? Given its conclusion, should and could the Appellate Body have completed the legal analysis in relation to the TBT-consistency of the asbestos ban? How can Canada get a ruling on that matter?

Editorial note: The footnote numbering differs from the numbering in the original reports.

Appellate Body Report, WT/DS135/AB/R, 12 March 2001

Feliciano, Presiding Member; Bacchus, Member; Ehlermann, Member

(…)

IV. ISSUES RAISED IN THIS APPEAL

58. This appeal raises the following issues:

(a) whether the Panel erred in its interpretation of the term "technical regulation" in Annex 1.1 of the *TBT Agreement* in finding, in paragraph 8.72(a) of the Panel Report, that "the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products" does not constitute a "technical regulation"

(…)

V. TBT Agreement

(…)

60. In addressing this threshold issue, the Panel examined the nature and structure of the measure to assess how the *TBT Agreement* might apply to it. For this examination, the Panel decided that it would be appropriate to examine the measure in two stages. First, the Panel examined "the part of the Decree prohibiting the marketing of asbestos and asbestos-containing

products"; next, the Panel analyzed the "exceptions" in the Decree. [1] The Panel concluded that the part of the Decree containing the prohibitions is *not* a "technical regulation", and that, therefore, the *TBT Agreement* does not apply to this part of the Decree. [2] However, the Panel also concluded that the part of the Decree containing the exceptions does constitute a "technical regulation", and that, therefore, the *TBT Agreement* applies to that part of the Decree. On this basis, the Panel decided not to examine Canada's claims under the *TBT Agreement* because, it said, those claims relate solely to the part of the Decree containing the prohibitions, which, in the Panel's view, does not constitute a "technical regulation", and, therefore, the *TBT Agreement* does not apply. [3]

61. In concluding that the part of the Decree containing the prohibitions is not a "technical regulation", the Panel found that:

a measure constitutes a "technical regulation" if:

> (a) the measure affects one or more given products;
>
> (b) the measure specifies the technical characteristics of the product(s) which allow them to be marketed in the Member that took the measure;
>
> (c) compliance is mandatory. [4]

62. Canada appeals the Panel's finding that the *TBT Agreement* does not apply to the part of the Decree relating to the prohibitions on imports of asbestos and asbestos-containing products. According to Canada, the Panel erred in considering the part of the Decree relating to those prohibitions *separately* from the part of the Decree relating to the exceptions to those prohibitions, and, therefore, the Panel should have examined the Decree as a *single*, unified measure. Furthermore, Canada argues that the Panel erred in its interpretation of a "technical regulation", as defined in Annex 1.1 to the *TBT Agreement,* because, in Canada's view, a general prohibition can be a "technical regulation".

(…)

64. In our view, the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole. Article 1 of the Decree contains broad, general prohibitions on asbestos and products containing asbestos. However, the scope and generality of those prohibitions can only be understood in light of the exceptions to it which, albeit for a limited period, *permit*, *inter alia*, the use of certain products containing asbestos and, principally, products containing chrysotile asbestos fibres. The measure is, therefore, *not* a *total* prohibition on asbestos fibres, because it also includes provisions that *permit*, for a limited duration, the use of asbestos in certain situations. Thus, to characterize the measure simply as a general prohibition, and to examine it as such, overlooks the complexities of the measure, which include both prohibitive and permissive elements. In addition, we observe that the exceptions in the measure would have no autonomous legal significance in the absence of the prohibitions. We, therefore, conclude that the measure at issue is to be examined as an integrated whole, taking into account, as appropriate, the prohibitive and the permissive elements that are part of it.

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[1] Panel Report, heading (a) on p. 404 and heading (b) on p. 411.
[2] *Ibid*., para. 8.72(a).
[3] *Ibid*., para. 8.72.
[4] *Ibid*., para. 8.57.

65. Accordingly, we reverse the Panel's two-stage interpretive approach of examining, first, the application of the *TBT Agreement* to the prohibitions contained in the measure and, second and separately, its application to the exceptions contained in the measure.

66. We turn now to the term "technical regulation" and to the considerations that must go into interpreting the term. Article 1.2 of the *TBT Agreement* provides that, for the purposes of this Agreement, the meanings given in Annex 1 apply. Annex 1.1 of the *TBT Agreement* defines a "technical regulation" as a:

Document which lays down *product characteristics* or their related processes and production methods, including the *applicable administrative provisions*, with which *compliance is mandatory*. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. (emphasis added)

67. The heart of the definition of a "technical regulation" is that a "document" must "lay down" – that is, set forth, stipulate or provide – "product *characteristics*". The word "characteristic" has a number of synonyms that are helpful in understanding the ordinary meaning of that word, in this context. Thus, the "characteristics" of a product include, in our view, any objectively definable "features", "qualities", "attributes", or other "distinguishing mark" of a product. Such "characteristics" might relate, *inter alia*, to a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity. In the definition of a "technical regulation" in Annex 1.1, the *TBT Agreement* itself gives certain examples of "product characteristics" – "terminology, symbols, packaging, marking or labelling requirements". These examples indicate that "product characteristics" include, not only features and qualities intrinsic to the product itself, but also related "characteristics", such as the means of identification, the presentation and the appearance of a product. In addition, according to the definition in Annex 1.1 of the *TBT Agreement*, a "technical regulation" may set forth the "applicable administrative provisions" for products which have certain "characteristics". Further, we note that the definition of a "technical regulation" provides that such a regulation "may also include or deal *exclusively* with terminology, symbols, packaging, marking *or* labelling requirements". (emphasis added) The use here of the word "exclusively" and the disjunctive word "or" indicates that a "technical regulation" may be confined to laying down only one or a few "product characteristics".

68. The definition of a "technical regulation" in Annex 1.1 of the *TBT Agreement* also states that "*compliance* " with the "product characteristics" laid down in the "document" must be "*mandatory* ". A "technical regulation" must, in other words, regulate the "characteristics" of products in a binding or compulsory fashion. It follows that, with respect to products, a "technical regulation" has the effect of *prescribing* or *imposing* one or more "characteristics" – "features", "qualities", "attributes", or other "distinguishing mark".

69. "Product characteristics" may, in our view, be prescribed or imposed with respect to products in either a positive or a negative form. That is, the document may provide, positively, that products *must possess* certain "characteristics", or the document may require, negatively, that products *must not possess* certain "characteristics". In both cases, the legal result is the same: the document "lays down" certain binding "characteristics" for products, in one case affirmatively, and in the other by negative implication.

70. A "technical regulation" must, of course, be applicable to an *identifiable* product, or group of products. Otherwise, enforcement of the regulation will, in practical terms, be impossible. This consideration also underlies the formal obligation, in Article 2.9.2 of the *TBT Agreement*, for Members to notify other Members, through the WTO Secretariat, "of the *products to be covered*" by a proposed "technical regulation". (emphasis added) Clearly, compliance with this obligation requires identification of the product coverage of a technical regulation. However, in contrast to what the Panel suggested, this does not mean that a "technical regulation" must apply to "*given*" products which are actually *named*, *identified* or *specified* in the regulation. (emphasis added) Although the *TBT Agreement* clearly applies to "products" generally, nothing in the text of that Agreement suggests that those products need be named or otherwise *expressly* identified in a "technical regulation". Moreover, there may be perfectly sound administrative reasons for formulating a "technical regulation" in a way that does *not* expressly identify products by name, but simply makes them identifiable – for instance, through the "characteristic" that is the subject of regulation.

71. With these considerations in mind, we examine whether the measure at issue is a "technical regulation". Decree 96-1133 aims primarily at the regulation of a named product, asbestos. The first and second paragraphs of Article 1 of the Decree impose a prohibition on asbestos *fibres*, as such. This prohibition on these *fibres* does not, *in itself*, prescribe or impose any "characteristics" on asbestos fibres, but simply bans them in their natural state. Accordingly, if this measure consisted *only* of a prohibition on asbestos *fibres*, it might not constitute a "technical regulation".

72. There is, however, more to the measure than this prohibition on asbestos *fibres*. It is not contested that asbestos fibres have no known use in their raw mineral form. Thus, the regulation of asbestos can *only* be achieved through the regulation of *products that contain asbestos fibres*. This, too, is addressed by the Decree before us. An integral and essential aspect of the measure is the regulation of "*products containing asbestos fibres*", which are also prohibited by Article 1, paragraphs I and II of the Decree. It is important to note here that, although formulated *negatively* – products containing asbestos are prohibited – the measure, in this respect, effectively prescribes or imposes certain objective features, qualities or "characteristics" on *all* products. That is, in effect, the measure provides that *all* products must *not* contain asbestos fibres. Although this prohibition against products containing asbestos applies to a large number of products, and although it is, indeed, true that the products to which this prohibition applies cannot be determined from the terms of the measure itself, it seems to us that the products covered by the measure are *identifiable*: all products must be asbestos free; any products containing asbestos are prohibited. We also observe that compliance with the prohibition against products containing asbestos is mandatory and is, indeed, enforceable through criminal sanctions. [5]

73. Articles 2, 3 and 4 of the Decree also contain certain exceptions to the prohibitions found in Article 1 of the Decree. As we have already noted, these exceptions would have no meaning in the absence of the rest of the measure because they define the scope of the prohibitions in the measure. The nature of these exceptions is to *permit* the use of certain products containing chrysotile asbestos fibres, subject to compliance with strict administrative requirements. The scope of the exceptions is determined by an "exhaustive list" of products that are permitted to contain chrysotile asbestos fibres, which is promulgated and reviewed annually by a government

[5]Article 5 of the Decree characterizes a contravention of any aspect of Articles 1.I or 1.II as a "5th class offence".

Minister. [6] The inclusion of a product in the list of exceptions depends on the absence of an acceptable alternative fibre for incorporation into a particular product, and the demonstrable provision of "all technical guarantees of safety". [7] Any person seeking to avail himself of these limited exceptions must provide a detailed justification to the authorities, complete with necessary supporting documentation concerning "the state of scientific and technological progress". [8] Compliance with these administrative requirements is mandatory. [9]

74. Like the Panel, we consider that, through these exceptions, the measure sets out the "applicable administrative provisions, with which compliance is mandatory" for products with certain objective "characteristics". [10] The exceptions apply to a narrowly defined group of products with particular "characteristics". Although these products are not named, the measure provides criteria which permit their identification, both by reference to the qualities the excepted products must possess and by reference to the list promulgated by the Minister.

75. Viewing the measure as an integrated whole, we see that it lays down "characteristics" for all products that might contain asbestos, and we see also that it lays down the "applicable administrative provisions" for certain products containing chrysotile asbestos fibres which are excluded from the prohibitions in the measure. Accordingly, we find that the measure is a "document" which "lays down product characteristics … including the applicable administrative provisions, with which compliance is mandatory." For these reasons, we conclude that the measure constitutes a "technical regulation" under the *TBT Agreement*.

76. We, therefore, reverse the Panel's finding, in paragraph 8.72(a) of the Panel Report, that the *TBT Agreement* "does not apply to the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products because that part does not constitute a 'technical regulation' within the meaning of Annex 1.1 to the TBT Agreement."

77. We note, however – and we emphasize – that this does not mean that *all* internal measures covered by Article III:4 of the GATT 1994 "affecting" the "sale, offering for sale, purchase, transportation, distribution or use" of a product are, necessarily, "technical regulations" under the *TBT Agreement*. Rather, we rule only that this particular measure, the Decree at stake, falls within the definition of a "technical regulation" given in Annex 1.1 of that Agreement.

78. As we have reached a different conclusion from the Panel's regarding the applicability of the *TBT Agreement* to the measure, we now consider whether it is appropriate for us to rule on the claims made by Canada relating to the *TBT Agreement*. …

(…)

80. In this appeal, Canada's outstanding claims were made under Articles 2.1, 2.2, 2.4 and 2.8 of the *TBT Agreement*. We observe that, although the *TBT Agreement* is intended to "further the objectives of GATT 1994", it does so through a specialized legal regime that applies solely to a limited class of measures. For these measures, the *TBT Agreement* imposes obligations on

[6]Article 2.II of the Decree.
[7]Article 2.I of the Decree.
[8]Article 3.I of the Decree.
[9]Article 3.II of the Decree limits the benefit of the exception to activities that have been the subject of the necessary formalities.
[10]Panel Report, para. 8.69.

Members
that seem to be *different* from, and *additional* to, the obligations imposed on Members under the GATT 1994.

81. As the Panel decided not to examine Canada's four claims under the *TBT Agreement*, it made no findings, at all, regarding any of these claims. Moreover, the meaning of the different obligations in the *TBT Agreement* has not previously been the subject of any interpretation or application by either panels or the Appellate Body. …

82. In light of their novel character, we consider that Canada's claims under the *TBT Agreement* have not been explored before us in depth. As the Panel did not address these claims, there are no "issues of law" or "legal interpretations" regarding them to be analyzed by the parties, and reviewed by us under Article 17.6 of the DSU. We also observe that the sufficiency of the facts on the record depends on the reach of the provisions of the *TBT Agreement* claimed to apply – a reach that has yet to be determined.

83. With this particular collection of circumstances in mind, we consider that we do not have an adequate basis properly to examine Canada's claims under Articles 2.1, 2.2, 2.4 and 2.8 of the *TBT Agreement* and, accordingly, we refrain from so doing.

(…)

* * *

2-2. EC – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)

When reading this case ask yourself how the Appellate Body squares its ruling with its prior decision in EC—Asbestos. Does EC—Seal Products develop the AB's interpretation of TBT Annex 1.1? In what way?

Editorial note: The footnote numbering differs from the numbering in the original report

Appellate Body Report, WT/DS400/AB/R & WT/DS401/AB/R, 22 May 2014

Graham, Presiding Member; Chang, Member; Zhang, Member

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds401_e.htm

(…)

5 ANALYSIS OF THE APPELLATE BODY

5.1 Legal characterization of the EU Seal Regime – Annex 1.1 to the TBT Agreement

5.1. … The Panel determined that it would first examine the complainants' claims under the TBT Agreement. Before proceeding to address the substance of these claims, the Panel addressed the threshold question of whether, as contended by Canada and Norway, the measure at issue constitutes a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement. In its analysis of this question, the Panel referred to what it described as a "three-tier test" and made three intermediate findings.[1] First, the Panel found that the measure applies to an "identifiable group of products"[2], namely, seal products. Second, the Panel determined that the EU Seal Regime "lays down characteristics for all products that might contain seal" as well as "applicable administrative provisions for certain products containing seal inputs that are exempted from the prohibition under the measure [at issue]".[3] Third, the Panel found that the measure imposes mandatory compliance.[4]

5.2. The European Union does not contest the Panel's finding that the measure applies to an "identifiable group of products".[5] Nor does it take issue with the Panel's determination[6] that the

[1] Panel Reports, para. 7.85 (referring to Appellate Body Report, *EC – Sardines*, para. 176, in turn referring to Appellate Body Report, *EC – Asbestos*, paras. 66-70; and Appellate Body Reports, *US – Clove Cigarettes*; *US – Tuna II (Mexico)*; and *US – COOL*).
[2] Panel Reports, para. 7.117 (quoting Appellate Body Report, *EC – Asbestos*, para. 70; and referring to Appellate Body Report, *EC – Sardines*, para. 180).
[3] Panel Reports. para. 7.111.
[4] Panel Reports, para. 7.125.
[5] European Union's other appellant's submission, para. 38 (referring to Panel Reports, para. 7.117).
[6] Panel Reports, para. 7.125.

measure imposes mandatory compliance. Instead, the European Union's appeal focuses on the Panel's finding that the measure lays down product characteristics, including the applicable administrative provisions, and the Panel's conclusion that the EU Seal Regime is a technical regulation.[7] In reaching this conclusion, the Panel determined that the prohibition on seal-containing products lays down a product characteristic in the negative form by requiring that products placed on the EU market not contain seal.[8] The Panel also found that the EU Seal Regime sets out, through its exceptions, the applicable administrative provisions for products with "certain characteristics".[9] In the light of these findings, the Panel considered it unnecessary to examine whether the EU Seal Regime also lays down "related" processes and production methods.[10]

5.3. On appeal, the European Union argues that the Panel erred by construing the term "applicable administrative provisions" as relating to "products" rather than "product characteristics or their related processes and production methods". The European Union underscores that the procedural requirements contained in the EU Seal Regime do not directly pertain to "what the Panel considered as a product characteristic laid down in the negative form, namely that the products must not contain seal". Consequently, they cannot be considered as being "applicable" to a product characteristic within the meaning of Annex 1.1. The European Union further argues that the Panel erred in finding that the criteria under the exceptions of the EU Seal Regime lay down "product characteristic[s]". Instead, they impose requirements relating to the identity of the hunter or the type or purpose of the hunt. According to the European Union, the EU Seal Regime differs in this respect from the measure at issue in *EC – Asbestos*, where the exceptions themselves laid down product characteristics. The European Union cautions that, under the Panel's reasoning, "virtually anything that [bears] any relation to a product" could be construed as a product characteristic, and be potentially considered a technical regulation subject to the disciplines of the TBT Agreement. This, in the European Union's view, would "subsume [processes and production methods] into product characteristics" and mean that non-product related processes and production methods (PPMs) would fall within the ambit of the TBT Agreement.

5.4. The European Union further claims that the Panel erred in limiting its analysis of whether the measure lays down product characteristics to its finding that the EU Seal Regime lays down characteristics of a product in a negative form, by providing that all products may not contain seal. Referring to the Appellate Body's findings in *EC – Asbestos*, the European Union recalls that the proper legal characterization of the measure at issue requires that it be examined "as a whole".[11] Thus, it was incorrect for the Panel to assume that a measure can be deemed a technical regulation "simply because one of its components meets the criterion for a technical regulation".[12] The Panel should, instead, have based its determination on a consideration of all components of the measure and their respective role in the operation and purpose of the EU Seal Regime. In this regard, the European Union highlights that, if the prohibition contained in the EU Seal Regime is examined in the light of the IC, MRM, and Travellers exceptions, the measure "cannot be reduced

[7] European Union's other appellant's submission, para. 89.
[8] Panel Reports, para. 7.106.
[9] Panel Reports, para. 7.108.
[10] Panel Reports, para. 7.112.
[11] European Union's other appellant's submission, para. 76 (referring to Appellate Body Report, *EC – Asbestos*, para. 64).
[12] European Union's other appellant's submission, para. 79 (referring to Panel Reports, para. 7.100).

to the simple negative intrinsic product characteristic that products may not contain seal". Nor does the EU Seal Regime, when considered as a whole, lay down "product characteristics" within the meaning of Annex 1.1 to the TBT Agreement.

(…)

5.1.2 Interpretation of Annex 1.1 to the TBT Agreement

5.8. Article 1.2 of the TBT Agreement stipulates that "for the purposes of this Agreement the meaning of the terms given in Annex 1 applies". The first paragraph of Annex 1.1 defines the term "technical regulation" as follows:

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

5.9. Annex 1.1 describes a technical regulation by reference to a "document". As noted by the Appellate Body in *US – Tuna (II) (Mexico)*, the use of the term "document" could "cover a broad range of instruments or apply to a variety of measures".[13]

(…)

5.11. The first sentence of Annex 1.1 refers to "product characteristics" or "their related processes and production methods". Looking first at the meaning of "product characteristics", in *EC – Asbestos*, the Appellate Body explained that the "characteristics" of a product include "objectively definable 'features', 'qualities', 'attributes', or other 'distinguishing mark' of a product".[14] The Appellate Body added that such "product characteristics" might relate, *inter alia*, to "a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity".[15] The Appellate Body described these characteristics as "features and qualities intrinsic to the product itself", adding that "product characteristics" within the meaning of Annex 1.1 *may* also include "related 'characteristics'".[16] As the Appellate Body has noted, a technical regulation may lay down "only one or a few 'product characteristics'".[17]

5.12. The definition of a technical regulation further provides that such a regulation may prescribe "product characteristics *or* their related [PPMs]". The use here of the disjunctive "or" indicates that "related [PPMs]" may play an additional or alternative role vis-à-vis "product characteristics" under Annex 1.1. The noun "process" is ordinarily understood to refer to "a course of action, a

[13] Appellate Body Report, *US – Tuna II (Mexico)*, para. 185.
[14] Appellate Body Report, *EC – Asbestos*, para. 67.
[15] Appellate Body Report, *EC – Asbestos*, para. 67.
[16] Appellate Body Report, *EC – Asbestos*, para. 67. In that appeal, the Appellate Body considered that such "related" characteristics may pertain to "the means of identification, the presentation and the appearance of a product". (Ibid.)
[17] Appellate Body Report, *EC – Asbestos*, para. 67.

procedure, a series of actions or operations directed to some end, as in manufacturing".[18] We further note that the dictionary defines the term "production" as "[t]he process of being manufactured commercially, esp. in large quantities"[19], while the word "method" is defined as "a (defined or systematic) way of doing a thing".[20] The ordinary meaning of the term "related" is "[h]aving relation; having mutual relation; connected".[21] A plain reading of Annex 1.1 thus suggests that a "related" PPM is one that is "connected" or "has a relation" to the characteristics of a product. The word "their", which immediately precedes the words "related processes and production methods", refers back to "product characteristics". Thus, in the context of the first sentence of Annex 1.1, we understand the reference to "or their related processes and production methods" to indicate that the subject matter of a technical regulation may consist of a process or production method that is *related* to product characteristics. In order to determine whether a measure lays down related PPMs, a panel thus will have to examine whether the processes and production methods prescribed by the measure have a sufficient nexus to the characteristics of a product in order to be considered related to those characteristics.

(…)

5.1.3 Whether the EU Seal Regime constitutes a technical regulation

5.1.3.1 Overview of the EU Seal Regime

5.16. As noted by the Panel, the EU Seal Regime establishes "rules concerning the placing on the market of seal products".[22] Specifically, Article 3(1) of the Basic Regulation prescribes that the placing on the market of seal products is allowed "only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence".[23] Article 3(2) of the Basic Regulation sets out two "derogations" from Article 3(1). First, Article 3(2)(a) allows the importation of a seal product by a traveller under certain conditions. Second, Article 3(2)(b) allows the placing on the market of seal products where: (i) the seal products result from by-products of hunting that is regulated by national law; (ii) the hunting is conducted for the sole purpose of the sustainable management of marine resources; and (iii) the placing on the market is only on a non-profit basis. Specific requirements for each of the three conditions for importing and/or placing seal products on the market are elaborated in the Implementing Regulation.[24]

5.17. Referring to the IC, MRM, and Travellers exceptions, the Panel noted that the conditions set out under the EU Seal Regime, together, both allow and prohibit the placing of seal products on

[18] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2356.
[19] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2359.
[20] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1767.
[21] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2519.
[22] Panel Reports, para. 7.40 (referring to Basic Regulation, Article 1).
[23] Panel Reports, para. 7.13 (quoting Basic Regulation, Article 3(1)).
[24] See *supra*, paras. 4.9-4.11.

the market. The Panel therefore correctly considered that the EU Seal Regime does not constitute a "total" or "general" ban on seal products, but instead "consists of both prohibitive and permissive components and should be examined as such".[25]

5.1.3.2 Preliminary remarks

5.18. We wish to make three preliminary remarks before we examine the European Union's claims regarding the Panel's characterization of the measure at issue under Annex 1.1 to the TBT Agreement.

5.19. First, the Appellate Body has emphasized that a determination of whether a measure constitutes a technical regulation "must be made in the light of the characteristics of the measure at issue and the circumstances of the case".[26] As the Appellate Body has explained, this analysis should give particular weight to the "integral and essential" aspects of the measure.[27] In determining whether a measure is a technical regulation, a panel must therefore carefully examine the design and operation of the measure while seeking to identify its "integral and essential" aspects.[28] It is these features of the measure that are to be accorded the most weight for purposes of characterizing the measure, and, thereby, for determining whether it is subject to the disciplines of the TBT Agreement. The ultimate conclusion as to the legal characterization of the measure must be made in respect of, and having considered, the measure as a whole.

5.20. Second, the issue of how best to characterize a measure at issue which comprises several different elements is one that arises in many disputes. The question is of particular significance in cases where the inclusion or exclusion of certain elements in the definition of the measure can affect the legal characterization, or substantive analysis of the measure. A panel may, in some cases, find it appropriate to treat several domestic legal instruments together as a single measure in order to facilitate its analysis of that measure in the light of the claims raised or defences invoked.[29] Conversely, there may be instances where a panel may choose to consider different elements set out in a single legal instrument as different "measures", for purposes of its analysis.[30] As regards the measure at issue in the present disputes, the Panel noted that: (i) the Basic Regulation and the Implementing Regulation "operate in conjunction with each other in governing the importation and the placing of seal products on the EU market"[31]; (ii) the permissive and the prohibitive elements of the measure are intertwined within the EU Seal

[25] Panel Reports, para. 7.54.
[26] Appellate Body Report, *US – Tuna II (Mexico)*, para. 188 (referring to Appellate Body Reports, *EC – Asbestos*, para. 64; and *EC – Sardines*, paras. 192 and 193).
[27] Appellate Body Report, *EC – Asbestos*, para. 72.
[28] Appellate Body Report, *EC – Asbestos*, para. 72.
[29] For example, in *EC – Bananas III*, the EC Banana Regime comprised the Council Regulation (EEC) 404/931 "and the subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on Bananas, which implemented, supplemented and amended that regime". (Panel Reports, *EC – Bananas III*, para. 1.1) Treating multiple legal instruments as a single measure does not preclude a complainant from challenging different aspects of such a measure under different provisions of the WTO covered agreements.
[30] See e.g. Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 126 and 127.
[31] Panel Reports, para. 7.26.

Regime[32]; and (iii) the parties agreed that the EU Seal Regime should be treated as a single measure.[33] For the purpose of Annex 1.1, we therefore consider it appropriate to draw conclusions regarding the legal characterization of the EU Seal Regime as a whole on the basis of an integrated analysis of the constituent parts of the measure.

(…)

5.1.3.3 Whether the EU Seal Regime lays down product characteristics including the applicable administrative provisions

5.1.3.3.1 The Panel's approach

5.25. Referring to the Appellate Body report in *EC – Asbestos*, the Panel stated that it would "proceed to examine the prohibitive and permissive aspects of the EU Seal Regime with a view to determining whether the EU Seal Regime, taken as a whole, lays down product characteristics or their related PPMs within the meaning of Annex 1.1".[34] The Panel recalled the Appellate Body's finding in *EC – Asbestos* that the prohibition on asbestos fibres "as such" did not lay down "product characteristics" because it simply banned asbestos fibres in their natural state.[35] The Panel further noted, however, that the prohibition on asbestos-containing products was found by the Appellate Body "to lay down a product characteristic in the negative form by requiring that all products must not contain asbestos".[36] Turning to the measure at issue in the instant disputes, the Panel observed that the EU Seal Regime "prohibits all seal products, whether they are made exclusively of seal or contain seal as an input" and that it makes an exception "with regard to the import and/or placing on the market of seal products in three situations, namely when they result from IC hunts, MRM hunts, or in the case of Travellers imports".[37] Based on the text of the measure, and in the light of the reasoning of the Appellate Body in *EC – Asbestos*, the Panel concluded:

[W]e believe that the prohibition on seal-containing products under the EU Seal Regime lays down a product characteristic in the negative form by requiring that all products not contain seal.[*][38]

[*fn original] [153] We note that such conclusion is not affected by the fact that the prohibition of seals "in their natural state" might not, in itself, prescribe or impose any "characteristics". In this regard, Norway argues that the appropriate analogues to the "raw mineral form" of asbestos in the

[32] For example, in the case of the IC exception, Article 3(1) of the Basic Regulation prescribes that the *placing on the market* of seal products is allowed "*only* where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence". (emphasis added)
[33] Panel Reports, para. 7.26 (referring to parties' responses to Panel question No. 2).
[34] Panel Reports, para. 7.102. See also para. 7.99 (referring to Appellate Body Report, *EC – Asbestos*, para. 64).
[35] Panel Reports, para. 7.104 (referring to Appellate Body Report, *EC – Asbestos*, para. 71). See also Panel Reports, para. 7.99.
[36] Panel Reports, para. 7.104.
[37] Panel Reports, para. 7.105 (referring to Basic Regulation, Articles 3(1), 3(2)(a), and 3(2)(b)).
[38] Panel Reports, para. 7.106.

context of the EU Seal Regime would be live seals or unprocessed seal carcasses. In Norway's view, the majority of seal products are in fact "mixed" products, i.e. they must be combined with other products derived from other sources. (Norway's second written submission, paras. 154-155).

5.26. On appeal, the European Union recalls that the proper legal character of the measure at issue cannot be determined unless the measure is examined "as a whole".[39] According to the European Union, if the prohibition contained in the EU Seal Regime is examined in the light of the IC, MRM, and Travellers exceptions, the measure "cannot be reduced to the simple negative intrinsic product characteristic that products may not contain seal".[40]

(…)

5.28. We disagree with the approach adopted by the Panel. The Panel stated that the EU Seal Regime "consists of both prohibitive and permissive components and should be examined as such"[41], explaining that the "prohibitive" component of the EU Seal Regime "operates as a ban on seal products", while the "permissive" component consists of "an exception and two derogations, forming three conditions prescribed in Article 3 of the Basic Regulation (i.e. seal products obtained from IC hunts, MRM hunts, and those imported under the Travellers imports category)".[42] Although the Panel set out to "examine the prohibitive and permissive aspects of the EU Seal Regime with a view to determining whether the EU Seal Regime, taken as a whole, lays down product characteristics or their related PPMs within the meaning of Annex 1.1"[43], it appears that the Panel's conclusion that the measure lays down product characteristics rests on its assessment of a single component of the measure. In other words, having compartmentalized its assessment of the various components of the EU Seal Regime in this manner, the Panel seemed satisfied once it had found that the prohibition on seal-containing products laid down product characteristics in the negative form. … It is not apparent from its Reports that the Panel conducted a holistic assessment of the weight and relevance of each of the relevant components of the EU Seal Regime before reaching a conclusion as to the legal characterization of the measure "as a whole".

5.29. As noted, the Appellate Body has emphasized that a determination of whether a measure constitutes a technical regulation "must be made in the light of the characteristics of the measure at issue and the circumstances of the case".[44] In *EC – Asbestos*, the Appellate Body placed particular emphasis on the "integral and essential" aspects of the measure[45], "taking into account, as appropriate, the prohibitive and the permissive elements that are part of it".[46] In order to

[39] European Union's other appellant's submission, para. 76 (referring to Panel Reports, para. 7.101).
[40] European Union's other appellant's submission, para. 88.
[41] Panel Reports, para. 7.54.
[42] Panel Reports, para. 7.56.
[43] Panel Reports, para. 7.102.
[44] Appellate Body Report, *US – Tuna II (Mexico)*, para. 188 (referring to Appellate Body Reports, *EC – Asbestos*, para. 64; and *EC – Sardines*, paras. 192 and 193).
[45] Appellate Body Report, *EC – Asbestos*, para. 72.
[46] Appellate Body Report, *EC – Asbestos*, para. 64. In reaching this conclusion, the Appellate Body took into account the content of Canada's request for the establishment of a panel (i.e. Canada's identification of the Decree concerned as "the measure at issue") as well as the content of the measure itself (consisting of prohibitions and limited exceptions). The Appellate Body then examined each component (i.e. prohibitions and exceptions) of the measure before making an overall assessment of whether the measure, viewed as an integrated whole, was a "technical regulation" within the meaning of Annex 1.1.

determine the proper legal characterization of the EU Seal Regime, the Panel should therefore have examined the design and operation of the measure while seeking to identify its "integral and essential" aspects before reaching a final conclusion as to the legal characterization of the measure in respect of, and having considered, the measure as a whole. Although a measure that comprises, among other elements, a prohibition of seal-containing products may include a component that appears to prescribe product characteristics, we consider the Panel to have erred, to the extent it reached a final conclusion as to the legal character of the measure on the basis of an examination of the aspect of the EU Seal Regime that sets out a "prohibition on seal-containing products" taken alone.[47] The Panel could not have properly reached a conclusion as to the legal character of the measure at issue without analysing the weight and relevance of the essential and integral elements of the measure as an integrated whole.

5.30. Having expressed our concern regarding the overall approach adopted by the Panel, we turn to address the participants' arguments as they relate to the three specific aspects of the EU Seal Regime: (i) the prohibition on products consisting exclusively of seal (pure seal products); (ii) the prohibition on seal-containing products ("mixed" products); and (iii) the conditions under the IC/MRM/Travellers exceptions. …

5.1.3.3.2 Prohibitive and permissive elements

5.31. We note, first, that the Appellate Body has previously explained that a measure "may provide, positively, that products *must possess* certain 'characteristics'", or it "may require, negatively, that products *must not possess* certain 'characteristics'".[48] As the Appellate Body has explained, the legal result is the same in both cases: "the document 'lays down' certain binding 'characteristics' for products, in one case affirmatively, and in the other by negative implication."[49]

5.32. The European Union observes that one aspect of the EU Seal Regime consists of a prohibition on pure seal products.[50] According to the European Union, the Panel erred by failing to take into account that such a ban on pure seal products does not set out product characteristics. The European Union adds that this aspect of the measure is similar to the prohibition of asbestos fibres "as such" in *EC – Asbestos*, which the Appellate Body found did not constitute a technical regulation.[51]

5.33. Norway counters that the mere fact that the EU Seal Regime applies to pure seal products does not preclude the measure from being characterized as a technical regulation, considering that it lays down characteristics for all products containing seal inputs.[52] Norway adds that the

[47] Panel Reports, para. 7.106.
[48] Appellate Body Report, *EC – Asbestos*, para. 69. (emphasis original)
[49] Appellate Body Report, *EC – Asbestos*, para. 69.
[50] The Panel concluded on the basis of its examination of the text and legislative history of the EU Seal Regime, as well as other evidence pertaining to its design, structure, and operation, that the objective of the EU Seal Regime is "to address the moral concerns of the EU public with regard to the welfare of seals". (Panel Reports, para. 7.410)
[51] European Union's other appellant's submission, para. 33 (referring to Appellate Body Report, *EC – Asbestos*, paras. 71 and 72).
[52] Norway's appellee's submission, para. 95.

majority of seal products subject to the EU Seal Regime are "mixed products" that include non-seal inputs, such as "tanned seal fur skin; boots with seal fur skins; slippers with seal fur skin; refined seal oil; omega-3 oil capsules; and processed seal meat".[53] According to Norway, "the extent of pure seal products is so limited" that it does not affect the overall finding made by the Panel that the EU Seal Regime lays down product characteristics for all products that might contain seal inputs.[54]

5.34. In *EC – Asbestos*, the Appellate Body observed that the measure at issue prohibited asbestos fibres in their raw form.[55] The Appellate Body found that if a measure consisted only of a prohibition on a product in its natural state, it might not constitute a technical regulation. Specifically, the Appellate Body stated:

The first and second paragraphs of Article 1 of the Decree [96-1133] impose a prohibition on asbestos *fibres*, as such. This prohibition on these *fibres* does not, *in itself*, prescribe or impose any "characteristics" on asbestos fibres, but simply bans them in their natural state. Accordingly, if this measure consisted *only* of a prohibition on asbestos *fibres*, it might not constitute a "technical regulation".[56]

5.35. We agree with the European Union that a prohibition of pure seal products does *not* prescribe or impose any "characteristics" on such products. Unlike in *EC – Asbestos*, where it was undisputed that asbestos fibres had "no known use in their raw mineral form"[57], products consisting exclusively of seal are used, consumed and traded to a considerable extent even though trade in "mixed products" has surpassed trade in seal products in recent years.[58]

5.36. We agree with the European Union that the Panel should therefore have assessed the relevance of this aspect of the measure in order to determine whether it was a part of the integral and essential aspects of the measure and, if so, what weight it should ascribe to it in determining whether the EU Seal Regime, as a whole, lays down product characteristics. As noted, however, rather than conducting such an assessment, the Panel simply stated in footnote 153 of its Reports, that its conclusion that the measure lays down product characteristics is "not affected by the fact that the prohibition of seals 'in their natural state' might not, in itself, prescribe or impose any 'characteristics'".[59] This does not, in our view, show sufficient consideration of the integral and essential aspects of the measure as a whole.

5.37. We turn next to examine the EU Seal Regime as it applies to products containing seal *as an input*. With regard to products containing seal and other ingredients ("mixed" products), the European Union argues that the Panel should have also taken into account, together with the prohibition on seal-containing products, the exceptions under the measure, "because it is the permissive elements, *together* with the prohibition, that determine the situations where seal

[53] Norway's appellee's submission, para. 96 (referring to Norway's first written submission to the Panel, paras. 85-102).
[54] Norway's appellee's submission, para. 96.
[55] Appellate Body Report, *EC – Asbestos*, para. 71.
[56] Appellate Body Report, *EC – Asbestos*, para. 71. (emphasis original)
[57] Appellate Body Report, *EC – Asbestos*, para. 72 (referring to Panel Report, *EC – Asbestos*, paras. 3.418 and 3.439).
[58] Panel Reports, paras. 7.240 and 7.241.
[59] Panel Reports, fn. 153 to para. 7.106 (quoting Appellate Body Report, *EC – Asbestos*, para. 71).

products may be placed on the European Union market".[60] In response, Canada argues that the Panel correctly found that the EU Seal Regime "[lays] down a product characteristic in the negative form by requiring that 'all products not contain seal'".[61]

5.38. For its part, Norway argues that the Panel took the exceptions under the EU Seal Regime "into account in finding that the measure as a whole lays down product characteristics".[62] Norway notes, in particular, that the Panel reasoned that the exceptions "define the scope of the prohibition" of the EU Seal Regime and that the "nature of the exceptions is to allow products containing seal" subject to "strict administrative requirements" under the measure.[63]

5.39. In *EC – Asbestos*, the Appellate Body found that an "integral and essential aspect of the measure [was] the regulation of '*products containing asbestos fibres*'".[64] The Appellate Body attached importance to the fact that the measure at issue in that case effectively prescribed "certain objective features, qualities or 'characteristics' on all products".[65] The prohibition on seal-containing products as such may be seen as imposing certain "objective features, qualities or characteristics" on all products by providing that they may not contain seal. Yet, that prohibition is but one of the components of the EU Seal Regime and has to be analysed together with other components of the measure before reaching a conclusion under Annex 1.1. As the Appellate Body has previously noted, "the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole."[66] Moreover, the Appellate Body in *EC – Asbestos* did not conclude that the relevant French Decree qualified as a technical regulation merely on the basis of its intermediate finding that the aspect of the measure setting out a prohibition on "mixed products" prescribed "certain objective features, qualities or 'characteristics' on all products".[67] Rather, the Appellate Body reached its conclusion only after further examining other aspects of the measure (i.e. certain exceptions to such prohibition). Given that the EU Seal Regime "consists of both prohibitive and permissive components"[68], we consider it necessary further to examine the permissive elements of the measure before drawing, on the basis of all relevant components of the EU Seal Regime, an overall conclusion as to whether the measure prescribes product characteristics.

5.40. As noted, Article 1 of the Basic Regulation, entitled "Subject matter", states that the Regulation establishes "rules concerning the placing on the market of seal products". Article 3, the key substantive provision of the Basic Regulation, entitled "Conditions for placing on the market", starts with a paragraph prescribing that the placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence.[69] The second paragraph of Article 3 provides for two situations where derogation from paragraph 1 is allowed. First, the placing on the market of seal products on a non-profit basis is allowed where a seal product is

[60] European Union's other appellant's submission, para. 34 (referring to European Union's first written submission to the Panel, para. 216). (emphasis original)
[61] Canada's appellee's submission, para. 37 (referring to Panel Reports, para. 7.106).
[62] Norway's appellee's submission, para. 49.
[63] Norway's appellee's submission, para. 50 (quoting Panel Reports, para. 7.108).
[64] Appellate Body Report, *EC – Asbestos*, para. 72. (emphasis original)
[65] Appellate Body Report, *EC – Asbestos*, para. 72. (emphasis omitted)
[66] Appellate Body Report, *EC – Asbestos*, para. 64.
[67] Appellate Body Report, *EC – Asbestos*, para. 72. (emphasis omitted)
[68] Panel Reports, para. 7.54.
[69] Panel Reports, para. 7.13.

derived from MRM hunts and is not being placed on the market for "commercial reasons" (Article 3(2)(b)).[70] Second, the import by travellers of a seal product is allowed to the extent that it is not for "commercial reasons" (Article 3(2)(a)). Specific requirements for each of the three conditions for importing and/or placing seal products on the market are elaborated in other parts of the Basic Regulation and the Implementing Regulation.[71]

5.41. Before turning to examine the conditions under the exceptions, we consider it helpful to observe the different features of the measures at issue in *EC – Asbestos* and in these disputes. First, we note that, under the French Decree, asbestos-containing products were regulated due to the carcinogenicity or toxicity of the physical properties of the subject products – i.e. the fact that those products contained asbestos fibres. By contrast, the EU Seal Regime does not prohibit seal-containing products merely on the basis that such products contain seal as an input. Rather, such prohibition is imposed subject to conditions based on criteria relating to the identity of the hunter or the type or purpose of the hunt from which the product is derived. In *EC – Asbestos*, by contrast, the identity of the producer or manufacturer, or the type or purpose of manufacturing, did not feature in the French Decree as conditions for the prohibition or permission to place asbestos products on the market. Moreover, the prohibition of products containing asbestos set out in Article 1, paragraphs I and II of the French Decree, was an "integral and essential aspect" of the measure at issue in *EC – Asbestos*.[72] On the other hand, under the EU Seal Regime, in particular, Article 3 of the Basic Regulation, the prohibition on the products containing seal seems to be derivative of the three (IC/MRM/Travellers) market access conditions, that is, the permissive component of the measure.

5.42. In addition, we note the difficulty of verifying precisely whether a particular product contains seal as an input.[73] This may suggest, albeit indirectly, that the regulation of the "mixed products" is not an equally important feature of the EU Seal Regime as far as the *operation* of the measure is concerned, as it was the case for the regulation of products containing chrysotile asbestos fibres under the measure at issue in *EC – Asbestos*. Finally, we note that, with respect to the exceptions regarding crysotile asbestos fibres, pursuant to Article 2 of the French Decree at issue in *EC – Asbestos*, the exceptions under that measure applied on "an exceptional and temporary basis"[74] and the Appellate Body referred to these as "limited exceptions"[75], which is not the case for the exceptions under the EU Seal Regime.

5.43. We now turn to examine whether the conditions under the exceptions of the EU Seal Regime have features prescribing product characteristics.

5.44. The complainants confirmed at the oral hearing that they did not allege that the exceptions under the EU Seal Regime, when considered alone, lay down product characteristics.[76] The European Union asserts, however, that the Panel did make such a finding, and points to the following reasoning by the Panel:

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[70] Article 3(2)(b) of the Basic Regulation states, at the end: "The nature and quantity of the seal products shall not be such as to indicate that they are being *placed on the market* for commercial reasons." (emphasis added)
[71] See *supra*, paras. 4.9-4.11.
[72] Appellate Body Report, *EC – Asbestos*, para. 72.
[73] European Union's response to questioning at the oral hearing.
[74] Appellate Body Report, *EC – Asbestos*, para. 2 (quoting French Decree, Article 2).
[75] Appellate Body Report, *EC – Asbestos*, para. 73.
[76] Canada's and Norway's responses to questioning at the oral hearing.

> [O]nly seals obtained from the specific type of hunter and/or the qualifying hunts may be used in making final products. These criteria in our view constitute "objectively definable features" of the seal products that are allowed to be placed on the EU market and consequently lay down particular "characteristics" of the final products. Therefore, as was the case in *EC – Asbestos*, the exceptions under the EU Seal Regime identify a group of products with particular "characteristics" through a narrowly defined set of criteria.[77]

5.45. The Panel's discussion cited above gives the impression that the Panel treated the identity of the hunter, the type of hunt, and the purpose of the hunt as "product characteristics" within the meaning of Annex 1.1. In particular, we note that the Panel referred to these as "objectively definable features" of seal products that "lay down particular 'characteristics' of the final products".[78] We consider the Panel to have erred in this regard. We see no basis in the text of Annex 1.1, or in prior Appellate Body reports, to suggest that the identity of the hunter, the type of hunt, or the purpose of the hunt could be viewed as product characteristics.[79] Nor do we see a basis to find that the market access conditions under the exceptions to the EU Seal Regime exhibit features setting out product characteristics.

(…)

5.1.3.3.4 Conclusion

5.58. Having reviewed the relevant aspects of the EU Seal Regime, we see only one feature that may suggest that the measure lays down product characteristics, while all others suggest that this is not the case. For example, to the extent that the measure *regulates* the placing on the EU market of pure seal products, which is a part of the integral and essential aspects of the measure, it does *not* prescribe or impose any "characteristics" on the products themselves. To the extent the measure prohibits the placing on the EU market of seal-containing products, it could be seen as imposing certain "objective features, qualities or characteristics" on all products by providing that they may not contain seal. However, as stated above, we are not persuaded that this part of the Regulation constitutes the main feature of the measure at issue. Moreover, the EU Seal Regime's prohibition of "mixed" products differs, to a considerable extent, from the prohibitive aspects of the French Decree under *EC – Asbestos*. More importantly, as noted by the Panel, the EU Seal Regime "consists of both prohibitive and permissive components and should be examined as such".[80] As we see it, when the prohibitive aspects of the EU Seal Regime are considered in the light of the IC and MRM exceptions, it becomes apparent that the measure is not concerned with banning the placing on the EU market of seal products as such. Instead, it

[77] Panel Reports, para. 7.110.
[78] Panel Reports, para. 7.110.
[79] We note in this regard that Article 2.9 of the TBT Agreement envisages that technical regulations have "technical content". While the term "technical" can have a range of meanings, it does not appear plausible that a measure that purportedly distinguishes between seal products on the basis of criteria relating to the identity of the hunter and the purpose of the hunt would be "technical" in nature or have "technical" content.
[80] Panel Reports, para. 7.54.

establishes the conditions for placing seal products on the EU market based on criteria relating to the identity of the hunter or the type or purpose of the hunt from which the product is derived. We view this as the main feature of the measure. That being so, we do not consider that the measure as a whole lays down product characteristics. This is not changed by the fact that the administrative provisions under the EU Seal Regime may "apply" to products containing seal.

5.59. In the light of the above, we reverse the Panel's findings, in paragraphs 7.111 and 7.112 of the Panel Reports, that the EU Seal Regime lays down product characteristics. The Panel's conclusion that the EU Seal Regime constitutes a "technical regulation" relied on its intermediate finding that the EU Seal Regime lays down product characteristics. Accordingly, having reversed this finding by the Panel, we also reverse the Panel's findings in paragraphs 7.125 and 8.2(a) of the Panel Reports that the EU Seal Regime constitutes a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement.

5.60. In our analysis above, we have addressed the participants' arguments as they pertain to the Panel's interpretation and application of the terms "product characteristics" and "applicable administrative provisions" in the first sentence of Annex 1.1. In doing so, we have focused on the text and the immediate context found in Annex 1.1 as well as on previous jurisprudence by the Appellate Body. In future cases, depending on the nature of the measure and the circumstances of the case, a panel may find it helpful to seek further contextual guidance in other provisions of the TBT Agreement, for example, those pertaining to standards[81], international standards[82], and conformity assessment procedures[83], in delimiting the contours of the term "technical regulation".[84] It may also be relevant for a panel to examine supplementary means of interpretation such as the negotiating history of the TBT Agreement or the types and the nature of claims that have been brought by the complainants. Indeed, as the Appellate Body has emphasized, a determination of whether a measure constitutes a technical regulation "must be made in the light of the characteristics of the measure at issue and the circumstances of the case".[85]

5.1.3.4 Completing the legal analysis

5.61. We note that both Canada and Norway have requested, should we find that the Panel erred in determining that the EU Seal Regime lays down "product characteristics" and/or "applicable administrative provisions" within the meaning of Annex 1.1, and reverse either of those findings of the Panel, that we complete the analysis and find that the EU Seal Regime constitutes a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement.[86] Hence, having

[81] TBT Agreement, Annex 1.2.
[82] TBT Agreement, Articles 2.4, 2.5, 2.6, and 2.9.
[83] TBT Agreement, Article 5 and Annex 1.3. If the requirements set out in a measure are not apt to be subject to "conformity assessment procedures" as defined in Annex 1.3, this may be an indication that the measure at issue is not a technical regulation.
[84] Thus, for example, if a measure has characteristics of a "standard" within the meaning of Annex 1.2, it would not constitute a technical regulation. In determining whether this is the case, it may also be relevant to consider provisions such as Articles 2.4, 2.5, 2.6, and 2.9 of the TBT Agreement.
[85] Appellate Body Report, *US – Tuna II (Mexico)*, para. 188 (referring to Appellate Body Reports, *EC – Asbestos*, para. 64; and *EC – Sardines*, paras. 192 and 193).
[86] Canada's appellee's submission, para. 66; Norway's appellee's submission, para. 101.

reversed the Panel's finding that the measure lays down "product characteristics", we now consider whether we can complete the legal analysis as requested by the complainants.

(…)

5.64. Turning to the specific case before us, we recall that the first sentence of Annex 1.1 indicates that the subject matter of a technical regulation may consist of either "product characteristics" *or* "their related processes and production methods". Hence, we might, in principle, be able to complete the analysis by ruling on whether the EU Seal Regime lays down "their related processes and production methods" and therefore qualifies as a technical regulation even though it does not lay down product characteristics.

(…)

5.69. As noted[87], the Appellate Body has refrained from completing the legal analysis in view of the novel character of an issue which the panel "had not examined at all" and on which the Panel had made no findings. Importantly, it has not completed the analysis in the absence of a full exploration of issues before the panel that might have given rise to concerns about the parties' due process rights. We believe that all these elements are present in this case. We further note that the line between PPMs that fall, and those that do not fall, within the scope of the TBT Agreement raises important systemic issues. Although we explored the issue of whether the EU Seal Regime lays down related PPMs with the participants and third participants at the oral hearing, and while the participants' answers to the Division's questions did shed at least some light on the issue, we consider that in order to develop an interpretation of that phrase in the first sentence of Annex 1.1 and in order to reach a conclusion in this respect regarding the EU Seal Regime, more argumentation by the participants and exploration in questioning would have been required. The Panel has made no findings on this issue and the question was not explored by the Panel. Moreover, the complainants focused in their argumentation on the issue of whether the EU Seal Regime lays down "product characteristics" and "applicable administrative provisions" within the meaning of Annex 1.1. In these circumstances, we do not consider it appropriate to complete the legal analysis by ruling on whether the EU Seal Regime lays down "related processes and production methods" within the meaning of Annex 1.1 to the TBT Agreement.

5.1.4 Overall conclusion

5.70. Having reversed the Panel's finding that the EU Seal Regime constitutes a technical regulation subject to the disciplines of the TBT Agreement and having found that we are not in a position to complete the legal analysis in this case, we declare moot and of no legal effect the Panel's findings under Articles 2.1, 2.2, 5.1.2, and 5.2.1 of the TBT Agreement.

* * *

[87] See *supra*, para. 5.63.

3. From Non-Discrimination to Unnecessary Obstacles (TBT 2.1 & 2.2)

3-1. US – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes)

Editorial note: The footnote numbering differs from the numbering in the original reports.

Appellate Body Report, WT/DS406/AB/R, 4 April 2012

Oshima, Presiding Member; Ramírez-Hernández, Member; Van den Bossche, Member

I. INTRODUTION

1. The United States appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*[88] (the "Panel Report"). The Panel was established on 20 July 2010 to consider a complaint by Indonesia with respect to a measure adopted by the United States that prohibits cigarettes with characterizing flavours, other than tobacco or menthol.

2. Before the Panel, Indonesia claimed that the United States acted inconsistently with its substantive and procedural obligations under the *Agreement on Technical Barriers to Trade* (the "*TBT Agreement*") and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). In particular, Indonesia claimed that Section 907(a)(1)(A) of the United States Federal Food, Drug and Cosmetic Act[89] (the "FFDCA")—as amended by the Family Smoking Prevention and Tobacco Control Act[90] (the "FSPTCA")—was inconsistent with Articles 2.1, 2.2, 2.5, 2.8, 2.9, 2.10, 2.12, and 12.3 of the *TBT Agreement*. Alternatively, Indonesia claimed that Section 907(a)(1)(A) was inconsistent with Article III:4 of the GATT 1994[91], and could not be justified under Article XX(b) thereof.[92]

3. The Panel Report was circulated to Members of the World Trade Organization (the "WTO") on 2 September 2011. The Panel found that Section 907(a)(1)(A) was inconsistent with Article 2.1 of the *TBT Agreement* because it accorded to imported clove cigarettes less favourable treatment than that accorded to like menthol cigarettes of national origin.[93] Having found that Section 907(a)(1)(A) was inconsistent with Article 2.1 of the *TBT Agreement*, the Panel declined

[88]WT/DS406/R, 2 September 2011.
[89]Codified at *United States Code*, Title 21, Chapter 9, section 387g(a)(1)(A).
[90]United States Family Smoking Prevention and Tobacco Control Act, Public Law No. 111-31, 123 Stat. 1776 (22 June 2009) (Panel Exhibit US-7).
[91]Panel Report, para. 3.1.
[92]Panel Report, para. 7.299 (referring to Indonesia's first written submission to the Panel, paras. 114-127).
[93]Panel Report, paras. 7.293 and 8.1(b).

to rule on Indonesia's alternative claim under Article III:4 of the GATT 1994 and on the United States' related defence under Article XX(b) of the GATT 1994.[94]

(…)

5. Conversely, the Panel rejected Indonesia's claims under Articles 2.2, 2.5, 2.8, 2.9.3, 2.10, and 12.3 of the *TBT Agreement*. More specifically, the Panel found that Indonesia failed to demonstrate that Section 907(a)(1)(A) was inconsistent with Article 2.2 of the *TBT Agreement* to the extent that its ban on clove cigarettes was more trade restrictive than necessary to fulfil the legitimate objective of reducing youth smoking, taking account of the risks non-fulfilment would create.[95] ...

(…)

9. On appeal, the United States claims that the Panel erred in finding that the United States acted inconsistently with Article 2.1 of the *TBT Agreement*. In particular, the United States claims that the Panel erred in finding that imported clove cigarettes and domestic menthol cigarettes were like products within the meaning of Article 2.1. The United States also challenges the Panel's finding that Section 907(a)(1)(A) accords to imported clove cigarettes less favourable treatment than that accorded to domestic like products. …

(…)

III. ISSUES RAISED IN THIS APPEAL

76. The following issues are raised in this appeal:

(a) Whether the Panel erred in finding that Section 907(a)(1)(A) of the FFDCA is inconsistent with Article 2.1 of the *TBT Agreement*, and in particular:

(i) Whether the Panel erred in finding that clove cigarettes and menthol cigarettes are like products within the meaning of Article 2.1 of the *TBT Agreement*, and in particular:

- whether the Panel performed an incomplete analysis of the different end-uses of the products at issue;
- whether the Panel erred in its analysis of consumer tastes and habits;

(…)

[94]Panel Report, paras. 7.294, 7.310, 8.3, and 8.4.
[95]Panel Report, paras. 7.432 and 8.1(c).

(ii) Whether the Panel erred in finding that Section 907(a)(1)(A) accords to imported clove cigarettes less favourable treatment than that accorded to domestic menthol cigarettes within the meaning of Article 2.1 of the *TBT Agreement*, and in particular:

(…)

- whether the Panel erred in finding that the detrimental impact on competitive opportunities of imported clove cigarettes could not be explained by reasons unrelated to the foreign origin of those products; and

(…)

IV. BACKGROUND

77. Before commencing our analysis of the issues of law and legal interpretations raised in this appeal, we briefly outline certain pertinent facts and background information. This dispute concerns Section 907(a)(1)(A) of the United States Federal Food, Drug and Cosmetic Act[96] (the "FFDCA"). Section 907(a)(1)(A) was added to the FFDCA by Section 101(b) of the Family Smoking Prevention and Tobacco Control Act[97] (the "FSPTCA")[98], and became law on 22 June 2009.[99]

78. Under Section 907(a)(1)(A), beginning three months after the enactment of the FSPTCA —that is, as from 22 September 2009:

> … a cigarette or any of its components (including the tobacco, filter, or paper) shall not contain, as a constituent … or additive, an artificial or natural flavour (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, liquorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavour of the tobacco product or tobacco smoke.

79. The specific objective of Section 907(a)(1)(A) is not set forth in the FSPTCA itself. However, a report prepared by the House Energy and Commerce Committee[100] (the "House Report") articulates both the objectives of the FSPTCA overall, and of Section 907(a)(1)(A) in particular. According to the House Report, "[t]he objectives of [the FSPTCA] are to provide the Secretary with the proper authority over tobacco products in order to protect the public health and

[96] *Supra*, footnote 2.
[97] *Supra*, footnote 3.
[98] Panel Report, para. 2.4.
[99] Panel Report, para. 2.5 (referring to Indonesia's first written submission to the Panel, footnote 1 to para. 1).
[100] H.R. Rep. No. 111-58, Pt. 1 (2009) (Panel Exhibits IND-2 and US-67).

to reduce the number of individuals under 18 years of age who use tobacco products."[101] The House Report also explains the purpose of Section 907(a)(1)(A) as follows:

> Consistent with the overall intent of the bill to protect the public health, including by reducing the number of children and adolescents who smoke cigarettes, Section 907(a)(1)(A) is intended to prohibit the manufacture and sale of cigarettes with certain 'characterizing flavors' that appeal to youth.[102]

(…)

81. The Panel identified the products at issue in this dispute as being clove cigarettes and menthol cigarettes.[103] Clove cigarettes are composed of tobacco combined with flavouring additives, which is presented to the consumer in a paper wrapped with a filter.[104] More specifically, clove cigarettes are generally manufactured with 60 to 80 per cent tobacco content, usually resulting from a blend of different varieties of tobacco.[105] As for the additives, clove cigarettes contain approximately 20 to 40 per cent cloves, either in the form of clove buds or ground/minced cloves.[106] They also generally include a "sauce" as part of the flavouring ingredients chosen by each manufacturer[107], as well as other components inherent to cloves, such as benzyl acetate, methyl salicylate, trans-anethole, and methyl eugenol.[108] Before the Panel, the parties did not dispute that clove cigarettes contain eugenol[109]—a substance that the United States defined as "a common topical anesthetic used in dental procedures"[110]—and they also agreed that the Polzin paper, a study on certain ingredients of Indonesian clove cigarettes, shows that 19 of 33 clove cigarette brands analyzed contained coumarin, a flavouring additive.[111]

82. Menthol cigarettes, in contrast, have approximately 90 per cent tobacco content by weight and are composed of a blend of Virginia, Maryland burley, Oriental, and reconstituted tobacco.[112] The Panel noted that the March 2011 report by the Tobacco Products Scientific Advisory Committee to the FDA[113] (the "March 2011 TPSAC Report") specifies that "[m]enthol

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[101]House Report, p. 14.
[102]House Report, p. 37.
[103]Panel Report, para. 7.147.
[104]Panel Report, para. 7.157 (referring to Indonesia's first written submission to the Panel, para. 54; and Indonesia's second written submission to the Panel, para. 67).
[105]Panel Report, para. 7.158 (referring to S. Farrer, "Alternative Cigarettes May Deliver More Nicotine Than Conventional Cigarettes" (August 2003) 18(2) *National Institute on Drug Abuse (NIDA) Notes* (Panel Exhibit IND-29); United States' first written submission to the Panel, para. 163; and Indonesia's and United States' responses to Panel Question 33).
[106]Panel Report, para. 7.159.
[107]Panel Report, para. 7.160 (referring to United States' first written submission to the Panel, para. 165).
[108]Panel Report, para. 7.164 (referring to Indonesia's response to Panel Question 30).
[109]Panel Report, para. 7.162.
[110]Panel Report, para. 7.161 (quoting United States' first written submission to the Panel, para. 38).
[111]Panel Report, para. 7.163 (referring to Polzin et al., "Determination of eugenol, anethole, and coumarin in the mainstream cigarette smoke of Indonesian clove cigarettes" (October 2007) 45(10) *Food & Chemical Toxicology* (Panel Exhibit US-45); and Indonesia's and United States' responses to Panel Question 34).
[112]Panel Report, para. 7.166 (referring to United States' response to Panel Question 31). The Panel noted that Indonesia did not provide any specific information in that respect. (*Ibid.*, footnote 357 to para. 7.166)
[113]Available at http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM247689.pdf.

cigarettes are typically blended using more flue-cured and less burley tobacco … because some of the chemicals in burley tobaccos create an incompatible taste character with menthol."[114] The main additive in menthol cigarettes is menthol oil, a chemical compound extracted from the peppermint plant (*Mentha piperita*), the corn mint plant (*Mentha arvensis*), or produced by synthetic or semi-synthetic means. Menthol is added to cigarettes in several different ways[115] and diffuses throughout the cigarette, irrespective of the means of application.[116] According to the March 2011 TPSAC Report, menthol is added to cigarettes both as a characterizing flavour and for other taste reasons, which include brightening the flavour of tobacco blends and/or smoothing the taste of the blend. Menthol amounts to roughly 1 per cent of the content of the cigarette, although the specific amount varies from brand to brand.[117] Moreover, menthol may have cooling, analgesic, or irritating properties, and is reported to reduce sensitivity to noxious chemicals, including nicotine.[118]

83. In this Report, we first consider the United States' claim that the Panel erred in finding that clove and menthol cigarettes are like products within the meaning of Article 2.1 of the *TBT Agreement*. We then address the United States' claim that the Panel erred in finding that the United States acted inconsistently with Article 2.1 of the *TBT Agreement* by according to imported clove cigarettes less favourable treatment than that accorded to domestic menthol cigarettes. …

V. ARTICLE 2.1 OF THE *TBT AGREEMENT*

A. Introduction

84. The Panel found that Section 907(a)(1)(A) of the FFDCA is a "technical regulation" within the meaning of Annex 1.1 of the *TBT Agreement*, and that it is inconsistent with Article 2.1 of the *TBT Agreement* because it accords to imported clove cigarettes less favourable treatment than that accorded to like menthol cigarettes of national origin.[119] In particular, the Panel found that "clove cigarettes and menthol cigarettes are 'like products' for the purpose of Article 2.1 of the *TBT Agreement*"[120], and that, "by banning clove cigarettes while exempting menthol cigarettes from the ban, Section 907(a)(1)(A) does accord imported clove cigarettes less

[114]Panel Report, para. 7.166.
[115]The different ways in which menthol is added to cigarettes are the following: (a) by spraying the cut tobacco during blending; (b) by applying it to the pack foil; (c) by injecting it into the tobacco stream; (d) by injecting it into the filter; (e) by inserting a crushable capsule in the filter; (f) by placing a menthol thread in the filter; or (g) any combination of the above. (Panel Report, para. 7.167)
[116]Panel Report, para. 7.167.
[117]According to Indonesia, the menthol content can range up to 3 per cent. (Panel Report, para. 7.169 (referring to Indonesia's response to Panel Question 32))
[118]Panel Report, para. 7.168 (referring to March 2011 TPSAC Report, pp. 18-20 and 22).
[119]Panel Report, paras. 7.293, 8.1(a), and 8.1(b).
[120]Panel Report, para. 7.248.

favourable treatment than that accorded to domestic menthol cigarettes, for the purpose of Article 2.1 of the *TBT Agreement*".[121]

85. The United States appeals the Panel's finding that Section 907(a)(1)(A) is inconsistent with Article 2.1 of the *TBT Agreement*, and argues that the Panel erred in finding that clove and menthol cigarettes are like products and that Section 907(a)(1)(A) accords to imported clove cigarettes less favourable treatment than that accorded to like products of national origin within the meaning of Article 2.1 of the *TBT Agreement*. We address separately in this Report the United States' claims in respect of the Panel's findings on like products and on less favourable treatment under Article 2.1 of the *TBT Agreement*. Before doing so, however, we consider Article 2.1 as a whole in its context and in the light of the object and purpose of the *TBT Agreement*.

86. Article 2.1 of the *TBT Agreement* provides that, with respect to their central government bodies:

> 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.

87. Article 2.1 of the *TBT Agreement* contains a national treatment and a most-favoured nation treatment obligation. In this dispute, we are called upon to clarify the meaning of the national treatment obligation. For a violation of the national treatment obligation in Article 2.1 to be established, three elements must be satisfied: (i) the measure at issue must be a technical regulation; (ii) the imported and domestic products at issue must be like products; and (iii) the treatment accorded to imported products must be less favourable than that accorded to like domestic products. The United States' appeal concerns only the second and the third elements of this test of inconsistency, namely, whether the products at issue are like and whether the treatment accorded to clove cigarettes imported from Indonesia is less favourable than that accorded to like domestic products in the United States.[122]

88. In sections V.B and V.C of this Report, we interpret Article 2.1 of *TBT Agreement* and, in particular, the terms "like products" and "treatment no less favourable". However, before engaging in this interpretative effort, we wish to make some observations of general import on: the preamble of the *TBT Agreement*; the definition of "technical regulation"; the relevance of Article III:4 of the GATT 1994 in interpreting Article 2.1 of the *TBT Agreement*; and the absence among the provisions of the *TBT Agreement* of a general exception provision similar to Article XX of the GATT 1994.

89. The preamble of the *TBT Agreement* is part of the context of Article 2.1 and also sheds light on the object and purpose of the Agreement. We find guidance for the interpretation of Article 2.1, in particular, in the second, fifth, and sixth recitals of the preamble of the *TBT Agreement*.

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[121]Panel Report, para. 7.292.

[122]We recall that it was not disputed before the Panel that Section 907(a)(1)(A) is a technical regulation and that the United States has not appealed the Panel's finding that Section 907(a)(1)(A) is a technical regulation within the meaning of Annex 1.1 to the *TBT Agreement* (Panel Report, paras. 7.21 and 7.41).

90. The second recital links the *TBT Agreement* to the GATT 1994. It states:

> *Desiring* to further the objectives of GATT 1994;

91. While this recital may be read as suggesting that the *TBT Agreement* is a "development" or a "step forward" from the disciplines of the GATT 1994[123], in our view, it also suggests that the two agreements overlap in scope and have similar objectives. If this were not true, the *TBT Agreement* could not serve to "further the objectives" of the GATT 1994. The second recital indicates that the *TBT Agreement* expands on pre-existing GATT disciplines and emphasizes that the two Agreements should be interpreted in a coherent and consistent manner.

92. The fifth recital reflects the trade-liberalization objective of the *TBT Agreement* by expressing the "desire" that technical regulations, technical standards, and conformity assessment procedures do not create unnecessary obstacles to international trade. It states:

> *Desiring* however to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade;

93. We see the fifth recital reflected in those TBT provisions that aim at reducing obstacles to international trade and that limit Members' right to regulate, for instance, by prohibiting discrimination against imported products (Article 2.1) or requiring that technical regulations be no more trade restrictive than necessary to fulfil a legitimate objective (Article 2.2).

94. The objective of avoiding the creation of unnecessary obstacles to international trade through technical regulations, standards, and conformity assessment procedures is, however, qualified in the sixth recital by the explicit recognition of Members' right to regulate in order to pursue certain legitimate objectives. The sixth recital states:

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

95. We read the sixth recital as counterbalancing the trade-liberalization objective expressed in the fifth recital. The sixth recital "recognizes" Members' right to regulate versus the "desire" to avoid creating unnecessary obstacles to international trade, expressed in the fifth recital. While the fifth recital clearly suggests that Members' right to regulate is not unbounded, the sixth recital affirms that such a right exists while ensuring that trade-distortive effects of regulation are minimized. The sixth recital suggests that Members' right to regulate should not be constrained if

[123]Panel Report, para. 7.112.

the measures taken are necessary to fulfil certain legitimate policy objectives, and provided that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the Agreement. We thus understand the sixth recital to suggest that Members have a right to use technical regulations in pursuit of their legitimate objectives, provided that they do so in an even-handed manner and in a manner that is otherwise in accordance with the provisions of the *TBT Agreement*.

96. The balance set out in the preamble of the *TBT Agreement* between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX.

97. We observe that Article 2.1 of the *TBT Agreement* applies only in respect of technical regulations, which are defined in Annex 1.1 as "[d]ocument[s] which lay[] down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory".[124] Product characteristics laid down in a technical regulation may themselves be relevant to the determination of whether products are like within the meaning of Article 2.1. Thus, we consider that, in the case of technical regulations, the measure itself *may* provide elements that are relevant to the determination of whether products are like and whether less favourable treatment has been accorded to imported products.

98. The definition of technical regulations as documents laying down product characteristics gives an indication that, under the *TBT Agreement*, measures making distinctions based on product characteristics are in principle permitted. However, the fact that a technical regulation defines a product's characteristics with a view to fulfilling a legitimate policy objective does not mean that it may do so by treating imported products less favourably than like domestic products.

99. We note that the language of the national treatment obligation of Article 2.1 of the *TBT Agreement* closely resembles the language of Article III:4 of the GATT 1994. Article III:4 of the GATT 1994 reads, in relevant part:

> The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

100. The national treatment obligations of Article 2.1 and Article III:4 are built around the same core terms, namely, "like products" and "treatment no less favourable". We further note that technical regulations are in principle subject not only to Article 2.1 of the *TBT Agreement*, but also to the national treatment obligation of Article III:4 of the GATT 1994, as "laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation,

[124]The second sentence of Annex 1.1 reads as follows: "It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method".

distribution or use" of products. The very similar formulation of the provisions, and the overlap in their scope of application in respect of technical regulations, confirm that Article III:4 of the GATT 1994 is relevant context for the interpretation of the national treatment obligation of Article 2.1 of the *TBT Agreement*.[125] We consider that, in interpreting Article 2.1 of the *TBT Agreement*, a panel should focus on the text of Article 2.1, read in the context of the *TBT Agreement*, including its preamble, and also consider other contextual elements, such as Article III:4 of the GATT 1994.

101. Finally, we observe that the *TBT Agreement* does not contain among its provisions a general exceptions clause. This may be contrasted with the GATT 1994, which contains a general exceptions clause in Article XX.

102. With these observations of general import in mind, we turn to the United States' appeal of the Panel's findings that clove and menthol cigarettes are like products, and that Section 907(a)(1)(A) accords imported clove cigarettes from Indonesia less favourable treatment than that accorded to like domestic menthol cigarettes, within the meaning of Article 2.1 of the *TBT Agreement*.

B. The Panel's Finding that Clove Cigarettes and Menthol Cigarettes are "Like Products" within the Meaning of Article 2.1 of the TBT Agreement

103. We begin our analysis by addressing the Panel's interpretation of the concept of "like products" under Article 2.1 of the *TBT Agreement*. We then turn to the United States' claims that the Panel erred in its interpretation and application of the "likeness" criteria of end-use and consumer tastes and habits…. The United States does not appeal the Panel's findings concerning the products' physical characteristics and tariff classification.

1. "Like Products" under Article 2.1 of the TBT Agreement

104. The Panel found that clove cigarettes and menthol cigarettes are like products within the meaning of Article 2.1 of the *TBT Agreement*.[126] The Panel reached this conclusion after having evaluated the traditional "likeness" criteria (physical characteristics, end-uses, consumer tastes and habits, and tariff classification), "bearing in mind that the measure at issue is a technical regulation, with the immediate purpose of regulating cigarettes having a characterizing flavour, with a view to attaining the legitimate objective of reducing youth smoking".[127] Before addressing the United States' appeal of the Panel's specific findings in respect of the "likeness" criteria of end-uses and consumer tastes and habits, we first consider the Panel's approach to interpreting "like products" in the context of Article 2.1 of the *TBT Agreement*.

[125]We recall that, in *EC – Asbestos*, the Appellate Body found that the terms used in one provision "must be interpreted in light of the context, and of the object and purpose, of the provision at issue, and of the object and purpose of the covered agreement in which the provision appears" and that the meaning attributed to the same terms in other provisions of the same agreement or in other covered agreements, may also be relevant context. (Appellate Body Report, *EC – Asbestos*, paras. 88-89)
[126]Panel Report, para. 7.248.
[127]Panel Report, para. 7.244.

105. The Panel considered that "it is far from clear that it is always appropriate to transpose automatically the competition-oriented approach to likeness under Article III:4 of the GATT 1994 to Article 2.1 of the *TBT Agreement*" in the absence of a general principle such as that expressed in Article III:1 of the GATT 1994.[128] The Panel also noted that, despite the similarity in wording, Article 2.1 of the *TBT Agreement* and Article III:4 of the GATT 1994 differ in that the former only applies to technical regulations whereas the latter applies to a much broader range of measures.[129] The Panel stated that Article III:4 of the GATT 1994 could not be regarded as immediate context to Article 2.1 of the *TBT Agreement* and noted that the Appellate Body's reference to an "accordion" of "likeness" allows, and potentially mandates, different interpretations of the term "like products" under Article III:4 of the GATT 1994 and Article 2.1 of the *TBT Agreement*.[130]

106. The Panel turned to what it considered the immediate context of the term "like products" in Article 2.1 of the *TBT Agreement*, namely, Article 2.1 itself and the *TBT Agreement* as a whole, and to that Agreement's object and purpose as set out in its preamble. The Panel considered that the fact that Section 907(a)(1)(A) of the FFDCA is a technical regulation within the meaning of Annex 1.1 of the *TBT Agreement*, which has the immediate purpose of regulating cigarettes with characterizing flavours with the view to attaining the legitimate objective of reducing youth smoking, should have "some weight and potentially considerable weight" in the determination of whether the products at issue are like.[131] The Panel also noted that the sixth recital of the preamble of the *TBT Agreement*, which recognizes Members' right to take measures for legitimate objectives, and Article 2.2 could justify a different interpretation of "likeness" under Article 2.1 of the *TBT Agreement* from that developed under Article III:4 of the GATT 1994.[132]

107. The Panel thus found that, in the circumstances of this case, the interpretation of Article 2.1 of the *TBT Agreement* should not be approached primarily from a competition-oriented perspective, but that the weighing of the evidence relating to the "likeness" criteria should be influenced by the fact that Section 907(a)(1)(A) is a technical regulation having the immediate purpose of regulating cigarettes with a characterizing flavour for public health reasons.[133] Having developed this interpretative approach, the Panel turned to the analysis of the traditional "likeness" criteria, namely, the physical characteristics of the products, end-uses, consumer tastes and habits, and tariff classification. The Panel gave particular weight to the health objective of Section 907(a)(1)(A) in its assessment of the products' physical characteristics and of consumer tastes and habits.[134]

108. We agree with the Panel that the interpretation of the term "like products" in Article 2.1 of the *TBT Agreement* should start with the text of that provision in the light of the context provided by Article 2.1 itself, by other provisions of the *TBT Agreement*, and by the *TBT Agreement* as a whole. We also agree that the relevant context includes the fact that Article 2.1 applies to technical regulations, which are documents laying down the characteristics

[128]Panel Report, para. 7.99.
[129]Panel Report, para. 7.106.
[130]Panel Report, para. 7.105.
[131]Panel Report, para. 7.109.
[132]Panel Report, para. 7.114.
[133]Panel Report, para. 7.119.
[134]Panel Report, para. 7.119.

of products. We further note that the preamble of the *TBT Agreement* recognizes Members' right to regulate through technical regulations. As explained below, however, we are not persuaded that these contextual elements and the object and purpose of the *TBT Agreement* suggest that the interpretation of the concept of "like products" in Article 2.1 of the *TBT Agreement* cannot be approached from a competition-oriented perspective.

109. As we have observed above, the balance that the preamble of the *TBT Agreement* strikes between, on the one hand, the pursuit of trade liberalization and, on the other hand, Members' right to regulate, is not, in principle, different from the balance that exists between the national treatment obligation of Article III and the general exceptions provided under Article XX of the GATT 1994. The second recital of the preamble links the two Agreements by expressing the "desire" "to further the objectives of the GATT 1994", while the "recognition" of a Member's right to regulate in the sixth recital is balanced by the "desire" expressed in the fifth recital to ensure that technical regulations, standards, and conformity assessment procedures do not create unnecessary obstacles to international trade. We note, however, that in the GATT 1994 this balance is expressed by the national treatment rule in Article III:4 as qualified by the exceptions in Article XX, while, in the *TBT Agreement*, this balance is to be found in Article 2.1 itself, read in the light of its context and of its object and purpose.

110. The Panel was also of the view that the absence of a provision like Article III:1 of the GATT 1994 in the *TBT Agreement* would prevent the transposition of the GATT competition-oriented approach to likeness to Article 2.1 of the *TBT Agreement*.[135] Article III:1 provides that internal fiscal and regulatory measures "should not be applied to imported or domestic products so as to afford protection to domestic production". We observe, in this respect, that, in *EC – Asbestos*, the Appellate Body considered that the "general principle" articulated in Article III:1 of the GATT 1994 "seeks to prevent Members from applying internal taxes and regulations in a manner which affects the competitive relationship, in the marketplace, *between the domestic and imported products involved*, 'so as to afford protection to domestic production'".[136] However, the Appellate Body did not base its conclusion that "likeness" in Article III:4 is about the "nature and extent of a competitive relationship between and among products"[137] exclusively on the "general principle" expressed in Article III:1. Rather, the Appellate Body further clarified that "the word 'like' in Article III:4 is to be interpreted to apply to products that are in … a competitive relationship", because it is "products that are in a competitive relationship in the marketplace [that] could be affected through treatment of *imports* 'less favourable' than the treatment accorded to *domestic* products".[138]

111. We agree that the 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. We note, however, that, in determining likeness based on the competitive relationship between and among the products, a panel should discount any distortive effects that the measure at issue may itself have

[135]Panel Report, para. 7.99.
[136]Appellate Body Report, *EC – Asbestos*, para. 98. (original emphasis)
[137]Appellate Body Report, *EC – Asbestos*, para. 99.
[138]Appellate Body Report, *EC – Asbestos*, para. 99. (original emphasis)

on the competitive relationship, and reserve the consideration of such effects for the analysis of less favourable treatment. In such cases, a panel should determine the nature and the extent of the competitive relationship for the purpose of determining likeness in isolation from the measure at issue, to the extent that the latter informs the physical characteristics of the products and/or consumers' preferences.

112. In the light of the above, we disagree with the Panel that the text and context of the *TBT Agreement* support an interpretation of the concept of "likeness" in Article 2.1 of the *TBT Agreement* that focuses on the legitimate objectives and purposes of the technical regulation, rather than on the competitive relationship between and among the products.

113. We further observe that measures often pursue a multiplicity of objectives, which are not always easily discernible from the text or even from the design, architecture, and structure of the measure. Determining likeness on the basis of the regulatory objectives of the measure, rather than on the products' competitive relationship, would require the identification of all the relevant objectives of a measure, as well as an assessment of which objectives among others are relevant or should prevail in determining whether the products are like. It seems to us that it would not always be possible for a complainant or a panel to identify all the objectives of a measure and/or be in a position to determine which among multiple objectives are relevant to the determination of whether two products are like, or not.[139]

114. The appeal by the United States of the Panel's determination of consumer tastes and habits, which we address further below, highlights the difficulties that arise when attempting to determine likeness based on the regulatory purposes of the measure rather than on the competitive relationship between and among products. The Panel relied on the objective of the measure at issue, which it identified as reducing youth smoking, to determine the likeness of the products.[140] The United States questions the basis for the Panel's narrow focus on the immediate objective of the measure[141] and cites to other regulatory objectives related to health considerations associated with heavily used cigarettes to draw further distinctions between menthol and clove cigarettes.[142]

115. Measures, such as technical regulations, may have more than one objective. However, a panel that is tasked with determining whether two products are like may not be able to reach a coherent result if, in determining likeness, it has to rely on various possible regulatory objectives of the measure. If a panel were to focus on one of the objectives of a measure to the exclusion of all others that are equally important, it may reach a somewhat arbitrary result in the determination of what are the like products at issue which, in turn, has implications for the determination of whether less favourable treatment has been accorded. Moreover, we note that a purpose-based approach to the determination of likeness does not, necessarily, leave more regulatory autonomy for Members, because it almost invariably puts panels into the position of having to determine which of the various objectives purportedly pursued by Members are more important, or which of these objectives should prevail in determining likeness or less favourable treatment in the event of conflicting objectives.

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[139]See Panel Report, *Japan – Alcoholic Beverages II*, para. 6.16.
[140]Panel Report, para. 7.119.
[141]United States' appellant's submission, para. 60.
[142]The United States cites to "possible countervailing public health factors" associated with banning heavily used cigarettes, such as "possible increases in unregulated black market cigarettes or strain to the healthcare system". (United States' appellant's submission, para. 61)

116. 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.

117. Nevertheless, in concluding that the determination of likeness should not be based on the regulatory purposes of technical regulations, we are not suggesting that the regulatory concerns underlying technical regulations may not play a role in the determination of whether or not products are like. In this respect, we recall that, in *EC – Asbestos*, the Appellate Body found that regulatory concerns and considerations may play a role in applying certain of the "likeness" criteria (that is, physical characteristics and consumer preferences) and, thus, in the determination of likeness under Article III:4 of the GATT 1994.

118. In *EC – Asbestos*, the Appellate Body found that, in examining whether products are like, panels must evaluate all relevant evidence, including evidence relating to the health risks associated with a product, which was the underlying concern of the challenged measure in that dispute. The Appellate Body found that such evidence would not be examined as a separate criterion but, rather, under the traditional "likeness" criteria. In particular, the Appellate Body stated that a product's health risks are relevant to the determination of the competitive relationship between products, and addressed health risks as part of the products' physical characteristics and of the tastes and habits of consumers.[143] In respect of physical characteristics, the Appellate Body considered that a panel should examine fully the physical properties of products, in particular, those physical properties that are likely to influence the competitive relationship between products in the marketplace. These include those physical properties that make a product toxic or otherwise dangerous to health.[144] In respect of consumer tastes and habits, the Appellate Body found that the health risks associated with a product could influence the preference of consumers.[145]

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[143]Appellate Body Report, *EC – Asbestos*, para. 113.

[144]The Appellate Body noted that a characteristic of chrysotile asbestos fibres was that the microscopic particles and filaments of these fibres were carcinogenic for humans when inhaled. Thus, the Appellate Body concluded that the carcinogenicity, or toxicity, constituted a defining aspect of the physical properties of chrysotile asbestos fibres as opposed to polyvinyl alcohol, cellulose, and glass (PCG) fibres, which did not present the same health risk. (Appellate Body Report, *EC – Asbestos*, para. 114)

[145]The Appellate Body found that the health risks associated with chrysotile asbestos fibres influenced the behaviour of both manufacturers (who incorporate fibres into another product) and ultimate consumers. The Appellate Body noted that a manufacturer cannot ignore the preferences of the ultimate consumers of a product and, if the risks posed by a particular product are sufficiently great, the ultimate consumers may simply cease to buy that product. (Appellate Body Report, *EC – Asbestos*, para. 122)

119. Similarly, we consider that the 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.

120. The interpretation of the concept of "likeness" in Article 2.1 has to be based on the text of that provision as read in the context of the *TBT Agreement* and of Article III:4 of the GATT 1994, which also contains a similarly worded national treatment obligation that applies to laws, regulations, and requirements including technical regulations. In the light of this context and of the object and purpose of the *TBT Agreement*, as expressed in its preamble, we consider that the determination of likeness under Article 2.1 of the *TBT Agreement*, as well as under Article III:4 of the GATT 1994, is a determination about the nature and extent of a competitive relationship between and among the products at issue. To the extent that they are relevant to the examination of certain "likeness" criteria and are reflected in the products' competitive relationship, regulatory concerns underlying technical regulations may play a role in the determination of likeness.

121. With this interpretative approach in mind, we now turn to the claims by the United States that the Panel committed errors in its assessments of the end-uses of clove and menthol cigarettes and of the tastes and habits of consumers of clove and menthol cigarettes, as well as to the United States' claim that the Panel acted inconsistently with Article 11 of the DSU in its assessment of consumer tastes and habits. We begin by examining the Panel's finding that clove and menthol cigarettes have the same end-use.

2. End-Uses

122. In examining the end-uses of clove and menthol cigarettes, the Panel found that both clove and menthol cigarettes have the same end-use, that is, "to be smoked"[146], and disagreed with the United States that the end-uses of a cigarette include "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke". The Panel considered that the end-uses presented by the United States relate to the reasons why people smoke, but that does not mean that cigarettes have several end-uses.[147] In particular, the Panel considered that the United States' comments on the appeal of flavours to certain smokers relate more properly to consumer tastes and habits than to end-use.[148]

123. The United States claims that a panel, when conducting an end-use analysis, must consider the different uses of the products and not just the use that is a "common denominator" of the products in question.[149] According to the United States, it is undisputed that both clove and menthol cigarettes are used for smoking, but the Panel improperly limited its analysis to considering only this common use between the products while ignoring other relevant end-uses. Menthol cigarettes, the United States posits, are used to "satisfy the nicotine addictions of millions of smokers in the United States", whereas clove cigarettes are primarily used "for

[146]Panel Report, para. 7.199.
[147]Panel Report, para. 7.198.
[148]Panel Report, para. 7.197.
[149]United States' appellant's submission, para. 45.

experimentation and special social settings" and generally are not smoked to satisfy nicotine addiction in the US market.[150]

124. Indonesia responds that the Panel did not err in finding that the end-use of clove and menthol cigarettes is "to be smoked". In Indonesia's view, moreover, even assuming *arguendo* that the end-uses put forward by the United States were pertinent ones, the United States presented no evidence showing that clove and menthol cigarettes were not both *capable* of performing the end-uses of satisfying a nicotine addiction and creating a pleasurable experience.[151]

125. We observe that end-uses describe the possible functions of a product, while consumer tastes and habits reflect the consumers' appreciation of these functions. In *EC – Asbestos*, the Appellate Body described end-uses as "the extent to which products are *capable* of performing the same, or similar, functions" and consumer tastes and habits as "the extent to which consumers are willing to use the products to perform these functions".[152] That a product is not principally used to perform a certain function does not exclude that it may nevertheless be *capable* of performing that function.

126. The Appellate Body has also considered that, while each criterion addresses, in principle, a different aspect of the products involved, which should be examined separately, the different criteria are "interrelated"[153] and "not mutually exclusive", so that certain evidence may well fall under more than one criterion.[154] Thus, in our view, that consumers smoke to satisfy an addiction or that they smoke for pleasure are relevant to the examination of both end-uses and consumer tastes and habits, although different aspects are addressed in the analysis of these two separate "likeness" criteria.

127. We do not consider that it is correct to characterize "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke" as consumer tastes and habits and not end-uses. To the extent that they describe possible functions of the products, rather than the consumers' appreciation of these functions, they represent, in fact, different end-uses of the products at issue, rather than consumer tastes and habits. Consumer tastes and habits should indicate to what extent consumers are willing to substitute clove cigarettes and menthol cigarettes to "satisfy an addiction to nicotine" and/or to "create a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke".

128. We also recall that, in *EC – Asbestos*, the Appellate Body found that the panel had not provided a complete picture of the various end-uses of the different fibres at issue, because its analysis was based on a "small number of applications" for which the products were substitutable, and because it had failed to examine other, different end-uses for the products. The Appellate

[150]United States' appellant's submission, para. 46.
[151]Indonesia's appellee's submission, para. 73.
[152]Appellate Body Report, *EC – Asbestos*, para. 117. (emphasis added)
[153]Appellate Body Report, *EC – Asbestos*, para. 102.
[154]Appellate Body Reports, *Philippines – Distilled Spirits*, para. 131. In that dispute, the Appellate Body considered that factors such as the perceptibility of differences among the products and the products' presentation and labelling concern both physical characteristics and consumer tastes and habits. (*Ibid.*, paras. 128 and 132)

Body noted that it is only by forming a complete picture of the various end-uses of a product that a panel can assess the significance of the fact that products share a limited number of end-uses.[155]

129. An analysis of end-use should be comprehensive and specific enough to provide meaningful guidance as to whether the products in question are like products. It is not disputed that both clove and menthol cigarettes are "to be smoked". Nevertheless, "to be smoked" does not exhaustively describe the functions of cigarettes. As a consequence, to find, as the Panel did, that the end-use of both clove and menthol cigarettes is "to be smoked" does not, in our view, provide sufficient guidance as to whether such products are like products within the meaning of Article 2.1 of the *TBT Agreement*. Also cigars, loose tobacco, and herbs share the same end-use of being "smoked", although this does not say much as to whether all these products are like.[156]

130. In our view, the Panel did not perform an analysis of the end-uses of clove and menthol cigarettes that was sufficiently comprehensive and specific to provide significant indications as to the likeness of these products. We agree with the United States that there are more specific permutations and functions of "smoking", which are relevant to the end-uses of cigarettes, such as "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke". The Panel should have considered these permutations and functions in its evaluation of whether the products at issue are like. We also note, however, the argument by Indonesia that, even assuming that the end-uses put forward by the United States were "legitimate end-uses", the United States did not show that clove and menthol cigarettes were not both *capable* of performing the functions of "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke".[157]

131. The United States argues on appeal that menthol cigarettes are used to satisfy the nicotine addictions of millions of smokers in the United States, while clove cigarettes are primarily used for experimentation and special social settings and generally are not used to satisfy addiction. The Panel, however, found that "both menthol and clove cigarettes appeal to youth because of the presence of an additive that gives them a characterizing flavour having the effect of masking the harshness of tobacco".[158] Both types of cigarettes are capable of performing a social/experimentation function and, thus, share the end-use of "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke". At the same time, both clove and menthol cigarettes are capable of performing the function of "satisfying an addiction to nicotine", considering that both types of cigarettes contain nicotine, whose addictiveness is scientifically proven.[159] The fact that more "addicts" smoke menthol than clove cigarettes does not mean that clove cigarettes cannot be smoked to "satisfy an addiction to nicotine". As we have observed above, what matters in determining a product's end-use is that a product is *capable* of

[155]Appellate Body Report, *EC – Asbestos*, para. 119.
[156]Similarly, to state that the end-use of alcoholic beverages is "to be drunk" would not distinguish alcoholic beverages from water, milk, or orange juice that are also consumed by drinking. In contrast, in *Philippines – Distilled Spirits*, the specific end-use of alcoholic beverages was described as "thirst quenching, socialization, relaxation, pleasant intoxication". (Appellate Body Reports, *Philippines – Distilled Spirits*, para. 171 (quoting Panel Reports, *Philippines – Distilled Spirits*, para. 7.81))
[157]Indonesia's appellee's submission, para. 73.
[158]Panel Report, para. 7.231.
[159]In its response to Panel Question 37, the United States notes that, "[w]ith respect to the addictive effects of regular, menthol and clove cigarettes, all of these products contain nicotine and are thus addictive." (United States' response to Panel Question 37, para. 85)

performing it, not that such end-use represents the principal or the most common end-use of that product.

132. In the light of the above, we disagree with the Panel that the end-use of cigarettes is simply "to be smoked" and agree with the United States that there are more specific end-uses of cigarettes such as "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke". We consider, however, that, based on the Panel's findings referred to above, it can be concluded that both clove and menthol cigarettes share the end-uses of "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke". Accordingly, we consider that the more specific products' end-uses put forward by the United States also support the Panel's overall finding that clove and menthol cigarettes are like products.

3. Consumer Tastes and Habits

133. In addressing consumer tastes and habits in respect of clove and menthol cigarettes, the Panel stated that the legitimate objective of Section 907(a)(1)(A) of the FFDCA, namely, reducing youth smoking, delimited the scope of the consumers whose tastes and habits should be examined under this criterion.[160] Accordingly, the Panel considered it appropriate to examine the substitutability of clove and menthol cigarettes from the perspective of the relevant group of consumers, which included young smokers and those ready to become smokers (potential consumers).[161] The Panel found that the evidence submitted by the parties showed that both clove and menthol cigarettes, because of their characterizing flavours, which help to mask the harshness of tobacco, appeal to youth and are better vehicles for youth to start smoking than regular cigarettes.[162] Therefore, the Panel concluded that, from the point of view of the consumers at issue in this case, menthol-flavoured and clove-flavoured cigarettes are "similar for the purpose of starting to smoke".[163]

134. The United States claims that the Panel erred in considering the tastes and habits of only young smokers and potential young smokers, and not of current adult smokers. The United States notes that Section 907(a)(1)(A) makes regulatory distinctions among cigarettes based not only on their appeal to young and potential smokers, but also on their use by current adult smokers.[164] The United States argues that nothing in the text of Article 2.1 of the *TBT Agreement* provides a basis for the Panel to have limited its consideration of the public health distinctions drawn under the measure according to what the Panel construed to be the immediate objective of the measure.[165]

135. The United States contends that a like product analysis under Article 2.1 must take account of the regulatory distinctions drawn under the measure at issue, which are not limited to the immediate or primary objective of a measure, but that often reflect a balancing of other considerations relevant to the public welfare. In particular, the United States argues that, even though the primary or immediate purpose of Section 907(a)(1)(A) is to reduce youth smoking, the

[160]Panel Report, para. 7.206.
[161]Panel Report, para. 7.214.
[162]Panel Report, para. 7.217.
[163]Panel Report, para. 7.232.
[164]United States' appellant's submission, para. 54.
[165]United States' appellant's submission, para. 60.

measure was developed based on a consideration of the health benefits, risks, and consequences to the population as a whole, including the possible negative consequences of banning a type of cigarette, such as menthol cigarettes, to which millions of adults are chemically and psychologically addicted.[166]

136. We have disagreed with the Panel's approach to interpreting the concept of "likeness" in Article 2.1 of the *TBT Agreement* in the light of the regulatory objectives of the measure, rather than based on the competitive relationship between and among the products.[167] In particular, we have observed that the context of the *TBT Agreement* and its object and purpose do not suggest that the regulatory objectives of a technical regulation should play a role that is separate from the determination of a competitive relationship between and among products. We have also noted that determining likeness primarily in the light of the regulatory objectives of the measure is further complicated by the fact that measures, including technical regulations, often have multiple objectives. In contrast, we have considered that the determination of likeness under Article 2.1 of the *TBT Agreement* is a determination about the nature and the extent of a competitive relationship between and among products, and that the regulatory concerns that underlie a measure may be considered to the extent that they have an impact on the competitive relationship.[168]

137. In the light of the above, we also consider that the Panel was wrong in confining its analysis of consumer tastes and habits to those consumers (young and potential young smokers) that are the concern of the objective of the regulation (to reduce youth smoking). In an analysis of likeness based on products' competitive relationship, it is the market that defines the scope of consumers whose preferences are relevant. The proportion of youth and adults smoking different types of cigarettes may vary, but clove, menthol, and regular cigarettes are smoked by both young and adult smokers. To evaluate the degree of substitutability among these products, the Panel should have assessed the tastes and habits of all relevant consumers of the products at issue, not only of the main consumers of clove and menthol cigarettes, particularly where it is clear that an important proportion of menthol cigarette smokers are adult consumers.

138. Moreover, without at this stage entering into the merits of the other objectives of the regulation advocated by the United States, the Panel's approach discounts the fact that the technical regulation at issue may also have other objectives that concern other actual and potential consumers of the products at issue. Therefore, we disagree with the Panel that the legitimate objective of Section 907(a)(1)(A), that is, reducing youth smoking, delimits the scope of the consumers whose tastes and habits should be examined to young smokers and potential young smokers.[169]

139. Having determined that the Panel was wrong in confining its analysis of consumer tastes and habits to young and potential young smokers, we now consider whether the Panel's failure to evaluate the tastes and habits of current adult consumers of menthol cigarettes undermines the proposition that there is a sufficient degree of substitutability between clove and menthol cigarettes to support an overall finding of likeness under Article 2.1 of the *TBT Agreement*.

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[166]United States' appellant's submission, para. 62. The United States cites in particular to "possible increases in unregulated black market cigarettes or strain to the healthcare system". (United States' appellant's submission, para. 61)
[167]Section V.B.1 of this Report.
[168]See *supra*, para. 119.
[169]Panel Report, paras. 7.206.

140. The United States claims that "[e]vidence comparing the tastes and habits of younger, potential smokers and the tastes and habits of older, established smokers is directly relevant to the issue of consumer tastes and habits", because clove cigarettes are smoked disproportionately by youth, while menthol cigarettes are smoked more evenly among young and adult smokers. Accordingly, the United States argues, clove cigarettes present a unique risk to young, uninitiated smokers and have little to no impact on adults, while menthol cigarettes are a risk to young, uninitiated smokers, but also have a significant impact on adults.[170]

141. Indonesia submits that the United States failed to present evidence showing that consumers, whether adult or youth, would be unwilling to substitute clove and menthol cigarettes for the end-use of smoking. Indonesia argues that the United States is wrong in presuming that consumer tastes and habits must be identical to be like, considering that the Appellate Body found that products that are close to being perfectly substitutable can be like products. Indonesia contends that there is sufficient evidence on record supporting the fact that young smokers and pre-smoking youth view clove and menthol cigarettes "as at least close to substitutable".[171]

142. We consider that, in order to determine whether products are like under Article 2.1 of the *TBT Agreement*, it is not necessary to demonstrate that the products are substitutable for all consumers or that they actually compete in the entire market. Rather, if the products are highly substitutable for some consumers but not for others, this may also support a finding that the products are like. In *Philippines – Distilled Spirits*, the Appellate Body considered that the standard of "directly competitive or substitutable" relating to Article III:2, second sentence, of the GATT 1994 is satisfied even if competition does not take place in the whole market but is limited to a segment of the market. The Appellate Body found that "it was reasonable for the [p]anel to draw, from the Philippines' argument that imported distilled spirits are only available to a 'narrow segment' of its population, the inference that there is actual competition between imported and domestic distilled spirits at least in the segment of the market that the Philippines admitted has access to both imported and domestic distilled spirits".[172] In that same dispute, the Appellate Body found that Article III:2, second sentence, does not require that competition be assessed in relation to the market segment that is most representative of the "market as a whole", and that Article III of the GATT 1994 "does not protect just *some* instances or *most* instances, but rather, it protects *all* instances of direct competition".[173]

143. Although the Appellate Body's finding in *Philippines – Distilled Spirits* concerned the second sentence of Article III:2 of the GATT 1994, we consider this interpretation of "directly competitive or substitutable products" to be relevant to the concept of "likeness" in Article III:4 of the GATT 1994 and 2.1 of the *TBT Agreement*, since likeness under these provisions is determined on the basis of the competitive relationship between and among the products.[174] In our view, the notion that actual competition does not need to take place in the whole market, but may

[170]United States' appellant's submission, para. 55.
[171]Indonesia's appellee's submission, para. 82 (referring to Appellate Body Reports, *Philippines – Distilled Spirits*, para. 149).
[172]Appellate Body Reports, *Philippines – Distilled Spirits*, para. 220.
[173]Appellate Body Reports, *Philippines – Distilled Spirits*, para. 221 (referring to Panel Report, *Chile – Alcoholic Beverages*, para. 7.43). (original emphasis)
[174]In *EC – Asbestos*, the Appellate Body, while not defining the precise scope of the concept of "like products" in Article III:4, found that Article III:4 applies to products that are in a competitive relationship and that "the scope of 'like' in Article III:4 is broader than the scope of 'like' in Article III:2, first sentence". (Appellate Body Report, *EC – Asbestos*, para. 99)

be limited to a segment of the market, is separate from the question of the degree of competition that is required to satisfy the standards of "directly competitive or substitutable products" and "like products".

144. The Panel's consideration of consumer tastes and habits was too limited. At the same time, the mere fact that clove cigarettes are smoked disproportionately by youth, while menthol cigarettes are smoked more evenly by young and adult smokers does not necessarily affect the degree of substitutability between clove and menthol cigarettes. The Panel found that, from the perspective of young and potential young smokers, clove-flavoured cigarettes and menthol-flavoured cigarettes are similar for purposes of starting to smoke.[175] We understand this as a finding that young and potential young smokers perceive clove and menthol cigarettes as sufficiently substitutable. This, in turn, is sufficient to support the Panel's finding that those products are like within the meaning of Article 2.1 of the *TBT Agreement*, even if the degree of substitutability is not the same for all adult smokers.

145. In the light of the above, we are of the view that, while the Panel should not have limited its analysis of consumer tastes and habits to young and potential young smokers to the exclusion of current adult smokers, this does not undermine the Panel's finding regarding consumer tastes and habits and its ultimate finding of likeness. This is so because the degree of competition and substitutability that the Panel found for young and potential young smokers is sufficiently high to support a finding of likeness under Article 2.1 of the *TBT Agreement*.

(…)

4. Conclusion on "Like Products"

156. We have disagreed with the Panel's interpretation of the concept of "like products" in Article 2.1 of the *TBT Agreement*, which focuses on the purposes of the technical regulation at issue, as separate from the competitive relationship between and among the products. In contrast, we have concluded that the context provided by Article 2.1 itself, by other provisions of the *TBT Agreement*, by the *TBT Agreement* as a whole, and by Article III:4 of the GATT 1994, as well as the object and purpose of the *TBT Agreement*, support an interpretation of the concept of "likeness" in Article 2.1 that is based on the competitive relationship between and among the products and that takes into account the regulatory concerns underlying a technical regulation, to the extent that they are relevant to the examination of certain likeness criteria and are reflected in the products' competitive relationship.

(…)

160. In the light of all of the above, while we disagree with certain aspects of the Panel's analysis, we agree with the Panel that the "likeness" criteria it examined support its overall conclusion that clove and menthol cigarettes are like products within the meaning of Article 2.1 of the *TBT Agreement*. Therefore, we *uphold*, albeit for different reasons, the Panel's finding, in paragraph 7.248 of the Panel Report, that clove cigarettes and menthol cigarettes are like products within the meaning of Article 2.1 of the *TBT Agreement*.

[175]Panel Report, para. 7.232.

C. The Panel's Finding that Section 907(a)(1)(A) of the FFDCA Accords Imported Clove Cigarettes Less Favourable Treatment than That Accorded to Domestic Menthol Cigarettes, within the Meaning of Article 2.1 of the TBT Agreement

1. Introduction

161. In this section, we address the United States' appeal of the Panel's finding that the United States acted inconsistently with Article 2.1 of the *TBT Agreement* by according to clove cigarettes imported from Indonesia less favourable treatment than that accorded to domestic like products.

162. Having concluded that clove and menthol cigarettes are like products within the meaning of Article 2.1 of the *TBT Agreement*, the Panel undertook a four-step analysis to determine whether Section 907(a)(1)(A) of the FFDCA accords to clove cigarettes imported from Indonesia less favourable treatment than that accorded to like domestic products. First, the Panel sought to determine the products to be compared in its analysis.[176] The Panel found that Article 2.1 called for a comparison between treatment accorded to, on the one hand, clove cigarettes imported from Indonesia, and, on the other hand, domestic menthol cigarettes.[177] Second, the Panel determined that under Section 907(a)(1)(A) clove and menthol cigarettes are treated differently, in that clove cigarettes are banned while menthol cigarettes are excluded from the ban.[178] Third, the Panel found that such difference in treatment modifies the conditions of competition to the detriment of the imported products, insofar as imported clove cigarettes are banned while domestic menthol cigarettes are allowed to remain in the market.[179] Fourth and finally, the Panel rejected the United States' argument that such detrimental impact could be "explained by factors or circumstances unrelated to the foreign origin of the products"[180], because Section 907(a)(1)(A) imposes costs on foreign producers, notably producers in Indonesia, while at the same time imposing no costs on any US entity.[181]

(…)

165. Before turning to the specific issues raised by the United States on appeal, we find it useful to interpret the "treatment no less favourable" requirement of Article 2.1 of the *TBT Agreement* in the light of the conflicting interpretations of this phrase offered by the participants on appeal.

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[176]Panel Report, para. 7.270.
[177]Panel Report, paras. 7.275-7.277.
[178]Panel Report, paras. 7.279 and 7.280.
[179]Panel Report, para. 7.281.
[180]Panel Report, para. 7.283 (referring to United States' second written submission to the Panel, para. 127, in turn referring to Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96).
[181]Panel Report, para. 7.289.

2. "Treatment No Less Favourable" under Article 2.1 of the TBT Agreement

166. Referring to the Appellate Body's interpretation of Article III:4 of the GATT 1994[182], the United States and Indonesia agree that the "treatment no less favourable" standard of Article 2.1 of the *TBT Agreement* requires a panel to determine whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of the imported products. However, Indonesia considers that the existence of any detrimental effect on competitive opportunities for imported products is sufficient to establish less favourable treatment under Article 2.1.[183] In contrast, the United States argues that the existence of a detrimental effect on competitive opportunities for imports is necessary, but not sufficient, to establish a violation of Article 2.1. Referring to the Appellate Body report in *Dominican Republic – Import and Sale of Cigarettes*, the United States argues that Article 2.1 requires further inquiry into whether "the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product".[184]

167. Article 2.1 of the *TBT Agreement* provides that, with respect to their central government bodies:

> 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.

168. As already set out above, for a violation of the national treatment obligation in Article 2.1 to be established, three elements must be satisfied: (i) the measure at issue must be a "technical regulation"; (ii) the imported and domestic products at issue must be like products; and (iii) the treatment accorded to imported products must be less favourable than that accorded to like domestic products. In this part of its appeal, the United States challenges only the Panel's finding that Section 907(a)(1)(A) of the FFDCA violates the national treatment obligation provided in Article 2.1 of the *TBT Agreement*, insofar as it accords to imported clove cigarettes less favourable treatment than that accorded to like domestic products.

169. The "treatment no less favourable" requirement of Article 2.1 of the *TBT Agreement* applies "in respect of technical regulations". A technical regulation is defined in Annex 1.1 thereto as a "[d]ocument which lays down product characteristics or their related processes and production methods … with which compliance is mandatory". 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.

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[182]See Appellate Body Report, *Korea – Various Measures on Beef*, para. 137.
[183]Indonesia's appellee's submission, para. 172.
[184]United States' appellant's submission, para. 101 (referring to Panel Report, para. 7.269; and Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96).

170. We next observe that Article 2.2 of the *TBT Agreement* provides, in relevant part, that:

> 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.

171. 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*.

172. This interpretation of Article 2.1 is buttressed by the sixth recital of the preamble of the *TBT Agreement*, in which WTO Members recognize that:

> … no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal, or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement 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 this Agreement.

173. The language of the sixth recital expressly acknowledges that Members may take measures necessary for, *inter alia*, the protection of human life or health, provided that such measures "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade" and are "otherwise in accordance with the provisions of this Agreement". We consider that the sixth recital of the preamble of the *TBT Agreement* provides relevant context regarding the ambit of the "treatment no less favourable" requirement in Article 2.1, by making 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*.

174. Finally, as noted earlier[185], the object and purpose of the *TBT Agreement* is to strike a balance between, on the one hand, the objective of trade liberalization and, on the other hand, Members' right to regulate. This object and purpose therefore suggests that Article 2.1 should not be interpreted as prohibiting any detrimental impact on competitive opportunities for imports in

[185] *Supra*, paras. 0 and 0.

cases where such detrimental impact on imports stems exclusively from legitimate regulatory distinctions.

175. Accordingly, 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.

176. Like the participants, we also find it useful to consider the context provided by the other covered agreements. In particular, we note that the non-discrimination obligation of Article 2.1 of the *TBT Agreement* is expressed in the same terms as that of Article III:4 of the GATT 1994.[186] In the context of Article III:4, the "treatment no less favourable" requirement has been widely interpreted by previous GATT and WTO panels and by the Appellate Body. Beginning with the GATT panel in *US – Section 337 Tariff Act*, the term "treatment no less favourable" in Article III:4 was interpreted as requiring "effective equality of opportunities for imported products".[187] Subsequent GATT and WTO panels followed a similar approach, and found violations of Article III:4 in cases where regulatory distinctions in enforcement procedures[188], distribution channels[189], statutory content requirements[190], and allocation of import licenses[191] resulted in alteration of the competitive opportunities in the market of the regulating Member to the detriment of imported products vis-à-vis domestic like products.

177. In *Korea – Various Measures on Beef*, the Appellate Body agreed that the analysis of less favourable treatment under Article III:4 focuses on the "conditions of competition" between imported and domestic like products.[192] The Appellate Body further clarified that a formal difference in treatment between imported and like domestic products is:

> … neither necessary, nor sufficient, to show a violation of Article III:4. Whether or not imported products are treated "less favourably" than like domestic products should be assessed instead by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products.[193] (original emphasis)

178. Subsequently, in *EC – Asbestos*, the Appellate Body explained that imports will be treated less favourably than domestic like products when regulatory distinctions disadvantage the

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[186]Article III:4 of the GATT 1994 reads:

> The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

[187]GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.10.
[188]GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.20.
[189]GATT Panel Report, *Canada – Provincial Liquor Boards (US)*, paras. 5.12-5.16.
[190]Panel Report, *US – Gasoline*, para. 6.10.
[191]Panel Reports, *EC – Bananas III*, paras. 7.179-7.180.
[192]Appellate Body Report, *Korea – Various Measures on Beef*, para. 136.
[193]Appellate Body Report, *Korea – Various Measures on Beef*, para. 137.

group of imported products vis-à-vis the group of domestic like products. The Appellate Body reasoned that the "treatment no less favourable" clause of Article III:4:

> … expresses the general principle, in Article III:1, that internal regulations "should not be applied … so as to afford protection to domestic production." If there is "less favourable treatment" of the group of "like" imported products, there is, conversely, "protection" of the group of "like" domestic products. However, a Member may draw distinctions between products which have been found to be "like", without, for this reason alone, according to the group of "like" *imported* products "less favourable treatment" than that accorded to the group of "like" *domestic* products.[194] (original emphasis)

179. Thus, the "treatment no less favourable" standard of Article III:4 of the GATT 1994 prohibits WTO Members from modifying the conditions of competition in the marketplace to the detriment of the group of imported products vis-à-vis the group of domestic like products.[195]

180. Although we are mindful that the meaning of the term "treatment no less favourable" in Article 2.1 of the *TBT Agreement* is to be interpreted in the light of the specific context provided by the *TBT Agreement*, we nonetheless consider these previous findings by the Appellate Body in the context of Article III:4 of the GATT 1994 to be instructive in assessing the meaning of "treatment no less favourable", provided that the specific context in which the term appears in Article 2.1 of the *TBT Agreement* is taken into account. Similarly to Article III:4 of the GATT 1994, Article 2.1 of the *TBT Agreement* requires WTO Members to accord to the group of imported products treatment no less favourable than that accorded to the group of like domestic products. Article 2.1 prescribes such treatment specifically in respect of technical regulations. For this reason, a panel examining a claim of violation under Article 2.1 should seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products vis-à-vis the group of like domestic products.

181. However, as noted earlier, the context and object and purpose of the *TBT Agreement* weigh in favour of interpreting the "treatment no less favourable" requirement of Article 2.1 as not prohibiting detrimental impact on imports that stems exclusively from a legitimate regulatory distinction. Rather, for the aforementioned reasons[196], the "treatment no less favourable" requirement of Article 2.1 only prohibits *de jure* and *de facto* discrimination against the group of imported products.

182. Accordingly, where 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

[194]Appellate Body Report, *EC – Asbestos*, para. 100.
[195]We disagree with the United States to the extent that it suggests that *Dominican Republic – Import and Sale of Cigarettes* stands for the proposition that, under Article III:4, panels should inquire further whether "the detrimental effect is unrelated to the foreign origin of the product". …
[196]See *supra*, paras. 0-0.

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.

(…)

183. We now turn to the specific issues raised by the United States on appeal. …

(…)

5. Detrimental Impact on Imported Products

213. Finally, the United States claims that, even if the Appellate Body were to agree with the comparison undertaken by the Panel in its less favourable treatment analysis, the Panel nonetheless erred in finding that the detrimental effect on competitive opportunities for imported clove cigarettes was not "explained by factors unrelated to the foreign origin of those products".[197]

214. The United States does not challenge on appeal the Panel's findings that Section 907(a)(1)(A) of the FFDCA accords different treatment to imported clove cigarettes and to domestic menthol cigarettes, and that such differential treatment is to the detriment of the imported product, insofar as clove cigarettes are banned while menthol cigarettes are permitted.[198] Accordingly, the Panel's conclusion that Section 907(a)(1)(A) modifies the conditions of competition in the US market to the detriment of imported clove cigarettes stands.

215. However, as noted earlier[199], the existence of a detrimental impact on competitive opportunities in the relevant market for the group of imported products vis-à-vis the group of domestic like products is not sufficient to establish a violation of the national treatment obligation contained in Article 2.1 of the *TBT Agreement*. Where the technical regulation at issue does not *de jure* discriminate against imports, 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 the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflects discrimination against the group of imported products.

216. Before the Panel, the United States argued that the exemption of menthol cigarettes from the ban on flavoured cigarettes is unrelated to the origin of the products, because it addresses two distinct objectives: one relates to the potential impact on the US health care system associated with the need to treat "millions" of menthol cigarette addicts with withdrawal

[197]United States' appellant's submission, para. 99 (referring to Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96).
[198]Panel Report, paras. 7.279-7.281.
[199]See *supra*, paras. 0 and 0.

symptoms; and the other relates to the risk of development of a black market and smuggling to supply the needs of menthol cigarette smokers.[200]

217. The Panel considered that "the potential impact on the health care system and the potential development of a black market and smuggling of menthol cigarettes"[201] did not constitute legitimate objectives, because:

> These reasons which the United States has presented as constituting a legitimate objective by themselves, appear to us as relating in one way or another to the costs that might be incurred by the United States were it to ban menthol cigarettes. Indeed, the United States is not banning menthol cigarettes because it is not a type of cigarette with a characterizing flavour that appeals to youth, but rather because of the costs that might be incurred as a result of such a ban. We recall that at the time of the ban, there were no domestic cigarettes with characterizing flavours other than menthol cigarettes which accounted for approximately 25 per cent of the market and for a very significant proportion of the cigarettes smoked by youth in the United States. It seems to us that the effect of banning cigarettes with characterizing flavours other than menthol is to impose costs on producers in other Members, notably producers in Indonesia, while at the same time imposing no costs on any U.S. entity.[202] (footnotes omitted)

218. On appeal, the United States claims that the Panel erred in concluding that any detriment to the competitive opportunities for imported clove cigarettes could not be explained by factors unrelated to the foreign origin of the products.[203] In addition, the United States claims that the Panel failed to make an objective assessment of the matter under Article 11 of the DSU in finding that there were no costs imposed on any US entity.[204]

(a) Application of Article 2.1

219. We begin with the United States' claim that the Panel erred in concluding that any detriment to the competitive opportunities for imported clove cigarettes could not be explained by factors unrelated to the foreign origin of the products.[205] The United States argues that, "even where a technical regulation adversely affects the competitive situation of imported products compared to like domestic products, this does not constitute less favourable treatment when the detrimental effect is unrelated to the foreign origin of the product."[206] According to the United States, many factors affect the costs associated with a technical regulation, such as transportation

[200]Panel Report, para. 7.289 and footnote 522 thereto.
[201]Panel Report, para. 7.289.
[202]Panel Report, para. 7.289.
[203]United States' appellant's submission, para. 99.
[204]United States' appellant's submission, para. 109.
[205]United States' appellant's submission, para. 99.
[206]United States' appellant's submission, para. 101.

costs, production methods, the age of the producer's facility, size, efficiency, productivity, and marketing strategy. As a result, Article 2.1 does not prohibit the imposition of costs on imported products as compared to domestic products, where those costs are not related to the origin of the product.[207] The Panel did not examine the "architecture, structure and design" of Section 907(a)(1)(A), including the fact that it allows Indonesia to import and sell regular and menthol cigarettes in the United States.[208] For the United States, reference to unspecified "costs" on foreign producers does not establish that the effects of Section 907(a)(1)(A) on competitive opportunities for imported products are related to their origin.[209] The United States underscores that the costs that Section 907(a)(1)(A) allegedly avoids would be incurred by the US regulatory enforcement and health care systems (and not by domestic menthol cigarette producers), even if all menthol cigarettes were imported.[210]

220. For Indonesia, the Panel's finding that Section 907(a)(1)(A) modifies the conditions of competition in the United States to the detriment of imported clove cigarettes vis-à-vis domestic menthol cigarettes was sufficient to establish a violation of Article 2.1.[211] Although Indonesia maintains that an additional "national origin" test was not required, Indonesia argues that, nevertheless, the Panel was correct in concluding that Section 907(a)(1)(A) had a "discriminatory intent", because menthol cigarettes accounted for 25 per cent of the market, and for a significant proportion of the cigarettes smoked by youth in the United States.[212] The Panel correctly rejected the potential costs on the US health care and enforcement systems as "legitimate reasons" for exempting menthol cigarettes from the ban on flavoured cigarettes. The Panel also appropriately found that the disproportionate allocation of costs between Indonesian and US entities evidenced *de facto* discrimination against imports.[213]

221. At the outset, we agree with the United States that the Panel did not clearly articulate its reasons for concluding that "the effect of banning cigarettes with characterizing flavours other than menthol is to impose costs on producers in other Members, notably producers in Indonesia, while at the same time imposing no costs on any US entity."[214] To the extent that actual or potential costs are relevant to the analysis of less favourable treatment under Article 2.1, the Panel did not elaborate on why, in its view, Section 907(a)(1)(A) does not impose costs "on any US entity" beyond observing that, "at the time of the ban, there were no domestic cigarettes with characterizing flavours other than menthol cigarettes"[215] on the US market.[216]

222. Nonetheless, we are not persuaded that the Panel erred in ultimately finding that Section 907(a)(1)(A) is inconsistent with Article 2.1. By design, Section 907(a)(1)(A) prohibits all cigarettes with characterizing flavours other than tobacco or menthol. In relation to the

[207]United States' appellant's submission, para. 101.
[208]United States' appellant's submission, para. 103.
[209]United States' appellant's submission, para. 106.
[210]United States' appellant's submission, para. 107.
[211]Indonesia's appellee's submission, para. 172.
[212]Indonesia's appellee's submission, para. 183.
[213]Indonesia's appellee's submission, paras. 184-185.
[214]Panel Report, para. 7.289.
[215]Panel Report, para. 7.289.
[216]Moreover, to the extent that the Panel's finding could be read as suggesting that reducing potential costs of regulation *per se* constitutes an illegitimate regulatory objective, we disagree. Nothing in Article 2.1 prevents a Member from seeking to minimize the potential costs arising from technical regulations, provided that the technical regulation at issue does not overtly or covertly discriminate against imports.

cigarettes that are banned under Section 907(a)(1)(A), the Panel made a factual finding that "virtually all clove cigarettes" that were imported into the United States in the three years prior to the ban came from Indonesia.[217] The Panel also noted that the "vast majority" of clove cigarettes consumed in the United States came from Indonesia.[218] Although the United States stated that it was "unable to attain market share data for all non-clove products banned under Section 907(a)(1)(A)"[219], the Panel did not find evidence that these products had "any sizeable market share in the United States prior to the implementation of the ban in 2009".[220] In response to a Panel question, the United States confirmed that non-clove-flavoured cigarettes banned under Section 907(a)(1)(A) "were on the market for a relatively short period of time and represented a relatively small market share".[221]

223. With respect to the cigarettes that are *not* banned under Section 907(a)(1)(A), the record demonstrates that, in the years 2000 to 2009, between 94.3 and 97.4 per cent of all cigarettes sold in the United States were domestically produced[222], and that menthol cigarettes accounted for about 26 per cent of the total US cigarette market.[223] Information on the record also shows that three domestic brands dominate the US market for menthol cigarettes: Kool, Salem (Reynolds American), and Newport (Lorillard), with Marlboro having a smaller market share.[224]

224. Given the above, the design, architecture, revealing structure, operation, and application of Section 907(a)(1)(A) strongly suggest that the detrimental impact on competitive opportunities for clove cigarettes reflects discrimination against the group of like products imported from Indonesia. The products that are prohibited under Section 907(a)(1)(A) consist primarily of clove cigarettes imported from Indonesia, while the like products that are actually permitted under this measure consist primarily of domestically produced menthol cigarettes.

225. Moreover, we are not persuaded that the detrimental impact of Section 907(a)(1)(A) on competitive opportunities for imported clove cigarettes does stem from a legitimate regulatory distinction. 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 them more pleasant to start smoking than regular cigarettes.[225] To the extent that this particular characteristic

[217]Panel Report, para. 2.26 (referring to Indonesia's first written submission to the Panel, para. 18; United States' first written submission to the Panel, para. 35; World Trade Atlas, United States – Imports, Clove Cigarette Market Share Data (Panel Exhibit US-100); and World Trade Atlas, Indonesia Cigarette Exports to the United States, 1998-2009 (Panel Exhibit US-134)).
[218]Panel Report, para. 2.27. The Panel nonetheless was able to identify at least one US company that manufactured clove cigarettes prior to the entry into force of the FSPTCA. (*Ibid.* (referring to United States' first written submission to the Panel, para. 35))
[219]Panel Report, footnote 58 to para. 2.28.
[220]Panel Report, para. 2.28.
[221]United States' response to Panel Question 17, para. 43.
[222]Cigarettes: Domestic and Imported, 2000-2009 (Panel Exhibit US-31).
[223]United States' first written submission to the Panel, para. 27 (referring to US Federal Trade Commission, *Cigarette Report for 2006*, Table 1A (2009) (Panel Exhibit US-29); and P.S. Gardiner, "The African Americanization of menthol cigarette use in the United States" (February 2004) 6(1) *Nicotine & Tobacco Research* S55 (Panel Exhibit US-30)).
[224]See United States' first written submission to the Panel, para. 29 and P.S. Gardiner, "The African Americanization of menthol cigarette use in the United States" (February 2004) 6(1) *Nicotine & Tobacco Research* S55 (Panel Exhibit US-30), p. 58.
[225]Panel Report, paras. 7.216-7.221.

is present in both clove and menthol cigarettes[226], 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. Furthermore, the reasons presented by the United States for the exemption of menthol cigarettes from the ban on flavoured cigarettes do not, in our view, demonstrate that the detrimental impact on competitive opportunities for imported clove cigarettes does stem 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.

226. Therefore, even though Section 907(a)(1)(A) does not expressly distinguish between treatment accorded to the imported and domestic like products, it operates in a manner that reflects discrimination against the group of like products imported from Indonesia. Accordingly, despite our reservations on the brevity of the Panel's analysis, we agree with the Panel that, by exempting menthol cigarettes from the ban on flavoured cigarettes, Section 907(a)(1)(A) accords to clove cigarettes imported from Indonesia less favourable treatment than that accorded to domestic like products, within the meaning of Article 2.1 of the *TBT Agreement*.

(…)

6. Conclusion on "Treatment No Less Favourable"

233. Given the above, we *uphold*, albeit for different reasons, the Panel's finding, in paragraph 7.292 of the Panel Report, that, by banning clove cigarettes while exempting menthol cigarettes from the ban, Section 907(a)(1)(A) of the FFDCA accords imported clove cigarettes less favourable treatment than that accorded to domestic menthol cigarettes, within the meaning of Article 2.1 of the *TBT Agreement*.

D. Conclusions under Article 2.1 of the TBT Agreement

234. In the light of the foregoing considerations with regard to the Panel's findings on likeness and less favourable treatment, we therefore *uphold*, albeit for different reasons, the

[226]Panel Report, para. 7.221 (referring to "Use of Menthol Cigarettes", The National Survey on Drug Use and Health Report, 19 November 2009 (Panel Exhibit IND-66); and American Lung Association, Tobacco Policy Trend Alert, *From Joe Camel to Kauai Kolada – the Marketing of Candy-Flavored Cigarettes* (2006) (Panel Exhibit US-35), p. 1, available at <http://slati.lungusa.org/reports/CandyFlavoredUpdatedAlert.pdf>).

Panel's finding, in paragraphs 7.293 and 8.1(b) of the Panel Report, that Section 907(a)(1)(A) of the FFDCA is inconsistent with Article 2.1 of the *TBT Agreement* because it accords to imported clove cigarettes less favourable treatment than that accorded to like menthol cigarettes of national origin.

235. In reaching this conclusion, we wish to clarify the implications of our decision. We do not consider that the *TBT Agreement* or any of the covered agreements is to be interpreted as preventing Members from devising and implementing public health policies generally, and tobacco-control policies in particular, through the regulation of the content of tobacco products, including the prohibition or restriction on the use of ingredients that increase the attractiveness and palatability of cigarettes for young and potential smokers. Moreover, we recognize the importance of Members' efforts in the World Health Organization on tobacco control.

236. While we have upheld the Panel's finding that the specific measure at issue in this dispute is inconsistent with Article 2.1 of the *TBT Agreement*, we are not saying that a Member cannot adopt measures to pursue legitimate health objectives such as curbing and preventing youth smoking. In particular, we are not saying that the United States cannot ban clove cigarettes: however, if it chooses to do so, this has to be done consistently with the *TBT Agreement*. Although Section 907(a)(1)(A) pursues the legitimate objective of reducing youth smoking by banning cigarettes containing flavours and ingredients that increase the attractiveness of tobacco to youth, it does so in a manner that is inconsistent with the national treatment obligation in Article 2.1 of the *TBT Agreement* as a result of the exemption of menthol cigarettes, which similarly contain flavours and ingredients that increase the attractiveness of tobacco to youth, from the ban on flavoured cigarettes.

(…)

VII. FINDINGS AND CONCLUSIONS

298. For the reasons set out in this Report, the Appellate Body:

(a) With respect to Article 2.1 of the *TBT Agreement*:

(…)

(v) upholds, albeit for different reasons, the Panel's finding, in paragraphs 7.293 and 8.1(b) of the Panel Report, that Section 907(a)(1)(A) of the FFDCA is inconsistent with Article 2.1 of the *TBT Agreement* because it accords to imported clove cigarettes less favourable treatment than that accorded to like menthol cigarettes of national origin; …

* * *

3-2. US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Tuna/Dolphin II)

Editorial note: The footnote numbering differs from the numbering in the original reports.

Appellate Body Report, WT/DS381/AB/R, 16 May 2012

Zhang, Presiding Member; Bhatia, Member; Graham, Member

I. INTRODUCTION

1. The United States and Mexico each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (the "Panel Report").[227] The Panel was established to consider a complaint by Mexico[228] regarding the consistency of certain measures imposed by the United States on the importation, marketing, and sale of tuna and tuna products with the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") and the *Agreement on Technical Barriers to Trade* (the "*TBT Agreement*").

2. Before the Panel, Mexico challenged the *United States Code*, Title 16, Section 1385 (the "Dolphin Protection Consumer Information Act" or "DPCIA"), the *United States Code of Federal Regulations*, Title 50, Section 216.91 and Section 216.92 (the "implementing regulations"), and a ruling by a US federal appeals court in *Earth Island Institute v. Hogarth*[229] (the "Hogarth ruling") as inconsistent with the United States' obligations under Article 2 of the *TBT Agreement* and Articles I and III of the GATT 1994. The Panel reasoned that the legal instruments identified by Mexico in its panel request "set out the terms of the US 'dolphin-safe' labelling scheme" and considered it appropriate therefore to treat them as a single measure for purposes of its analysis of Mexico's claims and its findings.[230] The Panel thereafter referred to the measure at issue in this dispute as "the US dolphin-safe labelling provisions".[231]

3. Having found that the US "dolphin-safe" labelling provisions constitute a "technical regulation" within the meaning of Annex 1.1 to the *TBT Agreement*, the Panel proceeded to examine the substantive claims brought by Mexico under the *TBT Agreement*. With respect to Mexico's claim that the measure is inconsistent with Article 2.1, the Panel found that Mexico had failed to establish that the measure affords treatment less favourable to Mexican tuna products than to US tuna products and tuna products originating in other countries and concluded, therefore, that the measure is not inconsistent with the United States' obligations under that

[227]WT/DS381/R, 15 September 2011.
[228]Request for the Establishment of a Panel by Mexico, WT/DS381/4.
[229]United States Court of Appeals for the Ninth Circuit, *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007) (Panel Exhibit MEX-31).
[230]Panel Report, para. 7.24.
[231]Panel Report, para. 7.26.

provision.[232] Next, the Panel found that the measure is more trade restrictive than necessary to fulfil its legitimate objectives, taking account of the risks non-fulfilment would create. Therefore, the Panel found that the measure is inconsistent with Article 2.2 of the *TBT Agreement*.[233] With respect to Mexico's claim under Article 2.4 of the *TBT Agreement*, the Panel found that the Agreement on the International Dolphin Conservation Program[234] (the "AIDCP") is a relevant international standard, but that Mexico had failed to prove that it is an effective and appropriate means to fulfil the United States' objectives at its chosen level of protection.[235] The Panel decided to exercise judicial economy with respect to Mexico's claims under Articles I:1 and III:4 of the GATT 1994.[236]

(…)

III. ISSUES RAISED ON APPEAL

171. The following issues are raised on appeal:

(a) whether the Panel erred in characterizing the measure at issue as a "technical regulation" within the meaning of Annex 1.1 to the *TBT Agreement*;

(b) whether the Panel erred in finding, in paragraphs 7.374 and 8.1(a) of the Panel Report, that the US "dolphin-safe" labelling provisions are not inconsistent with Article 2.1 of the *TBT Agreement*, and in particular:

(i) whether the Panel erred in its interpretation and application of the phrase "treatment no less favourable" in Article 2.1 of the *TBT Agreement*; and

(…)

(c) whether the Panel erred in law … in finding, in paragraph 7.620 of the Panel Report, that the measure at issue is more trade restrictive than necessary to fulfil the United States' legitimate objectives, taking account of the risks non-fulfilment would create, and that, therefore, the measure at issue is inconsistent with Article 2.2 of the *TBT Agreement*;

(d) if the Appellate Body reverses the Panel's finding that the measure at issue is inconsistent with Article 2.2 of the *TBT Agreement*, then whether the Panel erred in finding that the United States' objective of "contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins" is a legitimate objective within the meaning of that provision;

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[232]Panel Report, paras. 7.374 and 8.1(a).
[233]Panel Report, paras. 7.620 and 8.1(b).
[234]Panel Exhibits US-23a and MEX-11.
[235]Panel Report, paras. 7.740 and 8.1(c).
[236]Panel Report, para. 7.748.

(e) if the Appellate Body reverses the Panel's finding that the measure at issue is inconsistent with Article 2.2 of the *TBT Agreement* and rejects the ground of appeal in item (d) above, then whether the measure at issue is inconsistent with Article 2.2 of the *TBT Agreement* based on the Panel's finding that the measure did not entirely fulfil its objectives;

(…)

IV. BACKGROUND AND OVERVIEW OF THE MEASURE AT ISSUE

172. This dispute arises out of a challenge brought by Mexico against certain legal instruments of the United States establishing the conditions for the use of a "dolphin-safe" label on tuna products. In particular, Mexico identified the following legal instruments as the object of its challenge: the *United States Code*, Title 16, Section 1385 (the "Dolphin Protection Consumer Information Act" or "DPCIA"); the *United States Code of Federal Regulations*, Title 50, Section 216.91 and Section 216.92 (the "implementing regulations"); and a ruling by a US federal appeals court in *Earth Island Institute v. Hogarth*[237] (the "Hogarth ruling"). Taken together, the DPCIA, the implementing regulations, and the Hogarth ruling set out the requirements for when tuna products sold in the United States may be labelled as "dolphin-safe".[238] More specifically, they condition eligibility for a "dolphin-safe" label upon certain documentary evidence that varies depending on the area where the tuna contained in the tuna product is harvested and the type of vessel and fishing method by which it is harvested. In particular, tuna caught by "setting on"[239] dolphins is currently not eligible for a "dolphin-safe" label in the United States, regardless of whether this fishing method is used inside or outside the Eastern Tropical Pacific Ocean (the "ETP").[240] The DPCIA and the implementing regulations also prohibit any reference to dolphins, porpoises, or marine mammals on the label of a tuna product if the tuna contained in the product does not comply with the labelling conditions spelled out in the DPCIA. However, they do not make the use of a "dolphin-safe" label obligatory for the importation or sale of tuna products in the United States. We refer to the legal instruments challenged by Mexico collectively as the "measure at issue", the "US measure", or "the US 'dolphin-safe' labelling provisions" for ease of reference and uniformity with the Panel.

173. With respect to the conditions for access to a "dolphin-safe" label, the DPCIA distinguishes between five different fisheries, namely: (1) large purse seine vessels in the ETP; (2) purse seine vessels in any ocean region outside of the ETP where the US Secretary of

[237]United States Court of Appeals for the Ninth Circuit, *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007) (Panel Exhibit MEX-31).
[238]Panel Report, para. 7.24.
[239]The fishing technique of "setting on" dolphins takes advantage of the fact that tuna tend to swim beneath schools of dolphins in the ETP. The fishing method involves chasing and encircling the dolphins with a purse seine net in order to catch the tuna swimming beneath the dolphins.
[240]The ETP, as defined under US law, extends westward from the west coast of the Americas to include most of the tropical Pacific east of the Hawaiian Islands, and includes high seas areas as well as the exclusive economic zones and territorial seas of Chile, Colombia, Costa Rica, Ecuador, El Salvador, France (due to the French overseas possession, Clipperton Island), Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, and the United States. More specifically, the DPCIA defines the ETP as "the area of the Pacific Ocean bounded by 40 degrees north latitude, 40 degrees south latitude, 160 degrees west longitude, and the western coastlines of North, Central, and South America." (DPCIA, subsection 1385(c)(2))

Commerce has determined that there is a regular and significant tuna-dolphin association similar to that found in the ETP; (3) purse seine vessels in any other ocean region outside the ETP; (4) non-purse seine vessels in any ocean area where the US Secretary of Commerce has determined that there is a regular and significant mortality or serious injury of dolphins; and (5) vessels engaged in driftnet fishing on the high seas. At the time of the panel request in this dispute, the US Secretary of Commerce had not identified any fisheries as having a regular and significant tuna-dolphin association or as having a regular and significant mortality or serious injury of dolphins.[241]

174. Depending on the fishery in which the tuna contained in a tuna product is harvested, the DPCIA requires either one or both of the following certifications as a condition for a "dolphin-safe" label: (1) a certification that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna were caught; (2) a certification that no dolphins were killed or seriously injured in the sets in which the tuna were caught. The DPCIA further prescribes whether these certifications are to be provided: (1) by the captain of the vessel; or (2) by the captain of the vessel and an observer. The DPCIA provides that access to the "dolphin-safe" label is prohibited for tuna products containing tuna fished with driftnets on the high seas.

(…)

176. … The Panel accepted this characterization of the current situation under US law. Accordingly, it found that:

> … under the DPCIA provisions that are currently applicable, tuna harvested in the ETP by a large vessel using purse-seine nets may be labelled dolphin-safe if the captain and an observer approved by the IDCP [the "International Dolphin Conservation Program"] certify that *no dolphins were killed or seriously injured* during the sets in which the tuna were caught and that *no purse seine net was intentionally deployed on or used to encircle dolphins* during the same fishing trip.[242] (original emphasis)

177. Subsection 1385(d)(3) of the DPCIA provides for the development of an official "dolphin-safe" label and stipulates conditions for the use of alternative "dolphin-safe" labels. Either the official label or an alternative one may be used, provided that the conditions are met.[243] In response to questioning by the Panel, the United States clarified that the requirements for the alternative label apply in addition to the conditions for the official label. The Panel accepted the United States' characterization of the law.[244]

(…)

[241]Panel Report, paras. 2.23, 7.488, and 7.534.
[242]Panel Report, para. 2.20.
[243]Panel Report, paras. 2.28 and 2.29.
[244]Panel Report, paras. 2.30 and 7.536 (referring to United States' response to Panel Question 8; and United States' second written submission to the Panel, paras. 40 and 41).

VI. ARTICLE 2.1 OF THE TBT AGREEMENT

200. We turn next to address Mexico's appeal of the Panel's finding that Mexico failed to demonstrate that the US "dolphin-safe" labelling provisions are inconsistent with Article 2.1 of the *TBT Agreement*.

201. Article 2.1 of the *TBT Agreement* provides that, with respect to their central government bodies:

> 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.

202. 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.[245] Mexico's appeal concerns only the Panel's finding in respect of the third element, namely, the "treatment no less favourable" standard in Article 2.1.[246] We further note that the United States has not appealed the Panel's finding that Mexican tuna products are "like" tuna products of United States' origin and tuna products originating in any other country within the meaning of Article 2.1 of the *TBT Agreement*.

A. The Panel's Findings regarding "Treatment No Less Favourable"

203. On the basis of its reading of Article 2.1 of the *TBT Agreement*, the Panel found that less favourable treatment would arise in respect of technical regulations:

> … if imported products originating in any Member were placed at a disadvantage, compared to like domestic products and imported products originating in any other country, with respect to the preparation, adoption or application of technical regulations.[247]

204. The Panel observed that the essence of the measures covered under Article 2.1 of the *TBT Agreement* is to set out certain product characteristics or their related processes and production methods or, for example, labelling requirements as they apply to products or processes and production methods that must be complied with. The Panel added that "[d]istinctions in treatment may therefore arise … but they must not be designed or applied to the detriment of imports or imports of certain origins".[248] The Panel further emphasized that the question of what

[245]Appellate Body Report, *US – Clove Cigarettes*, para. 87.
[246]We recall that, earlier in our analysis, we found that the Panel did not err in characterizing the measure at issue as a "technical regulation" within the meaning of Annex 1.1 to the *TBT Agreement*.
[247]Panel Report, para. 7.273.
[248]Panel Report, para. 7.276.

is less favourable treatment within the meaning of Article 2.1 is also "informed by the terms of the preamble [of the *TBT Agreement*], which makes it clear that measures covered by the TBT Agreement must not be 'applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail'."[249]

205. In its analysis of less favourable treatment, the Panel examined first the regulatory distinction upon which the US measure was based, that is, the distinction between the treatment of tuna products containing tuna caught by setting on dolphins and the treatment of tuna products containing tuna caught by other fishing methods, and found that this distinction, in itself, does not place "Mexican tuna products at a disadvantage compared to US and other imported tuna products".[250] The Panel reasoned that denying the "dolphin-safe" label to tuna caught by setting on dolphins does not necessarily imply that less favourable treatment is afforded to Mexican tuna products, because "any fleet operating anywhere in the world must comply with the requirement".[251] For the Panel, even assuming "that tuna of Mexican origin might more likely not be eligible for the label because it would be caught in the ETP by setting on dolphins, this would not necessarily imply that products processed in Mexico would be less likely to qualify for the label".[252] In the Panel's view, this is because "Mexican processors could choose to make their products from tuna of other origins meeting the requirements of the label".[253]

206. The Panel then considered whether less favourable treatment nonetheless arises from the "application" of the US measure, due to the practices followed by Mexican and other fishing fleets.[254] The Panel observed that "at least two thirds of Mexico's purse seine tuna fleet fishes in the ETP by setting on dolphins (therefore fishing for tuna that would not be eligible to be contained in a 'dolphin-safe' tuna product under the US dolphin-safe labelling provisions)".[255] The Panel further noted that the US fishing fleet currently did not appear to practise setting on dolphins in the ETP.[256] Based on its analysis, the Panel found that "as the practices of the US and Mexican tuna fleets currently stand, most tuna caught by Mexican vessels, being caught in the ETP by setting on dolphins, would not be eligible for inclusion in a dolphin-safe product under the US dolphin-safe labelling provisions".[257] By contrast, "most tuna caught by US vessels is potentially eligible for the label, provided that it otherwise complies with the requirements of the measures".[258] However, the Panel was "not persuaded that it follows from these facts that the United States affords Mexican tuna products 'less favourable treatment' than that afforded to tuna products originating in the United States or in any other country".[259] The Panel explained that, as of 1990, when the first version of the DPCIA was enacted, "the United States and Mexico were in a comparable position with regard to their fishing practices in the ETP, in that both of them had the majority of their fleet operating in the ETP composed of purse seine vessels potentially setting on dolphins".[260] While US vessels "gradually discontinued setting on dolphins to catch tuna, and

[249]Panel Report, para. 7.276.
[250]Panel Report, paras. 7.304 and 7.311.
[251]Panel Report, para. 7.305.
[252]Panel Report, para. 7.310.
[253]Panel Report, para. 7.310.
[254]Panel Report, para. 7.311.
[255]Panel Report, para. 7.314.
[256]Panel Report, para. 7.316.
[257]Panel Report, para. 7.317.
[258]Panel Report, para. 7.317.
[259]Panel Report, para. 7.319.
[260]Panel Report, para. 7.324.

abandoned the practice entirely in 1994, four years after the enactment of the measures"[261], the Mexican fleet "concentrated its efforts on complying with the AIDCP requirements on observer coverage and fishing gear and equipment" rather than abandoning setting on dolphins.[262] As a result, the Mexican fleet and other fishing fleets that chose to continue to set on dolphins "were not eligible for dolphin-safe labelling under the existing US measures, while tuna caught without setting on dolphins remained eligible."[263] The Panel was therefore not persuaded that "any current discrepancy in the[ ] relative situations [of the Mexican and other fishing fleets]" was a result of the US "dolphin-safe" labelling provisions rather than the result of the choices of private actors.[264] The Panel added that the existence of adaptation costs, in itself, did not establish less favourable treatment.[265] The Panel further remarked that the decisions by major processors of tuna products not to purchase tuna caught by setting on dolphins predated the adoption of the first version of the DPCIA in 1990, which first defined "dolphin-safe" tuna harvested by a vessel using purse seine nets in the ETP as tuna that is not caught on a trip involving intentional deployment on, or encirclement of, dolphins.[266] Based on its analysis, the Panel was therefore not convinced that access to the principal US distribution channels was being denied to Mexican tuna products by the measure at issue. Nor was the Panel persuaded that both retailers and consumers would purchase Mexican tuna products if they were eligible for a "dolphin-safe" label, as Mexico had argued.

207. On this basis, the Panel concluded that Mexico had failed to demonstrate that the US "dolphin-safe" labelling provisions afford less favourable treatment to Mexican tuna products within the meaning of Article 2.1 of the *TBT Agreement*. Instead, the Panel found that the US "dolphin-safe" labelling provisions "do not inherently discriminate on the basis of the origin of the products", and "do not make it impossible for Mexican tuna products to comply with" the requirement not to set on dolphins.[267] Rather, it considered significant the fact that "the impact of the US dolphin-safe provisions on different operators on the market and on tuna products of various origins depends on a number of factors that are not related to the nationality of the product, but to the fishing and purchasing practices, geographical location, relative integration of different segments of production, and economic and marketing choices."[268] The Panel concluded therefore that "any particular adverse impact felt by Mexican tuna products on the US market"

[261]Panel Report, para. 7.327.
[262]Panel Report, para. 7.331.
[263]Panel Report, para. 7.331.
[264]Panel Report, para. 7.334. In support of its position, the Panel referred to the Appellate Body's finding in *Korea – Various Measures on Beef* that "where it is the decision of private actors rather than the governmental measure that results in the segregation of imported and domestic like products, this would not be a breach of Article III:4 insofar as what is addressed by this provision is merely the governmental intervention that affects the conditions under which like goods, domestic and imported, compete in the market." (Panel Report, para. 7.334 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 149))
[265]Panel Report, para. 7.342.
[266]Panel Report, para. 7.361.
[267]Panel Report, para. 7.377.
[268]In support of its approach, the Panel pointed to the Appellate Body's statement in *Dominican Republic – Import and Sale of Cigarettes* that the "existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product". (Panel Report, paras. 7.375 and 7.378 (referring to Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96))

was "primarily the result of 'factors or circumstances unrelated to the foreign origin of the product', including the choices made by Mexico's own fishing fleet and canners".[269]

(…)

C. "Treatment No Less Favourable" under Article 2.1 of the TBT Agreement

(…)

215. As the Appellate Body has previously explained, when assessing claims brought under Article 2.1 of the *TBT Agreement*, a panel should therefore seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of the group of imported products *vis-à-vis* the group of like domestic products or like products originating in any other country.[270] The existence of such a detrimental effect is not sufficient to demonstrate less favourable treatment under Article 2.1.[271] Instead, in *US – Clove Cigarettes*, the Appellate Body held that 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."[272]

216. With respect to the burden of showing that a technical regulation is inconsistent with Article 2.1 of the *TBT Agreement*, we recall that it is well-established "that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence".[273] Where the complaining party has met the burden of making its *prima facie* case, it is then for the responding party to rebut that showing. The nature and scope of arguments and evidence required to establish a *prima facie* case will necessarily vary according to the facts of the case. 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.[274] 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.

217. With this in mind, we turn to review the Panel's interpretation of Article 2.1 of the *TBT Agreement* and the analytical approach adopted by the Panel.

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[269]Panel Report, para. 7.378.
[270]Appellate Body Report, *US – Clove Cigarettes*, para. 180. See also para. 215.
[271]Appellate Body Report, *US – Clove Cigarettes*, para. 182. See also para. 215.
[272]Appellate Body Report, *US – Clove Cigarettes*, para. 182. See also para. 215. The Appellate Body also stated that a panel must examine, in particular, whether the technical regulation is even-handed. (*Ibid*., para. 182)
[273]Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, 323, at 335.
[274]Appellate Body Report, *US – Clove Cigarettes*, para. 182. See also para. 215.

1. The Panel's Approach to Assessing "Treatment No Less Favourable"

(…)

224. In finding that Mexico had failed to demonstrate that the US "dolphin-safe" labelling provisions afford "less favourable treatment" to Mexican tuna products within the meaning of Article 2.1 of the *TBT Agreement*, the Panel reasoned, *inter alia*, that "the measures at issue, in applying the same origin-neutral requirement to all tuna products, do not inherently discriminate on the basis of the origin of the products".[275] The Panel added that it appears that:

> … the impact of the US dolphin-safe provisions on different operators on the market and on tuna products of various origins depends on a number of factors that are not related to the nationality of the product, but to the fishing and purchasing practices, geographical location, relative integration of different segments of production, and economic and marketing choices. In this context, any particular adverse impact felt by Mexican tuna products on the US market is, in our view, primarily the result of "factors or circumstances unrelated to the foreign origin of the product", including the choices made by Mexico's own fishing fleet and canners.[276]

225. In its analysis, the Panel appears to juxtapose factors that "are related to the nationality of the product" with other factors such as "fishing and purchasing practices, geographical location, relative integration of different segments of production, and economic and marketing choices." In so doing, the Panel seems to have assumed, incorrectly in our view, that regulatory distinctions that are based on different "fishing methods" or "geographical location" rather than national origin *per se* cannot be relevant in assessing the consistency of a particular measure with Article 2.1 of the *TBT Agreement*. The Panel's approach is difficult to reconcile with the fact that a measure may be *de facto* inconsistent with Article 2.1 even when it is origin-neutral on its face. As the Appellate Body explained in *US – Clove Cigarettes*, in making a determination of whether a measure is *de facto* inconsistent with Article 2.1, "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."[277] The Panel failed to conduct such an analysis in the present case. Contrary to the Panel, we consider that in an analysis of "less favourable treatment" under Article 2.1, *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.[278]

226. Mexico also faults the Panel for failing to find that the US measure is "discriminatory" in that it uses a market access restriction to "pressure" Mexico and the Mexican fleet to adopt essentially the same "dolphin-safe" regime as in force in the United States, thereby *per se* targeting the origin of the tuna products.[279] As noted, technical regulations inherently establish

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[275]Panel Report, para. 7.377.
[276]Panel Report, para. 7.378.
[277]Appellate Body Report, *US – Clove Cigarettes*, para. 182.
[278]Appellate Body Report, *US – Clove Cigarettes*, footnote 372 to para. 179.
[279]Mexico's other appellant's submission, paras. 178 and 179 (referring to Appellate Body Report, *US – Shrimp*, para. 164).

distinctions between products according to their characteristics or their related processes and production methods. Thus, Article 2.1 should not be read to mean that any distinction would *per se* accord "less favourable treatment" within the meaning of that provision. At the same time, we have noted that any adverse impact on competitive opportunities for imported products *vis-à-vis* like domestic products that is caused by a technical regulation may potentially be relevant for an assessment of "less favourable treatment". It may thus have been pertinent for the Panel to consider, along with other factors, the question of whether the US measure had the effect of exerting pressure on Mexico to modify its practices. This alone, however, would not be sufficient to establish a breach of Article 2.1.

227. In sum, we consider that the Panel applied an incorrect approach to assessing whether the measure at issue is inconsistent with Article 2.1 of the *TBT Agreement*.

D. Whether the US Measure Is Inconsistent with Article 2.1 of the TBT Agreement

228. Based on our interpretation of Article 2.1 of the *TBT Agreement* set out above, we now consider whether the US "dolphin-safe" labelling provisions are inconsistent with this provision, as Mexico contends.

(…)

230. Earlier in our analysis, we found that the Panel did not err in characterizing the measure at issue as a technical regulation within the meaning of Annex 1.1. We further note that the United States has not appealed the Panel's finding that Mexican tuna products are "like" tuna products of US origin and tuna products originating in any other country within the meaning of Article 2.1 of the *TBT Agreement*.[280] This brings us to the question of whether, in the light of the findings of fact made by the Panel and uncontested facts on the record, it can be concluded that Mexico has established that the US "dolphin-safe" labelling provisions accord "less favourable treatment" to Mexican tuna products than that accorded to tuna products of the United States and tuna products originating in other countries.

231. Our analysis of this issue proceeds in two parts. First, we will assess whether the measure at issue modifies the conditions of competition in the US market to the detriment of Mexican tuna products as compared to US tuna products or tuna products originating in any other Member.[281] Second, we will review whether any detrimental impact reflects discrimination against the Mexican tuna products.

232. Our analysis will scrutinize, in particular, whether, in the light of the factual findings made by the Panel and undisputed facts on the record, 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.[282]

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[280]See Panel Report, para. 7.251.
[281]Appellate Body Report, *US – Clove Cigarettes*, para. 180. See also para. 215.
[282]Appellate Body Report, *US – Clove Cigarettes*, para. 182. See also para. 215.

1. Whether the Measure Modifies the Conditions of Competition in the US Market to the Detriment of Mexican Tuna Products

233. The Panel found that the "dolphin-safe" label has "significant commercial value on the US market for tuna products".[283] The Panel further found that Mexico had presented evidence concerning retailers' and final consumers' preferences regarding tuna products, which, in the Panel's view, confirmed the value of the "dolphin-safe" label on the US market.[284] On this basis, the Panel agreed with Mexico that access to the "dolphin-safe" label constitutes an "advantage" on the US market.[285] These findings have not been appealed.

234. The Panel further found that: (i) "the Mexican tuna cannery industry is vertically integrated, and the major Mexican tuna products producers and canneries own their vessels, which operate in the ETP"[286]; (ii) "at least two thirds of Mexico's purse seine tuna fleet fishes in the ETP by setting on dolphins" and is "therefore fishing for tuna that would not be eligible to be contained in a 'dolphin-safe' tuna product under the US dolphin-safe labelling provisions"[287]; (iii) "the US fleet currently does not practice setting on dolphins in the ETP"[288]; (iv) "as the practices of the US and Mexican tuna fleets currently stand, most tuna caught by Mexican vessels, being caught in the ETP by setting on dolphins, would not be eligible for inclusion in a dolphin-safe product under the US dolphin-safe labelling provisions", while "most tuna caught by US vessels is potentially eligible for the label".[289]

235. In our view, the factual findings by the Panel clearly establish that the lack of access to the "dolphin-safe" label of tuna products containing tuna caught by setting on dolphins has a detrimental impact on the competitive opportunities of Mexican tuna products in the US market.

236. Mexico and the United States disagree as to whether any detrimental impact on Mexican tuna products results from the measure itself rather than from the actions of private parties. In assessing whether there is a genuine relationship between the measure at issue and an adverse impact on competitive opportunities for imported products, the relevant question is whether governmental action "affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory".[290] …

237. The relevant question is thus whether the *governmental* intervention "affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory".[291] In this regard, we recall that it is the measure at issue that establishes the requirements under which a product can be labelled "dolphin-safe" in the United States. As noted by the Panel:

> … access to the label is controlled by compliance with the terms of the measures. Therefore, to the extent that access to the label

[283]Panel Report, para. 7.289.
[284]Panel Report, para. 7.290 (referring to Panel Exhibit MEX-58 (BCI)).
[285]Panel Report, para. 7.291.
[286]Panel Report, para. 7.310.
[287]Panel Report, para. 7.314.
[288]Panel Report, para. 7.316.
[289]Panel Report, para. 7.317. See also paras. 7.344, 7.357, and 7.533.
[290]Appellate Body Report, *Korea – Various Measures on Beef*, para. 149.
[291]Appellate Body Report, *Korea – Various Measures on Beef*, para. 149.

> is an advantage on the marketplace, this advantage is provided by the measures themselves. The exact value of the advantage provided by access to the label on the marketplace will depend on the commercial value attributed to it by operators on the market, including retailers and final consumers.[292]

238. Moreover, while the Panel agreed with the United States that "US consumers' decisions whether to purchase dolphin-safe tuna products are the result of their own choices rather than of the measures", it noted that:

> … it is the measures themselves that control access to the label and allow consumers to express their preferences for dolphin-safe tuna. An advantage is therefore afforded to products eligible for the label by the measures, in the form of access to the label.[293]

239. 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.[294] 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.[295]

240. In the light of the above, we consider that it is the measure at issue that modifies the competitive conditions in the US market to the detriment of Mexican tuna products. We turn next to the issue of whether this detrimental impact reflects discrimination.

2. Whether the Detrimental Impact Reflects Discrimination

241. Mexico's claim of discrimination may be summarized as follows:

> The U.S. dolphin-safe labelling provisions are discriminatory. Imports of tuna products produced from tuna harvested outside the ETP – in other words, virtually all of the tuna products

[292]Panel Report, para. 7.285.
[293]Panel Report, para. 7.287.
[294]Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)*, para. 469 (referring to Appellate Body Report, *EC – Bananas III*, para. 252, in turn referring to GATT Panel Report, *US – Superfund*, para. 5.1.9).
[295]See Appellate Body Report, *Korea – Various Measures on Beef*, para. 146.

> currently sold in the U.S. market – can be labelled as dolphin-safe under relaxed compliance standards even though there are no protections for dolphins outside the ETP. Meanwhile, tuna products from Mexican producers – who have taken extensive and demonstratively highly successful measures to protect dolphins – are prohibited from using the label.[296]

242. The Panel found that the US measure pursues the following objectives: (i) "ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins"; and (ii) "contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins".[297] The Panel accepted these objectives as legitimate within the meaning of Article 2.2 of the *TBT Agreement*.[298] The Panel further noted that "as described by the United States itself, its measures seek to address a range of adverse effects of fishing techniques on dolphins", including "situations in which dolphins are killed or seriously injured."[299]

243. The Panel made factual findings and reviewed a fair amount of evidence and arguments in the context of its analysis under Article 2.2 that are relevant to the issue of whether the detrimental impact to Mexican tuna products reflects discrimination and thus are pertinent to our assessment of the measure at issue under Article 2.1. We begin by reviewing the uncontested facts on the record of the Panel proceedings, and factual findings by the Panel that are not challenged on appeal, before turning to other findings made by the Panel which are subject to claims brought by the United States under Article 11 of the DSU.

(a) Uncontested Findings by the Panel

(…)

251. In sum, the participants do not contest the following findings by the Panel. First, setting on dolphins within the ETP may result in a substantial amount of dolphin mortalities and serious injuries and has the capacity of resulting in observed and unobserved effects on dolphins.[300] Further, the use of certain fishing techniques other than setting on dolphins causes harm to dolphins.[301] With respect to tuna fishing outside the ETP, the participants do not contest that the vast majority of tuna caught in the western Pacific Ocean is caught with FADs, trolls, or gillnets, and that US and foreign vessels use these fishing techniques.[302] It is also uncontested that the tuna-dolphin association does not occur outside the ETP as frequently as it does within the ETP,

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[296]Mexico's other appellant's submission, para. 129.
[297]Panel Report, para. 7.401.
[298]Panel Report, para. 7.444. As we explain in the following section of our Report, a panel adjudicating a claim under Article 2.2 of the *TBT Agreement* is required to objectively ascertain a measure's objective. A panel must also determine whether the objective of the measure is "legitimate".
[299]Panel Report, para. 7.550.
[300]Panel Report, paras. 7.438 and 7.493 (referring to Mexico's second written submission to the Panel; and United States' first written submission to the Panel, para. 52). Mexico confirmed that it did not contest this fact in response to questioning at the oral hearing.
[301]Panel Report, para. 7.520.
[302]Panel Report, para. 7.534.

and that there are no records of consistent and widespread fishing effort on tuna-dolphin associations anywhere other than in the ETP.[303] Finally, the participants do not contest that, as currently applied, the US measure does not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP[304], and that tuna caught in this area would be eligible for the US official label, even if dolphins have in fact been killed or seriously injured during the trip.[305]

(…)

(c) Whether the Measure Is Calibrated

282. The United States argued before the Panel that to the extent that there are any differences in criteria that must be satisfied in order to substantiate "dolphin-safe" claims, they are "calibrated" to the risk that dolphins may be killed or seriously injured when tuna is caught.[306] In this regard, the United States emphasized the uniqueness of the ETP in terms of the phenomenon of tuna-dolphin association, which is used widely and on a commercial basis to catch tuna, and causes observed and unobserved mortalities that, in the United States' view, are not comparable to dolphin mortalities outside the ETP.[307] The United States further alleged that there is a clear relationship between the objectives of the measure and the conditions under which tuna products may be labelled "dolphin-safe".[308] This clear relationship, the United States argued, does not support the conclusion that the "dolphin-safe" labelling provisions are inconsistent with Article 2.1 of the *TBT Agreement*.[309]

283. As an initial matter, we note that, in *Japan – Apples*, the Appellate Body pointed out that "[i]t is important to distinguish, on the one hand, the principle that the complainant must establish a *prima facie* case of inconsistency with a provision of a covered agreement from, on the other hand, the principle that the party that asserts a fact is responsible for providing proof thereof."[310] Although the burden of proof to show that the US "dolphin-safe" labelling provisions are inconsistent with Article 2.1 of the *TBT Agreement* is on Mexico as the complainant, it was for the United States to support its assertion that the US "dolphin-safe" labelling provisions are "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean.[311]

284. In the light of the findings of fact made by the Panel, we concluded earlier that the detrimental impact of the measure on Mexican tuna products is caused by the fact that most

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[303]Panel Report, para. 7.520.
[304]Panel Report, para. 7.544. We note that the measure at issue does address driftnet fishing in the high seas.
[305]Panel Report, para. 7.532.
[306]Panel Report, paras. 7.258, 7.546, and 7.559.
[307]Panel Report, para. 7.559.
[308]Panel Report, para. 4.158.
[309]Panel Report, para. 7.258 (referring to United States' response to Panel Question 150).
[310]Appellate Body Report, *Japan – Apples*, para. 157 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p.14, DSR 1997:1, 323 at 335; and Appellate Body Report, *EC – Hormones*, para. 98).
[311]Panel Report, para. 7.546 (referring to United States' second written submission to the Panel, paras. 39-47).

Mexican tuna products contain tuna caught by setting on dolphins in the ETP and are therefore not eligible for a "dolphin-safe" label, whereas most tuna products from the United States and other countries that are sold in the US market contain tuna caught by other fishing methods outside the ETP and are therefore eligible for a "dolphin-safe" label. The aspect of the measure that causes the detrimental impact on Mexican tuna products is thus 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. The question before us is thus whether the United States has demonstrated that *this* difference in labelling conditions is a legitimate regulatory distinction, and hence whether the detrimental impact of the measure stems exclusively from such a distinction rather than reflecting discrimination.

285. The Panel stated that it was "not persuaded" that "the United States has demonstrated that the requirements of the US dolphin-safe labelling provisions are 'calibrated' to the likelihood of injury".[312] The Panel also stated that it was "not persuaded that the requirements applicable in different fisheries under the US dolphin safe measures are 'calibrated', as the United States suggests, to the likelihood of dolphins being killed or seriously injured."[313] We note that the Panel made these statements in the context of its analysis under Article 2.2 of the *TBT Agreement*. In particular, the Panel was examining the extent to which the distinctions contained in the US "dolphin-safe" labelling provisions:

> … allow consumers to accurately distinguish between tuna that was caught in a manner that adversely affects dolphins and other tuna, by ensuring that the label is available exclusively to products containing tuna that was not caught "in a manner that adversely affects dolphins".[314]

286. The question examined by the Panel was thus different from the question of whether the detrimental impact of the US "dolphin-safe" labelling provisions on Mexican tuna products stems exclusively from a legitimate regulatory distinction. The Panel's findings with respect to the calibration of the measure at issue for the purposes of its analysis under Article 2.2 are thus not necessarily dispositive of the question whether the measure is calibrated for the purposes of Article 2.1. In particular, it would appear that in answering the question of whether the measure gives accurate information to consumers, *all* distinctions drawn by the measure are potentially relevant. By contrast, in an analysis under Article 2.1, we *only* need to examine the distinction that accounts for the detrimental impact on Mexican tuna products as compared to US tuna products and tuna products originating in other countries. Bearing the different scope of these enquiries in mind, we need to examine carefully to what extent the Panel's findings under Article 2.2 bear on the question of whether 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, are calibrated to the likelihood that dolphins would be adversely affected in the course of tuna fishing operations in the respective conditions.

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[312]Panel Report, para. 7.559.
[313]Panel Report, para. 7.561.
[314]Panel Report, para. 7.490. The Panel found that the distinctions were drawn in a way that created a "genuine risk that consumers may be misled about whether that tuna was caught by using a technique that does not adversely affect dolphins." (Panel Report, para. 7.562)

287. The United States has presented extensive evidence and arguments, and the Panel has made uncontested findings, to the effect that the fishing method of setting on dolphins causes observed and unobserved adverse effects on dolphins. The Panel further found that these adverse effects are fully addressed in the measure at issue, since the measure denies access to the label to products containing tuna caught by setting on dolphins.[315] The measure at issue thus addresses the adverse effects on dolphins resulting from the use of the fishing method that Mexico's fleet predominantly employs by disqualifying all tuna products containing tuna harvested with that method from access to the "dolphin-safe" label.

288. The Panel also found, and the United States did not contest, that there are "clear indications that the use of certain tuna fishing techniques *other* than setting on dolphins may also cause harm to dolphins".[316] The United States argued, however, that these adverse effects are "not comparable" to and are "fundamentally different" from the adverse effects resulting from setting on dolphins, and that the situation in the ETP is unique.[317] The Panel agreed with the United States that "certain fishing techniques seem to pose greater risks to dolphins than others."[318] However, it also stated that "even assuming that … certain environmental conditions in the ETP (such as the intensity of tuna-dolphin association) are unique, the evidence submitted to the Panel suggests that the *risks* faced by dolphin populations in the ETP are *not*."[319] It further stated that it was "not persuaded" that "at least some of the dolphin populations affected by fishing techniques other than setting on dolphins are not facing risks at least equivalent to those currently faced by dolphin populations in the ETP under AIDCP monitoring."[320] The United States has challenged these findings under Article 11 of the DSU. However, as explained above, we found no error in the Panel's analysis that would amount to an error of law under Article 11.[321]

289. It appears, then, that the Panel accepted the United States' argument that the fishing technique of setting on dolphins is particularly harmful to dolphins. However, the Panel did not agree with the United States, based on the evidence that Mexico had placed before it, that the risks to dolphins from other fishing techniques are insignificant[322] and do not under some circumstances rise to the same level as the risks from setting on dolphins.[323] These factual findings are the basis for the Panel's concerns about the way in which the measure at issue addresses the potential adverse effects on dolphins from the use of fishing techniques other than setting on dolphins outside the ETP. As the Panel noted, where "tuna is caught outside the ETP, it would be eligible for the US official label, even if dolphins have in fact been caught or seriously injured during the trip, since there is, under the US measures as currently applied, no requirement for a certificate to the effect that no dolphins have been killed or seriously injured outside the ETP".[324]

290. The Panel emphasized that:

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[315]Panel Report, para. 7.505.
[316]Panel Report, para. 7.520 (referring to Panel Exhibit MEX-02, *supra*, footnote **Error! Bookmark not defined.**, pp. 37 and 98). (original emphasis)
[317]Panel Report, paras. 7.258, 7.512, and 7.559.
[318]Panel Report, para. 7.438.
[319]Panel Report, para. 7.552. (original emphasis)
[320]Panel Report, para. 7.617.
[321]These findings by the Panel therefore stand.
[322]Panel Report, paras. 7.529, 7.531, and 7.562.
[323]Panel Report, para. 7.562.
[324]Panel Report, para. 7.532.

> … under the DPCIA provisions that are currently applicable *all* tuna products containing tuna caught in a non-ETP fishery using a method other than setting on dolphins are eligible to be labelled dolphin-safe without certifying that no dolphin was killed or seriously injured in the set.[325]

291. The Panel concluded that:

> … the US dolphin-safe provisions do not address observed mortality, and any resulting adverse effects on dolphin populations, for tuna not caught by setting on dolphins or high seas driftnet fishing outside the ETP.[326]

292. From the Panel's findings, it thus appears that the measure at issue does not address adverse effects on dolphins resulting from the use of fishing methods predominantly employed by fishing fleets supplying the United States' and other countries' tuna producers.[327] The Panel noted that the only requirement currently applicable to purse seine vessels fishing outside the ETP is to provide a certification by the captain that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip. This requirement, however, does not address risks from other fishing methods, such as FADs. As the Panel stated, risks to dolphins resulting from fishing methods other than setting on dolphins "could only be monitored by imposing a different substantive requirement, i.e. that no dolphins were killed or seriously injured in the sets in which the tuna was caught."[328]

293. Before the Panel and on appeal, the United States has argued that the US "dolphin-safe" labelling provisions reflect the fact that the lower likelihood that a dolphin may be killed or seriously injured in a fishery outside the ETP must be balanced against the additional burden imposed by conditioning the use of a "dolphin-safe" label on a certification based on an independent observer's statement.[329] The United States further argues that the imposition of a condition that an observer certify that no dolphins were killed or seriously injured on a particular fishing trip outside the ETP "would have significant monetary and infrastructure implications for most nations whose vessels fish for tuna outside the ETP and export to the United States".[330] We understand the United States to suggest that, at least in part due to such costs, it does not impose a certification requirement with respect to fisheries outside the ETP.

294. The Panel found these arguments unpersuasive. It noted that this argument was inconsistent with the United States' own explanation that the measure at issue already imposes a requirement that no dolphins be killed or seriously injured if an alternative label is used.[331] The Panel stated:

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[325]Panel Report, para. 7.534. (original emphasis) We note that the measure at issue does address driftnet fishing in the high seas.
[326]Panel Report, para. 7.621.
[327]Panel Report, para. 7.534 and footnote 767 thereto.
[328]Panel Report, para. 7.561.
[329]United States' appellant's submission, para. 116.
[330]United States' appellant's submission, para. 116.
[331]Panel Report, para. 7.541.

> We fail to see, however, how the cost of demonstrating compliance with the same requirement (i.e. that no dolphin was killed or seriously injured) would justify that no such requirement be imposed with respect to the use of an official label, while it would be imposed for the same tuna caught in the same conditions in the same fisheries, in the case of use of an alternative label. It is also not clear to us what the imposition of this additional requirement means in practice in respect of the alternative label, if it is assumed that it cannot be verified and that this is a reason not to impose it for the use of the official label.[332]

295. The Panel further noted that the provisions of the DPCIA themselves envisage the possibility that a fishery outside the ETP would be identified as one having a "regular and significant mortality, or serious injury of dolphins", which would then lead to the application in such fishery of a requirement to certify that no dolphin has been killed or seriously injured on the trip on which the tuna was caught.[333]

296. We see no error in the Panel's assessment. In addition, we note that nowhere in its reasoning did the Panel state that imposing a requirement that an independent observer certify that no dolphins were killed or seriously injured in the course of the fishing operations in which the tuna was caught would be the *only* way for the United States to calibrate its "dolphin-safe" labelling provisions to the risks that the Panel found were posed by fishing techniques other than setting on dolphins.[334] We note, in this regard, that the measure at issue itself contemplates the possibility that only the captain provide such a certification under certain circumstances.[335]

297. 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 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

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[332]Panel Report, para. 7.541.

[333]Panel Report, para. 7.543.

[334]We note, however, that such a requirement may be appropriate in circumstances in which dolphins face higher risks of mortality or serious injury.

[335]See DPCIA, subsection 1385(d)(1)(D):

> (D) by a vessel in a fishery other than one described in subparagraph (A), (B), or (C) that is identified by the Secretary as having a regular and significant mortality or serious injury of dolphins, unless such product is accompanied by a written statement executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, *provided that the Secretary determines that such an observer statement is necessary*. (emphasis added)

methods other than setting on dolphins outside the ETP".[336] 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.

3. Conclusion under Article 2.1 of the TBT Agreement

298. In the light of uncontested facts and factual findings made by the Panel, we consider that Mexico has established a *prima facie* case that the US "dolphin-safe" labelling provisions modify the conditions of competition in the US market to the detriment of Mexican tuna products and are not even-handed in the way in which they address the risks to dolphins arising from different fishing techniques in different areas of the ocean. We consider further that the United States has not met its burden of rebutting this *prima facie* case. Since we are not persuaded that the Panel acted inconsistently with Article 11 of the DSU in reviewing the evidence and arguments before it, we accept the Panel's conclusions that the use of certain tuna fishing methods other than setting on dolphins "outside the ETP may produce and has produced significant levels of dolphin bycatch"[337] and that "the US dolphin-safe provisions do not address observed mortality, and any resulting adverse effects on dolphin populations, for tuna not caught by setting on dolphins or high seas driftnet fishing outside the ETP."[338] Thus, in our view, the United States has not justified as non-discriminatory under Article 2.1 the different requirements that it applies to tuna caught by setting on dolphins inside the ETP and tuna caught by other fishing methods outside the ETP for access to the US "dolphin-safe" label. The United States has thus not demonstrated that the detrimental impact of the US measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction.

299. For these reasons, we *reverse* the Panel's finding, in paragraphs 7.374 and 8.1(a) of the Panel Report, that the US "dolphin-safe" labelling provisions are not inconsistent with Article 2.1 of the *TBT Agreement*. We *find*, instead, that the US "dolphin-safe" labelling provisions provide "less favourable treatment" to Mexican tuna products than that accorded to tuna products of the United States and tuna products originating in other countries and are therefore inconsistent with Article 2.1 of the *TBT Agreement*.

(…)

VII. ARTICLE 2.2 OF THE TBT AGREEMENT

301. We turn next to the United States' appeal of the Panel's finding that the measure at issue is more trade restrictive than necessary to fulfil the legitimate objectives pursued by the United States, and that, therefore, the measure is inconsistent with Article 2.2 of the *TBT Agreement*. The United States alleges that the Panel erred in its application of Article 2.2 of the *TBT Agreement* and failed to make an objective assessment of the matter before it as required pursuant to Article

[336]Panel Report, para. 7.544. We note that the measure at issue does address driftnet fishing in the high seas.
[337]Panel Report, para. 7.531.
[338]Panel Report, para. 7.621.

11 of the DSU. Mexico raises a conditional other appeal with respect to the Panel's finding under Article 2.2 of the *TBT Agreement*.

A. The Panel's Findings

302. The Panel concluded that the measure at issue is inconsistent with Article 2.2 of the *TBT Agreement*, because it is more trade restrictive than necessary to fulfil the legitimate objectives pursued by the United States, taking account of the risks non-fulfilment would create. This conclusion is based on a number of intermediate findings by the Panel. First, the Panel assessed the United States' objectives based on the description of those objectives by both parties, as well as on the basis of the design, structure, and characteristics of the measure at issue, and found the objectives to be the following:

(a) "ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins"[339] (the "consumer information objective"); and

(b) "contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins"[340] (the "dolphin protection objective").

303. The Panel then ascertained whether these objectives are "legitimate" within the meaning of Article 2.2 of the *TBT Agreement*. The Panel noted that the elaboration of legitimate objectives is the prerogative of the Member establishing a measure. The Panel also recalled the Appellate Body's finding in *US – Gambling* that a panel is not bound by a Member's characterization of the objectives of its own measures, but that a panel must make such characterization in an independent and objective fashion, based on the evidence in the record.[341] The Panel also recalled the Appellate Body's finding in *EC – Sardines* that there must be an examination and a determination on the legitimacy of the objectives of the measures.[342] The Panel considered the list of legitimate objectives in Article 2.2 and found that the consumer information objective falls within the broader goal of preventing deceptive practices, and that the dolphin protection objective may be understood as intended to protect animal life or health or the environment.[343] Accordingly, the Panel found "that the objectives of the US dolphin-safe provisions, as described by the United States and ascertained by the Panel, are legitimate" within the meaning of Article 2.2 of the *TBT Agreement*.[344]

304. The Panel then assessed whether the measure at issue is more trade restrictive than necessary to achieve the United States' objectives. The Panel stated that, in order to do so, it would assess "the manner in which and the extent to which the measures at issue fulfil their objectives, taking into account [the] Member's chosen level of protection, and compare this with a potential less trade restrictive alternative measure, in order to determine whether such alternative

[339]Panel Report, paras. 7.401 and 7.413.
[340]Panel Report, paras. 7.401 and 7.425.
[341]Panel Report, para. 7.405 (referring to Appellate Body Report, *US – Gambling*, para. 304).
[342]Panel Report, para. 7.436 (quoting Appellate Body Report, *EC – Sardines*, para. 286).
[343]Panel Report, para. 7.437.
[344]Panel Report, para. 7.444.

measure would similarly fulfil the objectives pursued by the technical regulation at the Member's chosen level of protection."[345] The Panel further stated that, "[t]o the extent that a measure is capable of contributing to its objective, it would be more trade-restrictive than necessary if an alternative measure that is less trade-restrictive is reasonably available, that would achieve the challenged measure's objective at the same level."[346]

305. Turning to the measure at issue, the Panel assessed whether the US "dolphin-safe" labelling provisions fulfil the consumer information objective and whether, as Mexico claimed, this objective could also be fulfilled by allowing the AIDCP label to coexist with the US "dolphin-safe" label in the US market. The Panel found that the measure at issue could only partially fulfil the consumer information objective, because, *inter alia*, under the US "dolphin-safe" label, consumers might be misled into thinking that a tuna product did not involve injury or killing of dolphins, even though this may in fact have been the case.[347] The Panel considered that allowing compliance with the "dolphin-safe" labelling requirements of the AIDCP in conjunction with the existing US "dolphin-safe" label would be a less trade restrictive alternative that would achieve a level of protection equivalent to that of the measure at issue. Accordingly, the Panel concluded that the measure at issue is more trade restrictive than necessary to fulfil the consumer information objective.[348]

306. The Panel subsequently considered whether the measure at issue fulfils the dolphin protection objective and whether this objective could also be fulfilled by allowing the AIDCP label to coexist with the US "dolphin-safe" label in the US market. The Panel concluded that the measure at issue could "at best, only partially fulfil [its] stated objective of protecting dolphins". The Panel reasoned that, although the measure was capable of protecting dolphins within the ETP, in other fisheries the measure was "capable of achieving [its] objective only in relation to the practices of setting on dolphins and using high seas driftnets", and "in relation to all other fishing techniques used outside the ETP" the measure is "not able to contribute to the protection of dolphins".[349]

307. The Panel noted that significant dolphin mortality arises outside the ETP from the use of fishing techniques other than setting on dolphins.[350] The Panel considered that, "in some cases, the risks arising from setting on dolphins under controlled circumstances may be lower than the risks arising from other fishing techniques applied without controlling for dolphin mortality or other adverse impacts."[351] The Panel considered that "the alternative suggested by Mexico does not seem to create greater risks to dolphins in the ETP than those accepted by the United States under the challenged measures in relation to other fishing techniques used outside the ETP."[352] Thus, the Panel found that "Mexico's alternative would achieve a level of protection equal to that achieved by the US dolphin-safe provisions outside the ETP".[353] Recalling its earlier conclusion that Mexico's alternative "is less trade-restrictive than the US dolphin-safe provisions", the Panel

[345]Panel Report, para. 7.465.
[346]Panel Report, para. 7.465.
[347]Panel Report, paras. 7.563 and 7.564.
[348]Panel Report, paras. 7.577 and 7.578.
[349]Panel Report, para. 7.599.
[350]Panel Report, para. 7.613.
[351]Panel Report, para. 7.615.
[352]Panel Report, para. 7.618.
[353]Panel Report, para. 7.618.

found that Mexico had identified a reasonably available less trade-restrictive alternative that would achieve the dolphin protection objective at the same level as the measure at issue.[354]

308. Consequently, in relation to both the consumer information objective and the dolphin protection objective, the Panel found the measure at issue to be more trade restrictive than necessary to fulfil its legitimate objectives and thus inconsistent with Article 2.2 of the *TBT Agreement*.[355]

B. The United States' Appeal

309. On appeal, the United States requests the Appellate Body to reverse this finding. The United States claims that the Panel erred in its application of Article 2.2 of the *TBT Agreement* when it found that the US "dolphin-safe" labelling provisions are more trade restrictive than necessary to fulfil their legitimate objectives. The United States also alleges that, in assessing the evidence relating to the extent to which the United States' measure fulfils the United States' objectives, the Panel failed to make an objective assessment of the matter before it as required under Article 11 of the DSU. In addition, the United States raises a claim under Article 11 of the DSU with respect to the Panel's finding that the alternative measure proposed by Mexico would be a less trade-restrictive alternative.

310. In response, Mexico argues that the Appellate Body should uphold the Panel's finding that the US "dolphin-safe" labelling provisions are more trade restrictive than necessary to fulfil their legitimate objectives and are therefore inconsistent with Article 2.2 of the *TBT Agreement*. According to Mexico, the Panel's finding is correct because the United States' objectives can be fulfilled with a less trade-restrictive alternative measure, namely, allowing the AIDCP label and the US "dolphin-safe" label to coexist in the US market.

1. Article 2.2 of the TBT Agreement

311. We begin by considering the text of Article 2.2 of the *TBT Agreement*, which provides:

> 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.

[354]Panel Report, para. 7.619.
[355]Panel Report, para. 7.620.

312. The first sentence of Article 2.2 requires WTO Members to ensure that their technical regulations are not prepared, adopted, or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade. The second sentence explains that "[f]or 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". We will address the different elements set out in the text of Article 2.2 in turn below, in particular the meaning of the terms "legitimate objective" and "fulfilment", as well as of the phrases "not … more trade-restrictive than necessary" and "taking account of the risks non-fulfilment would create".

313. Considering, first, the meaning of the term "legitimate objective" in the sense of Article 2.2 of the *TBT Agreement*, we note that the word "objective" describes a "thing aimed at or sought; a target, a goal, an aim".[356] The word "legitimate", in turn, is defined as "lawful; justifiable; proper".[357] 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*.

314. 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.[358] Subsequently, the analysis must turn to the question of whether a particular objective is legitimate, pursuant to the parameters set out above.

315. Next, we consider the meaning of the word "fulfil" in the context of the phrase "fulfil a legitimate objective" in Article 2.2 of the *TBT Agreement*. We note, first, that the word "fulfil" is defined as "provide fully with what is wished for".[359] Read in isolation, the word "fulfil" appears to describe complete achievement of something. But, in Article 2.2, it is used in the phrase "to fulfil a legitimate objective" and, as described above, the word "objective" means "a target, goal, or aim". As we see it, it is inherent in the notion of an "objective" that such a "goal, or aim" may be something that is pursued and achieved to a greater or lesser degree. Accordingly, we consider that the question of whether a technical regulation "fulfils" an objective is concerned with the degree of contribution that the technical regulation makes toward the achievement of the legitimate objective.

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[356]*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 1970.
[357]*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1577.
[358]See Appellate Body Report, *US – Gambling*, para. 304.
[359]*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1053.

316. We see support for this reading of the term "fulfil a legitimate objective" in the sixth recital of the preamble of the *TBT Agreement*, which provides relevant context for the interpretation of Article 2.2. It recognizes that a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives "at the levels it considers appropriate", subject to the requirement that such measures 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 *TBT Agreement*. As we see it, 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.

317. A panel adjudicating a claim under Article 2.2 of the *TBT Agreement* must seek to ascertain to what degree, or if at all[360], the challenged technical regulation, as written and applied, actually contributes to the legitimate objective pursued by the Member. The degree of achievement of a particular objective may be discerned from the design, structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure. As in other situations, such as, for instance, when determining the contribution of a measure to the achievement of a particular objective in the context of Article XX of the GATT 1994, a panel must assess the contribution to the legitimate objective actually achieved by the measure at issue.[361]

318. We turn next to the terms "unnecessary obstacles to international trade" in the first sentence and "not … more trade-restrictive than necessary" in the second sentence of Article 2.2 of the *TBT Agreement*. Both the first and second sentence of Article 2.2 refer to the notion of "necessity". These sentences are linked by the terms "[f]or this purpose", which suggests that the second sentence qualifies the terms of the first sentence and elaborates on the scope and meaning of the obligation contained in that sentence. The Appellate Body has previously noted that the word "necessary" refers to a range of degrees of necessity, depending on the connection in which it is used.[362] 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. We consider, therefore, that all these factors provide the basis for the determination of what is to be considered "necessary" in the sense of Article 2.2 in a particular case.[363]

319. What has to be assessed for "necessity" is the trade-restrictiveness of the measure at issue. 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.[364] As used in Article 2.2 in

[360]This may involve an assessment of whether the measure at issue is capable of achieving the legitimate objective.
[361]Appellate Body Report, *China – Publications and Audiovisual Products*, para. 252.
[362]The Appellate Body further noted that: "[a]t one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end, is 'necessary' taken to mean as 'making a contribution to.'" (Appellate Body Report, *Korea – Various Measures on Beef*, para. 161)
[363]Similarly, in the context of Article XX of the GATT 1994 and Article XIV of the GATS, "necessity" is determined on the basis of "weighing and balancing" a number of factors. (Appellate Body Report, *Brazil – Retreaded Tyres*, para. 178; Appellate Body Report, *US – Gambling*, paras. 306-308)
[364]The Appellate Body addressed this question in the context of Article XI:2(a) of the GATT 1994 in

conjunction with the word "trade", the term means something having a limiting effect on trade. We recall that Article 2.2 does not prohibit measures that have any trade-restrictive effect. It refers to "unnecessary obstacles" to trade and thus allows for some trade-restrictiveness; more specifically, Article 2.2 stipulates that technical regulations shall not be "more trade-restrictive than necessary to fulfil a legitimate objective". Article 2.2 is thus concerned with restrictions on international trade that exceed what is necessary to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective.

320. The use of the comparative "more … than" in the second sentence of Article 2.2 suggests that the existence of an "unnecessary obstacle[] to international trade" in the first sentence may be established on the basis of a comparative analysis of the above-mentioned factors. In most cases, this would involve 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.[365] The Appellate Body has clarified that a comparison with reasonably available alternative measures is a conceptual tool for the purpose of ascertaining whether a challenged measure is more trade restrictive than necessary.

321. Article 2.2 of the *TBT Agreement* further stipulates that the risks non-fulfilment of the objective would create shall be taken into account, and that, 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". As we see it, the obligation to consider "the risks non-fulfilment would create" suggests that the comparison of the challenged measure with a possible alternative measure should be made in the light of the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective. This suggests a further element of weighing and balancing in the determination of whether the trade-restrictiveness of a technical regulation is "necessary" or, alternatively, whether a possible alternative measure, which is less trade restrictive, would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and would be reasonably available.[366]

322. 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-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.[367] In particular, it may be relevant for the purpose of

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Appellate Body Reports, *China – Raw Materials*, para. 319.

[365]Similarly, the Appellate Body has held that in order to establish "necessity" in the context of Article XX of the GATT 1994 and Article XIV of the GATS, a comparison of a measure found to be inconsistent and reasonably available less trade-restrictive alternatives should be undertaken. (See, for instance, Appellate Body Report, *Korea – Various Measures on Beef*, para. 166)

[366]See also Appellate Body Report, *US – Gambling*, para. 307.

[367]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

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.

323. With respect to the burden of proof in showing that a technical regulation is inconsistent with Article 2.2, the complainant must prove its claim that the challenged measure creates an unnecessary obstacle to international trade.[368] In order to make a *prima facie* case, the complainant must present 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 objectives, taking account of the risks non-fulfilment would create. In making its *prima facie* case, a complainant may 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 and by demonstrating, for example, 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.

2. The Panel's Application of Article 2.2

324. We turn next to the review of the Panel's application of Article 2.2 of the *TBT Agreement*. The United States alleges that the Panel erred in finding that the "coexistence" of the US "dolphin-safe" label and the AIDCP label provides a reasonably available, less trade-restrictive means of achieving the objectives pursued by the United States at its chosen level. According to the United States, allowing the AIDCP label to coexist with the US "dolphin-safe" label would not address risks to dolphins outside the ETP, since by its terms it only applies to tuna caught inside the ETP. The United States further points out that the AIDCP label allows the practice of setting on dolphins to catch tuna, which is harmful to dolphins, and would therefore frustrate the dolphin protection objective.[369] Moreover, in the United States' view, coexistence of the two labels would be confusing for consumers, because the AIDCP and the US official "dolphin-safe" label are virtually identical, and consumers would have difficulty appreciating the difference in what each label signifies so as to make an informed decision about the tuna they buy.[370] Finally, the United States alleges that the Panel erred by implying that the United States is required to fulfil its objective to the same level inside and outside the ETP, regardless of the costs, and that this approach does not respect "well-established approaches to policymaking", such as weighing costs and benefits, which are also consistent with the *TBT Agreement*.[371]

325. In reviewing the Panel's application of Article 2.2 to the facts of this case, we recall its finding that the objectives at issue are, first, "ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects

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Article 2.2.

[368]Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335. See also Appellate Body Report, *EC – Sardines*, paras. 277-280.

[369]United States' appellant's submission, para. 121.

[370]United States' appellant's submission, para. 124.

[371]United States' appellant's submission, para. 115.

dolphins"[372]; and, second, "contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins".[373]

326. Before the Panel, Mexico argued that "a 'reasonably available alternative measure' for the United States would be to permit the use in the US market of the AIDCP 'dolphin safe' label."[374] It was for the Panel, therefore, in assessing Mexico's claim that the US "dolphin-safe" labelling provisions "are more trade-restrictive than necessary" within the meaning of Article 2.2, to examine, *inter alia*, the contribution that the US measure makes to the achievement of its objectives; the trade-restrictiveness of the US "dolphin-safe" labelling provisions; whether Mexico had identified a "reasonably available" and less trade-restrictive alternative measure, and to compare the degree of the US measure's contribution with that of the alternative measure, which is reasonably available and less trade restrictive, taking account of the risks non-fulfilment would create.

327. With respect to the degree to which the measure at issue contributes to the United States' consumer information objective, we recall the Panel's finding that the measure at issue "can only *partially* ensure that consumers are informed about whether tuna was caught by using a method that adversely affects dolphins".[375] This conclusion is based on the Panel's finding that fishing methods other than setting on dolphins or high-sea driftnet fishing outside the ETP may cause adverse effects on dolphins, and that to the extent tuna caught under such circumstances may be labelled "dolphin-safe" pursuant to the US "dolphin-safe" labelling provisions, consumers may be misled about whether tuna was caught using a technique that does not adversely affect dolphins.[376] Similarly, regarding the question of the degree to which the measure at issue contributes to the United States' dolphin protection objective, the Panel found that the US "dolphin-safe" labelling provisions are capable of protecting dolphins by ensuring that the US market is not used to encourage fishing practices that may kill or seriously injure dolphins, only within the ETP. The Panel further found that, in other fisheries, the measure at issue is capable of achieving its objective only in relation to the fishing practices of setting on dolphins and of using high seas driftnets, and that, in relation to all other fishing techniques used outside the ETP, the measure at issue is not able to contribute to the protection of dolphins. Accordingly, the Panel concluded that US "dolphin-safe" labelling provisions "may, at best, only partially fulfil their stated objective of protecting dolphins by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins".[377]

328. The Panel then considered the extent to which the proposed alternative measure would fulfil the United States' objectives and concluded, first, with respect to the consumer information objective, that "the extent to which consumers would be misled as to the implications of the manner in which tuna was caught would not be greater if the AIDCP label were allowed to co-exist with the US dolphin-safe provisions".[378] Second, with respect to the dolphin protection objective, the Panel found that "allowing compliance with the AIDCP labelling requirements to

[372]Panel Report, paras. 7.413 and 7.401.
[373]Panel Report, paras. 7.425 and 7.401.
[374]Panel Report, para. 7.566 (referring to Mexico's response to Panel Question 134, para. 52).
[375]Panel Report, para. 7.563. (original emphasis)
[376]Panel Report, para. 7.562.
[377]Panel Report, para. 7.599.
[378]Panel Report, para. 7.573.

be advertised on the US market would discourage observed dolphin mortality resulting from setting on dolphins to the same extent as the existing US dolphin-safe provisions do and would involve no reduction in the level of protection in this respect."[379] It appears to us, however, that the Panel's analysis of whether Mexico had demonstrated that the US "dolphin-safe" labelling provisions are "more trade-restrictive than necessary" within the meaning of Article 2.2 was based, at least in part, on an improper comparison. With respect to the dolphin protection objective, the Panel contrasted the AIDCP labelling requirements with the US "dolphin-safe" labelling provisions, stating that "allowing compliance" with the former "to be advertised on the US market would discourage observed dolphin mortality resulting from setting on dolphins to the same extent as the existing US dolphin-safe provisions do".[380] Similarly, with respect to the consumer information objective, the Panel noted, *inter alia*, that, "under the US measures", it is possible that tuna caught during a trip where dolphins were in fact killed or injured may be labelled "dolphin-safe".[381] The Panel compared that to the scenario "under the AIDCP", where "a label would only be granted if no dolphins [were] killed, but where certain unobserved adverse effects could nonetheless have been caused to dolphins".[382] This comparison, however, fails to take into account that the alternative measure identified by Mexico is *not* the AIDCP regime, as such, but rather the *coexistence* of the AIDCP rules with the US measure.

329. In any event, it would appear that, in respect of the conditions for labelling as "dolphin-safe" tuna products containing tuna harvested *outside* the ETP, there is no difference between the measure at issue and the alternative measure identified by Mexico, namely, the coexistence of the US "dolphin-safe" labelling provisions with the AIDCP rules. We recall that the geographic scope of application of the AIDCP rules is limited to the ETP. Thus, the conditions for fishing outside the ETP would be identical under the alternative measure proposed by Mexico, since only those set out in the US measure would apply. Therefore, for fishing activities *outside* the ETP, the degree to which the United States' objectives are achieved under the alternative measure would not be higher or lower than that achieved by the US measure, it would be the same. *Inside* the ETP, however, the measure at issue and the alternative measure set out different requirements. Under the alternative measure identified by Mexico, tuna that is caught by setting on dolphins would be eligible for a "dolphin-safe" label if the prerequisites of the AIDCP label have been complied with. By contrast, the measure at issue prohibits setting on dolphins, and thus tuna harvested in the ETP would only be eligible for a "dolphin-safe" label if it was caught by methods other than setting on dolphins.

330. It would seem, therefore, that the Panel's comparison of the degree to which the alternative measure identified by Mexico contributes to the United States' objectives should have focused on the conditions inside the ETP. In particular, for tuna harvested inside the ETP, the Panel should have examined whether the labelling of tuna products complying with the requirements of the AIDCP label would achieve the United States' objectives to an equivalent degree as the measure at issue. We note, in this regard, the Panel's finding, undisputed by the participants, that dolphins suffer adverse impact beyond observed mortalities from setting on dolphins[383], even under the restrictions contained in the AIDCP rules.[384] Since under the proposed

[379]Panel Report, para. 7.612.
[380]Panel Report, para. 7.612.
[381]Panel Report, para. 7.573.
[382]Panel Report, para. 7.573.
[383]In particular, the Panel considered cow-calf separation; potential muscle injury resulting from the chase; immune and reproductive systems failures; and other adverse health consequences for dolphins, such as

alternative measure tuna caught in the ETP by setting on dolphins would be eligible for the "dolphin-safe" label, it would appear, therefore, that the alternative measure proposed by Mexico would contribute to both the consumer information objective and the dolphin protection objective to a lesser degree than the measure at issue, because, overall, it would allow more tuna harvested in conditions that adversely affect dolphins to be labelled "dolphin-safe".[385] We disagree therefore with the Panel's findings that the proposed alternative measure would achieve the United States' objectives "to the same extent" as the existing US "dolphin-safe" labelling provisions, and that the extent to which consumers would be misled as to the implications of the manner in which tuna was caught "would not be greater" under the alternative measure proposed by Mexico.

331. For these reasons, we find that the Panel's comparison and analysis is flawed and cannot stand. Therefore, the Panel erred in concluding, in paragraphs 7.620 and 8.1(b) of the Panel Report, that it has been demonstrated that the measure at issue is more trade restrictive than necessary to fulfil the United States' legitimate objectives, taking account of the risks non-fulfilment would create. Accordingly, we *reverse* the Panel's findings that the measure at issue is inconsistent with Article 2.2 of the *TBT Agreement*.

(…)

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continuous acute stress. (See Panel Report, paras. 7.491-7.506)

[384]Panel Report, para. 7.504. The Panel stated that:

> … it appears that there is a degree of uncertainty in relation to the extent to which setting on dolphins may have an adverse impact on dolphins beyond observed mortality. Nonetheless, we consider that sufficient evidence has been put forward by the United States to raise a presumption that genuine concerns exist in this respect. The information presented to us in this respect also suggests that this is a field of research in which the collection and analysis of information is inherently difficult, but that efforts have been ongoing to better understand these issues, including in the context of the implementation of the DPCIA. We further note that such effects would arise as a result of the chase in itself, and would thus exist even if measures are taken in order to avoid the taking and killing of dolphins in the nets, as is the case under the AIDCP. (footnotes omitted)

[385]We also note in this regard the Panel's finding in the context of Mexico's claim under Article 2.4 of the *TBT Agreement*. In particular, the Panel stated:

> Therefore, with the AIDCP label alone, consumers will not be misled or deceived about whether dolphins were killed during the sets in which the tuna is caught. However, to the extent that there might be other adverse effects deriving from that fishing method, the AIDCP standard alone would not address them. (Panel Report, para. 7.729); [and]
>
> [T]he AIDCP standard, applied alone, would not be an effective or appropriate means of fulfilling the US objective of ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins.

(Panel Report, para. 7.731)

4. Harmonization and International Standards (TBT 2.4)

4-1. EC – Trade Description of Sardines (EC – Sardines)

Editorial note: The footnote numbering differs from the numbering in the original reports.

Appellate Body Report, WT/DS231/AB/R, 26 September 2002

Bacchus, Presiding Member; Abi-Saab, Member; Baptista, Member

I. INTRODUCTION

1. The European Communities appeals from certain issues of law and legal interpretations in the Panel Report, *European Communities – Trade Description of Sardines* (the "Panel Report"). [1]

2. This dispute concerns the name under which certain species of fish may be marketed in the European Communities. The measure at issue is Council Regulation (EEC) 2136/89 (the "EC Regulation"), which was adopted by the Council of the European Communities on 21 June 1989 and became applicable on 1 January 1990. [2] The EC Regulation sets forth common marketing standards for preserved sardines.

3. Article 2 of the EC Regulation provides that:

> Only products meeting the following requirements may be marketed as preserved sardines and under the trade description referred to in Article 7:
>
> – they must be covered by CN codes 1604 13 10 and ex 1604 20 50;
>
> – *they must be prepared exclusively from fish of the species "Sardina pilchardus Walbaum"*;
>
> – they must be pre-packaged with any appropriate covering medium in a hermetically sealed container;
>
> – they must be sterilized by appropriate treatment. (emphasis added)

[1] WT/DS231/R, 29 May 2002, WT/DS231/R/Corr.1, 10 June 2002.
[2] OJ No L 212, 22.07.1989, reproduced as Annex 1 to the Panel Report, pp. 79–81.

4. *Sardina pilchardus* Walbaum ("*Sardina pilchardus*"), the fish species refered to in the EC Regulation, is found mainly around the coasts of the Eastern North Atlantic Ocean, in the Mediterranean Sea, and in the Black Sea.[3]

5. In 1978, the Codex Alimentarius Commission (the "Codex Commission"), of the United Nations Food and Agriculture Organization and the World Health Organization, adopted a world-wide standard for preserved sardines and sardine-type products, which regulates matters such as presentation, essential composition and quality factors, food additives, hygiene and handling, labelling, sampling, examination and analyses, defects and lot acceptance. This standard, CODEX STAN 94–1981, Rev.1–1995 ("Codex Stan 94"), covers preserved sardines or sardine-type products prepared from the following 21 fish species:

- *Sardina pilchardus*
- *Sardinops melanostictus, S. neopilchardus, S. ocellatus, S. sagax*[,] *S. caeruleus*
- *Sardinella aurita, S. brasiliensis, S. maderensis, S. longiceps, S. gibbosa*
- *Clupea harengus*
- *Sprattus sprattus*
- *Hyperlophus vittatus*
- *Nematalosa vlaminghi*
- *Etrumeus teres*
- *Ethmidium maculatum*
- *Engraulis anchoita, E. mordax, E. ringens*
- *Opisthonema oglinum*.[4]

6. Section 6 of Codex Stan 94 provides as follows:

> 6. LABELLING
>
> In addition to the provisions of the Codex General Standard for the Labelling of Prepackaged Foods (CODEX STAN 1-1985, Rev. 3-1999) the following special provisions apply:
>
> 6.1 NAME OF THE FOOD
>
> The name of the product shall be:

[3]Panel Report, para. 2.2.
[4]Codex Stan 94, as reproduced in Annex 2 to the Panel Report, section 2.1.1.

> 6.1.1 (i) *"Sardines" (to be reserved exclusively for Sardina pilchardus (Walbaum)); or*
>
> (ii) *"X sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer*.
>
> 6.1.2 The name of the packing medium shall form part of the name of the food.
>
> 6.1.3 If the fish has been smoked or smoke flavoured, this information shall appear on the label in close proximity to the name.
>
> 6.1.4 In addition, the label shall include other descriptive terms that will avoid misleading or confusing the consumer. … (emphasis added)

7. Peru exports preserved products prepared from *Sardinops sagax sagax* ("*Sardinops sagax*"), one of the species of fish covered by Codex Stan 94. This species is found mainly in the Eastern Pacific Ocean, along the coasts of Peru and Chile. [5]

8. *Sardina pilchardus* and *Sardinops sagax* both belong to the *Clupeidae* family and the *Clupeinae* subfamily. As their scientific name suggests, however, they belong to different genus. *Sardina pilchardus* belongs to the genus *Sardina*, while *Sardinops sagax* belongs to the genus *Sardinops*. [6] Additional factual aspects of this dispute are set forth in paragraphs 2.1–2.9 of the Panel Report.

9. The Panel in this dispute was established on 24 July 2001. Before the Panel, Peru argued that the EC Regulation is inconsistent with Articles 2.4, 2.2 and 2.1 of the *Agreement on Technical Barriers to Trade* (the "*TBT Agreement* ") and Article III:4 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). [7]

10. In the Panel Report circulated to Members of the World Trade Organization (the "WTO") on 29 May 2002, the Panel found that the EC Regulation is inconsistent with Article 2.4 of the *TBT Agreement*, and exercised judicial economy in respect of Peru's claims under Articles 2.2 and 2.1 of the *TBT Agreement* and III:4 of the GATT 1994. [8] The Panel, therefore, recommended that the Dispute Settlement Body (the "DSB") request the European Communities to bring its measure into conformity with its obligations under the *TBT Agreement*. [9]

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[5]Panel Report, para. 2.2.
[6]Panel Report, para. 2.3.
[7]*Ibid*., para. 3.1.
[8]*Ibid*., paras. 8.1 and 7.152.
[9]*Ibid*., para. 8.3.

(…)

III. ISSUES RAISED IN THIS APPEAL

134. This appeal raises the following issues:

(…)

(e) whether the Panel erred by finding that CODEX STAN 94–1981, Rev.1–1995 ("Codex Stan 94") is a "relevant international standard" within the meaning of Article 2.4 of the *TBT Agreement*;

(f) whether the Panel erred by finding that Codex Stan 94 was not used "as a basis for" the EC Regulation within the meaning of Article 2.4 of the *TBT Agreement*;

(g) whether the Panel correctly interpreted and applied the second part of Article 2.4 of the *TBT Agreement*, which allows Members not to use international standards "as a basis for" their technical regulations "when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued";

(…)

VII. THE CHARACTERIZATION OF CODEX STAN 94 AS A "RELEVANT INTERNATIONAL STANDARD"

217. We proceed to the European Communities' claim that the Panel erred in finding that Codex Stan 94 is a "relevant international standard" within the meaning of Article 2.4 of the *TBT Agreement*.

218. The Panel found that "Codex Stan 94 is a relevant international standard".[10] The European Communities challenges this finding for two reasons. The European Communities asserts, first, that only standards adopted by international bodies by consensus are "relevant international standards" under Article 2.4 of the *TBT Agreement*.[11] The European Communities argues that the Panel assumed "that Codex Stan 94 … was adopted by consensus … without undertaking positive steps to verify the accuracy of the conflicting statements made in this respect by the parties".[12] Second, the European Communities asserts that, even if Codex Stan 94 were considered an international standard, it is not a "*relevant* international standard" because its product coverage is different from that of the EC Regulation. The European Communities contends that the EC Regulation covers only preserved sardines, while Codex Stan 94 covers that product as well as "sardine-type" products.[13] We will address each of these arguments in turn.

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[10]Panel Report, para. 7.70.
[11]European Communities' appellant's submission, para. 123.
[12]*Ibid.*, para. 134.
[13]This argument is based on the European Communities' interpretation of Codex Stan 94, which differs

A. The European Communities' Argument that Consensus is Required

219. The European Communities argues that only standards that have been adopted by an international body by consensus can be *relevant* for purposes of Article 2.4. The European Communities contends that the Panel did not verify that Codex Stan 94 was not adopted by consensus, and that, therefore, it cannot be a "relevant international standard". [14]

220. However, in our view, the European Communities' contention is essentially related to whether Codex Stan 94 meets the definition of a "standard" in Annex 1.2 of the *TBT Agreement*. The term "standard", is defined in Annex 1.2 as follows:

> *2. Standard*
>
> 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 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*

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from that of the Panel. The European Communities explains that when Codex Stan 94 was in draft form, and particularly when it was at Step 7 of the elaboration procedures of the Codex Commission, it provided three naming options: (i) "Sardines" (to be reserved exclusively for *Sardina pilchardus*); (ii) "X Sardines", where "X" is the name of a country, a geographic area, or the species; and (iii) the common name of the species. The European Communities claims that the first two options—"Sardines" and "X Sardines"—apply to sardine products, while the third option—the common name of the species—was envisaged as a separate option for "*sardine-type products*". Given that only editorial changes are allowed between Steps 7 and 8 of the elaboration procedures, when the second and third options were merged, the European Communities alleges that the draft standard at Step 7 should guide the interpretation of Codex Stan 94, even though the text approved at Step 8 includes the common name of the species in the same subsection as "X Sardines". (European Communities' appellant's submission, paras. 135–148; European Communities' response to questioning at the oral hearing) The Panel's interpretation of Codex Stan 94 focuses on its final version. The Panel is of the view that the "common name of the species" is part of the "X Sardines" option. (See *infra*, paras. 235–239)

[14]European Communities' response to questioning at the oral hearing.

> *Agreement covers also documents that are not based on consensus*. (emphasis added)

221. The European Communities does not contest that the Codex Commission is an international standardization body, and that it is a "recognized body" for purposes of the definition of a "standard" in Annex 1.2.[15] The issue before us, rather, is one of *approval*. The definition of a "standard" refers to documents *approved* by a recognized body. Whether approval takes place by consensus, or by other methods, is not addressed in the definition, but it is addressed in the last two sentences of the Explanatory note.

222. The Panel interpreted the last two sentences of the Explanatory note as follows:

> 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.[86] This provision therefore confirms that even if not adopted by consensus, an international standard can constitute a relevant international standard.
>
> [86] The record does not demonstrate that Codex Stan 94 was not adopted by consensus. In any event, we consider that this issue would have no bearing on our determination in light of the explanatory note of paragraph 2 of Annex 1 of the TBT Agreement which states that the TBT Agreement covers "documents that are not based on consensus".[16]

We agree with the Panel's interpretation. In our view, the text of the Explanatory note supports the conclusion that consensus is not required for standards adopted by the international standardizing community. The last sentence of the Explanatory note refers to "documents". The term "document" is also used in the singular in the first sentence of the definition of a "standard". We believe that "document(s)" must be interpreted as having the same meaning in both the definition and the Explanatory note. The European Communities agrees.[17] Interpreted in this way, the term "documents" in the last sentence of the Explanatory note must refer to standards *in general*, and not only to those adopted by entities *other than* international bodies, as the European Communities claims.

223. Moreover, the text of the last sentence of the Explanatory note, referring to documents not based on consensus, gives no indication whatsoever that it is departing from the subject of the

[15]European Communities' response to questioning at the oral hearing.
[16]Panel Report, para. 7.90 and footnote 86 thereto.
[17]European Communities' response to questioning at the oral hearing. The United States agreed. (United States' response to questioning at the oral hearing)

immediately preceding sentence, which deals with standards adopted by international bodies. Indeed, the use of the word "also" in the last sentence suggests that the same subject is being addressed—namely standards prepared by the international standardization community. Hence, the logical assumption is that the last phrase is simply continuing in the same vein, and refers to standards adopted by international bodies, including those not adopted by consensus.

224. The Panel's interpretation, moreover, gives effect to the chapeau of Annex 1 to the *TBT Agreement*, which provides:

> The terms presented in the sixth edition of the ISO/IEC Guide 2:1991, General Terms and Their Definitions Concerning Standardization and Related Activities, shall, when used in this Agreement, have the same meaning as given in the definitions in the said Guide …
>
> For the purpose of this Agreement, *however*, the following definitions shall apply … (emphasis added)

Thus, according to the chapeau, the terms defined in Annex 1 apply for the purposes of the *TBT Agreement* only if their definitions *depart* from those in the ISO/IEC Guide 2:1991 (the "ISO/IEC Guide").[18] This is underscored by the word "however". The definition of a "standard" in Annex 1 to the *TBT Agreement* departs from that provided in the ISO/IEC Guide precisely in respect of whether consensus is expressly required.

225. The term "standard" is defined in the ISO/IEC Guide as follows:

> Document, established by *consensus* and approved by a recognized *body*, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context.[19] (original emphasis)

Thus, the definition of a "standard" in the ISO/IEC Guide expressly includes a consensus requirement. Therefore, the logical conclusion, in our view, is that the *omission* of a consensus requirement in the definition of a "standard" in Annex 1.2 of the *TBT Agreement* was a deliberate choice on the part of the drafters of the *TBT Agreement*, and that the last two phrases of the Explanatory note were included to give effect to this choice. Had the negotiators considered consensus to be necessary to satisfy the definition of "standard", we believe they would have said so explicitly in the definition itself, as is the case in the ISO/IEC Guide. Indeed, there would, in our view, have been no point in the negotiators adding the last sentence of the Explanatory note.

[18]ISO/IEC Guide (6th edition, 1991), submitted as Exhibit EC-1 to the European Communities' appellant's submission.
[19]*Ibid.*, subclause 3.2.

226. Furthermore, we observe that the Panel found that, in any event, the European Communities did *not* prove that Codex Stan 94 was *not* adopted by consensus. Instead, the Panel found that, "[t]he record does not demonstrate that Codex Stan 94 was not adopted by consensus". [20]

227. Therefore, we uphold the Panel's conclusion, in paragraph 7.90 of the Panel Report, that the definition of a "standard" in Annex 1.2 to the *TBT Agreement* does not require approval by consensus for standards adopted by a "recognized body" of the international standardization community. We emphasize, however, that this conclusion is relevant only for purposes of the *TBT Agreement*. It is not intended to affect, in any way, the internal requirements that international standard-setting bodies may establish for themselves for the adoption of standards within their respective operations. In other words, the fact that we find that the *TBT Agreement* does not require approval by consensus for standards adopted by the international standardization community should not be interpreted to mean that we believe an international standardization body should not require consensus for the adoption of its standards. That is not for us to decide.

B. *The European Communities' Argument on the Product Coverage of Codex Stan 94*

228. We turn now to examine the European Communities' argument that Codex Stan 94 is not a "*relevant* international standard" because its product coverage is different from that of the EC Regulation.

(…)

230. We do not disagree with the Panel's interpretation of the ordinary meaning of the term "relevant". Nor does the European Communities. [21] Instead, the European Communities argues that, although the EC Regulation deals *only* with preserved sardines—understood to mean exclusively preserved *Sardina pilchardus*—Codex Stan 94 *also covers* other preserved fish that are "sardine-type". [22]

231. We are not persuaded by this argument. First, even if we accepted that the EC Regulation relates only to preserved *Sardina pilchardus*, which we do not, the fact remains that section 6.1.1(i) of Codex Stan 94 also relates to preserved *Sardina pilchardus*. Therefore, Codex Stan 94 can be said to bear upon, relate to, or be pertinent to the EC Regulation because both refer to preserved *Sardina pilchardus*.

232. Second, we have already concluded that, although the EC Regulation expressly mentions only *Sardina pilchardus*, it has legal consequences for other fish species that could be sold as

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[20]Panel Report, footnote 86 to para. 7.90. The report of the meeting of the Codex Commission where Codex Stan 94 was adopted, which Peru submitted to the Panel, makes no mention of votes being cast before its approval. (Report of the Twelfth Session of the Joint FAO/WHO Codex Alimentarius Commission (ALINORM 78/41), submitted as Exhibit Peru-14 by Peru to the Panel) We note that, at the oral hearing, the European Communities and Peru agreed that the Panel's conclusion that the record does not demonstrate that Codex Stan 94 was not adopted by consensus is a factual finding, which is beyond the purview of appellate review.

[21]European Communities' response to questioning at the oral hearing.

[22]*Ibid.*

preserved sardines, including preserved *Sardinops sagax*.[23] Codex Stan 94 covers 20 fish species in addition to *Sardina pilchardus*.[24] These other species also are legally affected by the exclusion in the EC Regulation. Therefore, we conclude that Codex Stan 94 bears upon, relates to, or is pertinent to the EC Regulation.

233. For all these reasons, we uphold the Panel's finding, in paragraph 7.70 of the Panel Report,
that Codex Stan 94 is a "relevant international standard" for purposes of Article 2.4 of the *TBT Agreement*.

VIII. WHETHER CODEX STAN 94 WAS USED "AS A BASIS FOR" THE EC REGULATION

234. We turn now to whether Codex Stan 94 has been used "as a basis for" the EC Regulation. It will be recalled 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. The Panel found that "the relevant international standard, i.e., Codex Stan 94, was not used as a basis for the EC Regulation".[25] The European Communities appeals this finding.

235. The starting point of the Panel's analysis was the interpretation of section 6.1.1(ii) of Codex Stan 94, which reads as follows:

> The name of the product shall be:
>
> …
>
> (ii) "X sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

236. Two interpretations of section 6.1.1(ii) of Codex Stan 94 were submitted to the Panel. The European Communities argued that the phrase "the common name of the species in accordance with the law and custom of the country in which the product is sold", found in section 6.1.1(ii) of Codex Stan 94, is intended as a self-standing option for "naming", independent of the formula "X sardines", and that, under this section, "each country has the option of choosing between 'X sardines' and the common name of the species".[26]

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[23]See *supra*, paras. 184–185.
[24]The fish species covered by Codex Stan 94 are listed in section 2.1.1 thereto. (*Supra*, footnote 4) See also, *supra*, para. 5.
[25]Panel Report, para. 7.112.
[26]*Ibid.*, para. 7.101. See also, *supra*, footnote 13, explaining why the European Communities interprets this as a stand-alone option.

237. For its part, Peru contended that, under section 6.1.1(ii), the species other than *Sardina pilchardus* to which Codex Stan 94 refers may be marketed as "X sardines" where "X" is one of the four following alternatives: (1) a country; (2) a geographic area; (3) the species; or (4) the common name of the species. [27] Thus, in Peru's view, "the common name of the species" is not a stand-alone option for naming, but rather is one of the qualifiers for naming sardines that are not *Sardina pilchardus*. Further, Peru argued that prohibiting the marketing in the European Communities of *Sardinops sagax* imported from Peru as, for example, "Peruvian sardines" would run counter to the first of the four options in section 6.1.1(ii).

238. The Panel was of the view that a textual reading of section 6.1.1(ii) favoured the interpretation advocated by Peru, adding that:

> We consider that paragraph 6.1.1(ii) of Codex Stan 94 contains four alternatives and each alternative envisages the use of the term "sardines" combined with the name of a country, name of a geographic area, name of the species or the common name of the species in accordance with the law and custom of the country in which the product is sold. [28]

239. We agree with Peru and with the Panel that section 6.1.1(ii) permits the marketing of non-*Sardina pilchardus* as "sardines" with one of four qualifiers. The French version of section 6.1.1(ii) supports this approach. It provides:

> "Sardines X", "X" désignant un pays, une zone géographique, l'espèce ou le nom commun de l'espèce en conformité des lois et usages du pays où le produit est vendu, de manière à ne pas induire le consommateur en erreur.

The French language is one official language of the Codex Commission. The French and English versions are equally authentic. The French version is drafted in a manner that puts all four qualifiers on an equal footing. In the French version, there is no comma after the word "espèce". The use of the term "'X' désignant" to introduce the enumeration in section 6.1.1(ii) of Codex Stan 94 makes clear that the common name of the species is *one* of the qualifiers that may be attached to the term "sardines" when marketing preserved sardines. [29]

240. With this understanding of this international standard in mind, we turn to the requirement that relevant international standards must be used "as a basis for" technical regulations. We note that the Panel interpreted the word "basis" to mean "the principal constituent of anything, the fundamental principle or theory, as of a system of knowledge". [30] In applying this interpretation of

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[27]Panel Report, para. 4.43.
[28]Panel Report, para. 7.103.
[29]Our interpretation is also consistent with the English print version of section 6.1.1(ii) of Codex Stan 94. See *supra*, footnote 5.
[30]Panel Report, para. 7.110, quoting *Webster's New World Dictionary, supra*, footnote **Error! Bookmark not defined.**, p. 117.

"basis" to the measure in this dispute, the Panel contrasted its interpretation of section 6.1.1(ii) of Codex Stan 94 as setting forth "four alternatives for labelling species other than *Sardina pilchardus*" that all "require the use of the term 'sardines' with a qualification"[31], with the fact that, under the EC Regulation, "species such as *Sardinops sagax* cannot be called 'sardines' even when … combined with the name of a country, name of a geographic area, name of the species or the common name in accordance with the law and custom of the country in which the product is sold."[32] In the light of this contrast, the Panel concluded that Codex Stan 94 was *not* used "as a basis for" the EC Regulation.

241. On appeal, the European Communities contends that the Panel erred in finding that Codex Stan 94 was not used "as a basis for" the EC Regulation. The European Communities submits that the EC Regulation is "based on" Codex Stan 94 "because it used as a basis paragraph 6.1.1(i) of the Codex standard", and because this paragraph reserves the term "sardines" exclusively for *Sardina pilchardus*.[33] According to the European Communities, the term "'as a basis' should involve a consideration of the texts as a whole, examining the basic structure of the domestic measure and deciding whether the international standard has been used in its preparation and adoption."[34] The European Communities adds that, in order to determine whether a relevant international standard, or a part of it, is used "as a basis for" a technical regulation, the criterion to apply is not, as the Panel suggested, whether the standard is the principal constituent or the fundamental principle of the technical regulation, but, rather, whether there is a "rational relationship" between the standard and the technical regulation on the substantive aspects of the standard in question.[35]

242. The question before us, therefore, is the proper meaning to be attributed to the words "as a basis for" in Article 2.4 of the *TBT Agreement*. In *EC – Hormones*, we addressed a similar issue, namely, the meaning of "based on" as used in Article 3.1 of the *SPS Agreement*, which provides:

> *Harmonization*
>
> 1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall *base their sanitary or phytosanitary measures on international standards*, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3. (emphasis added)

In *EC – Hormones*, we stated that "based on" does not mean the same thing as "conform to".[36] In that appeal, we articulated the ordinary meaning of the term "based on", as used in Article 3.1 of the *SPS Agreement* in the following terms:

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[31]Panel Report, para. 7.111.
[32]*Ibid.*, para. 7.112.
[33]European Communities' appellant's submission, para. 150.
[34]*Ibid.*, para. 155.
[35]*Ibid.*
[36]Appellate Body Report, *supra*, footnote **Error! Bookmark not defined.**, para. 166.

> A thing is commonly said to be "based on" another thing when the former "stands" or is "founded" or "built" upon or "is supported by" the latter.[150]

[150] L. Brown (ed.), *The New Shorter Oxford English Dictionary on Historical Principles* (Clarendon Press), Vol. I, p. 187.[37]

The Panel here referred to this conclusion in its analysis of Article 2.4 of the *TBT Agreement*. In our view, the Panel did so correctly, because our approach in *EC – Hormones* is also relevant for the interpretation of Article 2.4 of the *TBT Agreement*.[38]

(…)

246. The European Communities, however, seems to suggest the need for something different. The European Communities maintains 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.[39] According to the European Communities, an examination based on the criterion of the existence of a "rational relationship" focuses on "the qualitative aspect of the substantive relationship that should exist between the relevant international standard and the technical regulation".[40] In response to questioning at the oral hearing, the European Communities added that a "rational relationship" exists when the technical regulation is informed in its overall scope by the international standard.

247. Yet, we see nothing in the text of Article 2.4 to support the European Communities' view, nor has the European Communities pointed to any such support. Moreover, the European Communities does not offer any arguments relating to the context or the object and purpose of that provision that would support its 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.

248. We see no need here 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. Here we need only examine this measure to determine if it fulfils this obligation. 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 other, it cannot properly be concluded that the international standard has been used "as a basis for" the technical regulation.

249. Thus, we need only determine here whether there is a *contradiction* between Codex Stan 94 and the EC Regulation. If there is, we are justified in concluding our analysis with that determination, as the only appropriate conclusion from such a determination would be that the Codex Stan 94 has not been used "as a basis for" the EC Regulation.

[37] *Ibid.*, para. 163 and footnote 150 thereto.
[38] Panel Report, para. 7.110.
[39] European Communities' appellant's submission, para. 155.
[40] *Ibid.*

250. In making this determination, we note at the outset that Article 2.4 of the *TBT Agreement* provides that "Members shall use [relevant international standards], *or the relevant parts of them*, as a basis for their technical regulations". (emphasis added) 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.

251. This dispute concerns the WTO-consistency of the requirement set out in Article 2 of the EC Regulation that only products prepared exclusively from the species *Sardina pilchardus* may be marketed in the European Communities as preserved sardines. Consequently, the "relevant parts" of Codex Stan 94 are those elements of Codex Stan 94 that bear upon or relate to the marketing of preserved fish products under the name "sardines". …

(…)

253. As we have said, the European Communities contends that Codex Stan 94 was used "as a basis for" the EC Regulation "because it used as a basis paragraph 6.1.1(i) of the Codex standard"[41], which stipulates that only *Sardina pilchardus* may have the name "sardines", and that our examination as to whether Codex Stan 94 has been used "as a basis for" the EC Regulation must be limited to section 6.1.1(i).[42] This contention stems from the European Communities' proposition that the scope of the EC Regulation and that of Codex Stan 94 are different: the European Communities considers that the EC Regulation lays down prescriptions and technical requirements for *Sardina pilchardus* only, whereas Codex Stan 94 has a broader scope, as it also addresses other species, namely "sardine-type" products. In the view of the European Communities, section 6.1.1(ii) is not a "relevant part" of Codex Stan 94 for our determination of whether that standard has been used "as a basis for" the EC Regulation, because section 6.1.1(ii) concerns species other than *Sardina pilchardus*, a subject-matter the EC Regulation does not address.

254. We are not persuaded by this line of reasoning. Article 2 of the EC Regulation governs the use of the term "sardines" for the identification and marketing of preserved fish products. Section 6.1.1(ii) of Codex Stan 94 also relates to this same subject. Therefore, section 6.1.1(ii) is a "relevant part" of Codex Stan 94 for the purpose of determining whether Codex Stan 94 was used "as a basis for" the EC Regulation. As we stated earlier, the analysis must address *all* of the parts of Codex Stan 94 that relate to the use of the term "sardines" for the identification and the marketing of preserved fish products, and not only to selected parts. Moreover, the European Communities' argument that the EC Regulation does not relate to species other than *Sardina pilchardus* is simply untenable. It is tantamount to saying that a regulation stipulating 16 years as the age at which one may obtain a driver's licence, does not relate to persons that are under 16 years of age. Consequently, contrary to what the European Communities suggests, the "as a basis for" analysis cannot be restricted to section 6.1.1(i) of Codex Stan 94; it must, in addition, also encompass both section 6.1.1(ii), and section 2.1.1 of Codex Stan 94.

[41]European Communities' appellant's submission, para. 150.
[42]European Communities' response to questioning at the oral hearing.

255. In the light of all this, we ask now whether there is a *contradiction* between the EC Regulation and Codex Stan 94 in the use of the term "sardines" for the identification and marketing of preserved fish products.

(…)

257. The effect of Article 2 of the EC Regulation is to prohibit preserved fish products prepared from the 20 species of fish other than *Sardina pilchardus* to which Codex Stan 94 refers—including *Sardinops sagax*—from being identified and marketed under the appellation "sardines", even with one of the four qualifiers set out in the standard. Codex Stan 94, by contrast, permits the use of the term "sardines" with any one of four qualifiers for the identification and marketing of preserved fish products prepared from 20 species of fish other than *Sardina pilchardus*. Thus, the EC Regulation and Codex Stan 94 are manifestly contradictory. To us, the existence of this contradiction confirms that Codex Stan 94 was not used "as a basis for" the EC Regulation.

258. We, therefore, uphold the finding of the Panel, in paragraph 7.112 of the Panel Report, that Codex Stan 94 was not used "as a basis for" the EC Regulation within the meaning of Article 2.4 of the *TBT Agreement*.

IX. THE QUESTION OF THE "INEFFECTIVENESS OR INAPPROPRIATENESS" OF CODEX STAN 94

259. We turn now to the second part of Article 2.4 of the *TBT Agreement*, which provides that Members need not use international standards as a basis for their technical regulations "when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued".

260. In interpreting this part of Article 2.4, the Panel, first, addressed the question of the burden of proof, and made the following finding:

> … the burden of proof rests with the European Communities, as the party "assert[ing] the affirmative of a particular claim or defence", to demonstrate that the international standard is an ineffective or inappropriate means to fulfil the legitimate objectives pursued by the EC Regulation. [43] (footnote omitted)

261. Regarding the substance of the phrase "except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued", the Panel began by examining the meaning of the terms "ineffective" and "inappropriate". The Panel said:

> Concerning the terms "ineffective" and "inappropriate", we note that "ineffective" refers to something which is not "having the

[43]Panel Report, para 7.50. See also, Panel Report, paras. 7.52 and 7.114.

function of accomplishing", "having a result", or "brought to bear",[91] whereas "inappropriate" refers to something which is not "specially suitable", "proper", or "fitting".[92] Thus, in the context of Article 2.4, an 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.

[91] *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993), p. 786.

[92] *Ibid.*, p. 103. [44] (original emphasis)

262. Second, the Panel addressed the meaning of the phrase "legitimate objectives pursued". The Panel stated 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". [45] Also, the Panel indicated that Article 2.4 of the *TBT Agreement* requires an examination and a determination whether the objectives of the measure at issue are "legitimate". [46]

263. The Panel took note of the three "objectives" of the EC Regulation identified by the European Communities, namely market transparency, consumer protection, and fair competition. [47] The Panel also noted Peru's acknowledgement that those "objectives" are "legitimate", and the Panel saw "no reason to disagree with the parties' assessment in this respect." [48] During questioning at the oral hearing, Peru confirmed that it does see these three objectives pursued by the European Communities as "legitimate" within the meaning of Article 2.4.

264. The Panel then examined whether Codex Stan 94 is "ineffective" or "inappropriate" for the fulfilment of the three objectives pursued by the European Communities through the EC Regulation in the light of the definitions that the Panel articulated for those two terms. The Panel noted that the three objectives were founded on the factual premise that consumers in the

[44] *Ibid*., para. 7.116 and footnotes 91–92 thereto.
[45] *Ibid.*, para. 7.118.
[46] *Ibid.*, para. 7.122.
[47] Panel Report, para. 7.123.
[48] *Ibid.*, para. 7.122.

European Communities associate "sardines" exclusively with *Sardina pilchardus*. The Panel was of the view that, if this factual premise is valid, it must be concluded that Codex Stan 94 is "ineffective or inappropriate" to meet the "legitimate objectives" of market transparency, consumer protection, and fair competition. In other words, if European Communities consumers associate the term "sardines" exclusively with *Sardina pilchardus*, a product identified as "sardines" would have to be made exclusively of *Sardina pilchardus* so as not to mislead those consumers.[49] However, after reviewing the evidence adduced by the parties, the Panel stated that "it has not been established that consumers in most member States of the European Communities have always associated the common name 'sardines' exclusively with *Sardina pilchardus* and that the use of 'X sardines' would therefore not enable the European consumer to distinguish preserved *Sardina pilchardus* from preserved *Sardinops sagax*."[50] The Panel also found that, by establishing a precise labelling requirement "in a manner not to mislead the consumer"[51], "Codex Stan 94 allows Members to provide [a] precise trade description of preserved sardines which promotes market transparency so as to protect consumers and promote fair competition."[52] On this basis, the Panel concluded that Codex Stan 94 is *not* "ineffective or inappropriate" to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation.

265. Although the Panel had assigned the burden of proof under Article 2.4 to the European Communities—so that it was for the European Communities to prove that Codex Stan 94 was "ineffective or inappropriate" to meet the European Communities' "legitimate objectives"—the Panel stated that Peru had, in any event, adduced sufficient evidence and legal arguments to allow the Panel to reach the conclusion that the standard was not "ineffective or inappropriate".[53]

266. The European Communities appeals the Panel's assignment of the burden of proof under Article 2.4 of the *TBT Agreement*. The European Communities disputes the Panel's conclusion that the burden rests with the European Communities to demonstrate that Codex Stan 94 is an "ineffective or inappropriate" means to fulfil the "legitimate objectives" of the EC Regulation. The European Communities maintains that the burden of proof rests rather with Peru, as Peru is the party claiming that the measure at issue is inconsistent with WTO obligations.

267. The European Communities also appeals the finding of the Panel that Codex Stan 94 is not "ineffective or inappropriate" to fulfil the "legitimate objectives" of the EC Regulation. In particular, the European Communities argues that the Panel erred in founding its analysis on the factual premise that consumers in the European Communities associate "sardines" exclusively with *Sardina pilchardus*.[54] Furthermore, the European Communities contends that the Panel erred in concluding that the term "sardines", either by itself or when combined with the name of a country or geographic area, is a common name for *Sardinops sagax* in the European Communities. The European Communities also objects to the decision by the Panel to take this conclusion into account in its assessment of whether consumers in the European Communities associate the term "sardines" exclusively with *Sardina pilchardus*.

[49] *Ibid.*, para. 7.123.
[50] *Ibid.*, para. 7.137.
[51] Codex Stan 94, *supra*, footnote 4, section 6.1.1(ii).
[52] Panel Report, para. 7.133.
[53] Panel Report, para. 7.138.
[54] European Communities' appellant's submission, paras. 176–179.

268. In considering these claims of the European Communities, we will address, first, the question of the burden of proof, and, next, the substantive content of the second part of Article 2.4 of the *TBT Agreement*.

A. The Burden of Proof

(…)

272. In *EC – Hormones*, the panel assigned the burden of showing that the measure there was justified under Article 3.3 to the respondent, reasoning that Article 3.3 provides an exception to the general obligation contained in Article 3.1. The panel there was of the view that it was the *defending* party that was asserting the *affirmative* of that particular defence. We reversed the panel's finding.[55] In particular, we stated:

> The general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case of inconsistency with a provision of the *SPS Agreement* before the burden of showing consistency with that provision is taken on by the defending party, is *not* avoided by simply describing that same provision as an "exception". In much the same way, merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.[56] (original emphasis)

273. The Panel in this case acknowledged our finding in *EC – Hormones*, but concluded that it "does not have a direct bearing" on the question of the allocation of the burden of proof under the second part of Article 2.4 of the *TBT Agreement*.[57] …

274. We disagree with the Panel's conclusion that our ruling on the issue of the burden of proof has no "direct bearing" on this case. The Panel provides no explanation for this conclusion and, indeed, could not have provided any plausible explanation. For there are strong conceptual similarities between, on the one hand, Article 2.4 of the *TBT Agreement* and, on the other hand, Articles 3.1 and 3.3 of the *SPS Agreement*, and our reasoning in *EC – Hormones* is equally apposite for this case. The heart of Article 3.1 of the *SPS Agreement* is a requirement that Members base their sanitary or phytosanitary measures on international standards, guidelines, or recommendations. Likewise, the heart of Article 2.4 of the *TBT Agreement* is a requirement that Members use international standards as a basis for their technical regulations. Neither of these requirements in these two agreements is absolute. Articles 3.1 and 3.3 of the *SPS Agreement*

[55]Appellate Body Report, *supra*, footnote 17, para. 109.
[56]*Ibid.*, para. 104.
[57]Panel Report, footnote 70 to para. 7.50.

permit a Member to depart from an international standard if the Member seeks a level of protection higher than would be achieved by the international standard, the level of protection pursued is based on a proper risk assessment, and the international standard is not sufficient to achieve the level of protection pursued. Thus, under the *SPS Agreement*, departing from an international standard is permitted in circumstances where the international standard is ineffective to achieve the objective of the measure at issue. Likewise, under Article 2.4 of the *TBT Agreement*, a Member may depart from a relevant international standard when it would be an "ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued" by that Member through the technical regulation.

275. 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*. … 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. Hence, in this case, it is 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 proving its claim. This burden includes establishing that Codex Stan 94 has not been used "as a basis for" the EC Regulation, as well as establishing that Codex Stan 94 is effective and appropriate to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation.

(…)

282. We, therefore, reverse the finding of the Panel, in paragraph 7.52 of the Panel Report, that, under the second part of Article 2.4 of the *TBT Agreement*, the burden rests with the European Communities to demonstrate that Codex Stan 94 is an "ineffective or inappropriate" means to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation. Accordingly, we find that Peru bears the burden of demonstrating that Codex Stan 94 is an effective and appropriate means to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation.

283. We turn now to consider whether Peru effectively discharged its burden of proof under the second part of Article 2.4 of the *TBT Agreement*.

B. Whether Codex Stan 94 is an Effective and Appropriate Means to Fulfil the "Legitimate Objectives" Pursued by the European Communities Through the EC Regulation

284. We recall that the second part of Article 2.4 of the *TBT Agreement* reads as follows:

> … except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued …

Before ruling on whether Peru met its burden of proof in this case, we must address, successively, the interpretation and the application of the second part of Article 2.4.

1. The Interpretation of the Second Part of Article 2.4

285. The interpretation of the second part of Article 2.4 raises two questions: first, the meaning of the term "ineffective or inappropriate means"; and, second, the meaning of the term "legitimate objectives". As to the first question, we noted earlier the Panel's view that the term "ineffective or inappropriate means" refers to two questions—the question of the *effectiveness* of the measure and the question of the *appropriateness* of the measure—and that these two questions, although closely related, are different in nature.[58] The Panel pointed out that the term "ineffective" "refers to something which is not 'having the function of accomplishing', 'having a result', or 'brought to bear', whereas [the term] 'inappropriate' refers to something which is not 'specially suitable', 'proper', or 'fitting' ".[59] … We agree with the Panel's interpretation.

286. As to the second question, we are of the view that the Panel was also correct in concluding that "the 'legitimate objectives' referred to in Article 2.4 must be interpreted in the context of Article 2.2", which refers also to "legitimate objectives", and includes a description of what the nature of some such objectives can be.[60] Two implications flow from the Panel's interpretation. First, the term "legitimate objectives" in Article 2.4, as the Panel concluded, must cover the objectives explicitly mentioned in Article 2.2, namely: "national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment." Second, given the use of the term "*inter alia*" in Article 2.2, the objectives covered by the term "legitimate objectives" in Article 2.4 extend beyond the list of the objectives specifically mentioned in Article 2.2. Furthermore, we share the view of the Panel that the second part of Article 2.4 implies that there must be an examination and a determination on the legitimacy of the objectives of the measure.[61]

2. The Application of the Second Part of Article 2.4

287. With respect to the application of the second part of Article 2.4, we begin by recalling that Peru has the burden of establishing that Codex Stan 94 is an effective *and* appropriate means for the fulfilment of the "legitimate objectives" pursued by the European Communities through the EC Regulation. Those "legitimate objectives" are market transparency, consumer protection, and fair competition. To satisfy this burden of proof, Peru must, at least, have established a *prima facie* case of this claim. If Peru has succeeded in doing so, then a presumption will have been raised which the European Communities must have rebutted in order to succeed in its defence. If Peru has established a *prima facie* case, and if the European Communities has failed to rebut Peru's case effectively, then Peru will have discharged its burden of proof under Article 2.4. …

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[58] See *supra*, para. 261.
[59] Panel Report, para. 7.116.
[60] Panel Report, para. 7.118.
[61] *Ibid.*, para. 7.122.

288. This being so, our task is to assess whether Peru discharged its burden of showing that Codex Stan 94 is appropriate and effective to fulfil these same three "legitimate objectives". In the light of our reasoning thus far, Codex Stan 94 would be *effective* if it had the capacity to accomplish all three of these objectives, and it would be *appropriate* if it were suitable for the fulfilment of all three of these objectives.

289. We share the Panel's view that the terms "ineffective" and "inappropriate" have different meanings, and that it is conceptually possible that a measure could be effective but inappropriate, or appropriate but ineffective.[62] This is why Peru has the burden of showing that Codex Stan 94 is both *effective* and *appropriate*. We note, however, that, in this case, a consideration of the *appropriateness* of Codex Stan 94 and a consideration of the *effectiveness* of Codex Stan 94 are interrelated—as a consequence of the nature of the objectives of the EC Regulation. The capacity of a measure to accomplish the stated objectives—its *effectiveness*—and the suitability of a measure for the fulfilment of the stated objectives—its *appropriateness*—are *both* decisively influenced by the perceptions and expectations of consumers in the European Communities relating to preserved sardine products .[63]

290. We note that the Panel concluded that "Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 is not ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation."[64] We have examined the analysis which led the Panel to this conclusion. We note, in particular, that the Panel made the factual finding that "it has not been established that consumers in most member States of the European Communities have always associated the common name 'sardines' exclusively with *Sardina pilchardus*".[65] We also note that the Panel gave consideration to the contentions of Peru that, under Codex Stan 94, fish from the species *Sardinops sagax* bear a denomination that is distinct from that of *Sardina pilchardus*[66], and that "the very purpose of the labelling regulations set out in Codex Stan 94 for sardines of species other than *Sardina pilchardus* is to ensure market transparency".[67] We agree with the analysis made by the Panel. Accordingly, we see no reason to interfere with the Panel's finding that Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 meets the legal requirements of effectiveness and appropriateness set out in Article 2.4 of the *TBT Agreement*.

291. We, therefore, uphold the finding of the Panel, in paragraph 7.138 of the Panel Report, that Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 is not "ineffective or inappropriate" to fulfil the "legitimate objectives" of the EC Regulation. …

(…)

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[62]Panel Report, para. 7.116.
[63]We note that the Panel observed "that the European Communities has used the terms 'ineffective' and 'inappropriate' interchangeably throughout its oral and written statements." (*Ibid.*, footnote 93 to para. 7.117)
[64]*Ibid.*, para. 7.138.
[65]*Ibid.*, para. 7.137. In response to questioning at the oral hearing, the European Communities and Peru agreed that this statement of the Panel was a factual finding.
[66]*Ibid.*, para. 4.88.
[67]*Ibid.*, para. 4.86.

XIII. FINDINGS AND CONCLUSIONS

315. For the reasons set out in this Report, the Appellate Body:

(…)

(d) upholds the Panel's findings, in paragraph 7.60 of the Panel Report, that Article 2.4 of the *TBT Agreement* applies to measures that were adopted before 1 January 1995 but which have not "ceased to exist", and, in paragraph 7.83 of the Panel Report, that Article 2.4 of the *TBT Agreement* applies to existing technical regulations, including the EC Regulation;

(e) upholds the Panel's finding, in paragraph 7.70 of the Panel Report, that Codex Stan 94 is a "relevant international standard" under Article 2.4 of the *TBT Agreement*;

(f) upholds the Panel's finding, in paragraph 7.112 of the Panel Report, that Codex Stan 94 was not used "as a basis for" the EC Regulation within the meaning of Article 2.4 of the *TBT Agreement*;

(g) reverses the Panel's finding, in paragraph 7.52 of the Panel Report, that, under the second part of Article 2.4 of the *TBT Agreement*, the burden of proof rests with the European Communities to demonstrate that Codex Stan 94 is an "ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued" by the European Communities through the EC Regulation, and finds, instead, that the burden of proof rests with Peru to demonstrate that Codex Stan 94 is an effective and appropriate means to fulfil those "legitimate objectives", and, upholds the Panel's finding, in paragraph 7.138 of the Panel Report, that Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 is not "ineffective or inappropriate" to fulfil the "legitimate objectives" of the EC Regulation;

(…)

Therefore, the Appellate Body *upholds* the Panel's finding, in paragraph 8.1 of the Panel Report, that the EC Regulation is inconsistent with Article 2.4 of the *TBT Agreement*.

* * *

4-2. US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Tuna/Dolphin II)

Reading Questions: The excerpt of Tuna—Dolphin II produced above focused on the Appellate Body's analysis of TBT Arts. 2.1 and 2.2. The excerpt below returns to Tuna—Dolphin II*, with a focus on harmonization. How does the AB's analysis below enrich our understanding of harmonization in the TBT? How does it relate to* EC—Sardines? *Keep in mind, these cases must be read in light of the developments in the AB's jurisprudence on TBT Arts. 2.1 & 2.2.*

*Background note: this aspect of the Appeal concerns the normative weight, under the TBT, of a labelling standard set pursuant to the Agreement on the International Dolphin Conservation Program (AIDCP). The AIDCP is a multilateral treaty, which entered into force 1999 among thirteen member states – including the United States. It operates through a treaty body, comprised of delegates from all member states. In 2001 the members developed the AIDCP Dolphin Safe label to certify that tuna caught in the eastern Pacific Ocean has not contributed to dolphin mortality or serious injury. The AIDCP label was highly controversial – accused in particular of weakening dolphin protection standards to allow greater dolphin mortality than the pre-existing United States labeling scheme (allegedly at the behest of the fishing industry). The United States delegation supported the AIDCP standard, as did the Department of Commerce. However environmental groups successfully sued in federal court to block the adoption of the label in the United States (*Earth Island Institute v. Hogarth*, 9th Cir. (2007)). As a result, despite its close involvement in setting the AIDCP label, the United States does not permit its use on tuna sold in the United States. Such tuna may thus only be labelled "dolphin-safe" on the basis of the United States' pre-existing national "dolphin-safe" labelling scheme.*

Editorial Note: The footnote numbering differs from the numbering in the original reports.

Appellate Body Report, WT/DS381/AB/R, 16 May 2012

Zhang, Presiding Member; Bhatia, Member; Graham, Member

III. ISSUES RAISED ON APPEAL

171. The following issues are raised on appeal:

(…)

(f) whether the Panel erred in finding … that the AIDCP "dolphin-safe definition and certification" constitute a "relevant international standard" within the meaning of Article 2.4 of the *TBT Agreement*; and in finding, in paragraph 7.740 of the Panel Report, that Mexico had failed to demonstrate that the AIDCP standard is an effective and appropriate means to fulfil the United States' objectives "at the United States' chosen level of protection";

(…)

VIII. ARTICLE 2.4 OF THE TBT AGREEMENT

A. Introduction

343. The United States and Mexico each appeal different elements of the Panel's findings under Article 2.4 of the *TBT Agreement*. The United States appeals the Panel's finding that the "AIDCP dolphin-safe definition and certification" constitute a "relevant international standard" within the meaning of Article 2.4 of the *TBT Agreement*.[1] In particular, the United States appeals the Panel's intermediate finding that the AIDCP constitutes an "international standardizing organization" for the purposes of Article 2.4 of the *TBT Agreement*.[2] …

344. The Panel interpreted the term "international standard" in Article 2.4 of the *TBT Agreement* to mean a "standard that is adopted by an international standardizing/standards organization and made available to the public".[3] The Panel in turn interpreted the term "international standardizing organization" to refer to "a legal or administrative entity based on the membership of other bodies or individuals that has an established constitution and its own administration, has recognized activities in standardization, and whose membership is open to the relevant national body of every country."[4] The Panel found that the "AIDCP dolphin-safe definition and certification" constitute a "standard"[5], that the AIDCP is an "international standardizing organization"[6], and that the AIDCP standard was made available to the public.[7]

345. The Panel further found that the AIDCP standard is "relevant" for the purpose of the US "dolphin-safe" labelling provisions[8] and that the United States failed to base its "dolphin-safe" labelling provisions on the AIDCP standard.[9] However, the Panel concluded that Mexico had "failed to demonstrate that the [AIDCP standard] is an effective and appropriate means to fulfil the US objectives at the United States' chosen level of protection".[10]

346. The United States appeals the Panel's conclusion that the "AIDCP dolphin-safe definition and certification" constitute a "relevant international standard", and in particular the Panel's intermediate finding that the AIDCP is an "international standardizing organization".[11] The United States argues that the parties to the AIDCP are parties to an international agreement, not to a body or an organization, that the AIDCP does not have "recognized activities in standardization", and that the AIDCP is not "international" within the meaning of the *TBT*

[1]Panel Report, para. 7.707.
[2]Panel Report, para. 7.693.
[3]Panel Report, para. 7.663.
[4]Panel Report, para. 7.680.
[5]Panel Report, para. 7.677.
[6]Panel Report, para. 7.693.
[7]Panel Report, para. 7.695.
[8]Panel Report, para. 7.707.
[9]Panel Report, para. 7.716.
[10]Panel Report, para. 7.740.
[11]United States' appellant's submission, para. 136.

Agreement because its membership was not, and is not, open to all WTO Members.[12] Mexico responds that the Panel properly addressed and rejected the United States' arguments, and requests the Appellate Body to uphold the Panel's finding that the AIDCP standard is a "relevant international standard" within the meaning of Article 2.4.[13]

(…)

348. Before turning to our analysis, we note that the United States' appeal requires us to decide what constitutes an "international standard" for the purposes of the *TBT Agreement*. This question is important because, by virtue of Article 2.4, if a standard is found to constitute a "relevant international standard", WTO Members are required to use it, or its relevant parts, as a basis for their technical regulations, except when such standard would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued by the Member in question. Moreover, pursuant to Article 2.5 of the *TBT Agreement*, technical regulations that are in accordance with relevant international standards are rebuttably presumed not to create unnecessary obstacles to international trade.

B. The United States' Appeal

1. The Meaning of the Term "International Standard"

349. The text of Article 2.4 of the *TBT Agreement* reads as follows:

> 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.

350. The composite term "international standard" is not defined in Annex 1 of the *TBT Agreement*. However, 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 exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

[12]United States' appellant's submission, para. 137.
[13]Mexico's appellee's submission, para. 226.

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.

351. Moreover, Annex 1.4 to the *TBT Agreement* defines an "international body or system" as follows:

> Body or system whose membership is open to the relevant bodies of at least all Members.

352. The *TBT Agreement* thus establishes the characteristics of a *standard* and of an *international body*. The Explanatory Note to Annex 1.2 states that "[s]tandards prepared by the international standardization community are based on consensus."

353. 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[14] (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."[15] This definition suggests that it is primarily the characteristics of the entity approving a standard that lends the standard its "international" character. By contrast, the subject matter of a standard would not appear to be material to the determination of whether the standard is "international". The definition of "international standard" in the ISO/IEC Guide 2: 1991 and the Explanatory Note to the definition of "standard" in the *TBT Agreement* also suggest that there may be additional procedural conditions that have to be met for a standard to be considered "international" for the purposes of the *TBT Agreement*. Since the United States' appeal is limited to the characteristics of the entity approving an "international" standard, we do not need to address in this appeal the question of whether, in order to constitute an "international standard", a standard must also be "based on consensus". Nor do we have to address whether it has to be "made available to the public".[16]

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[14]International Organization for Standardization (ISO) / International Electrotechnical Commission (IEC) Guide 2, General Terms and Their Definitions Concerning Standardization and Related Activities, sixth edition (1991).

[15]ISO/IEC Guide 2: 1991, 3.2.1. See also Panel Report, para. 7.663.

[16]We note that the Panel in this dispute analyzed whether the AIDCP standard had been adopted by consensus. (Panel Report, para. 7.676) The Panel also examined whether the AIDCP standard had been "made available to the public". (Panel Report, para. 7.695)

354. The introductory clause of Annex 1 to the *TBT Agreement* also stipulates that: "[f]or the purpose of this Agreement, however, the following definitions shall apply". The use of the word "however" indicates that the definitions contained in Annex 1 to the *TBT Agreement* prevail to the extent that they depart from the definitions set out in the ISO/IEC Guide 2: 1991.[17] A panel must therefore carefully scrutinize to what extent the definitions in Annex 1 to the *TBT Agreement* depart from the definitions in the ISO/IEC Guide 2: 1991.

355. With respect to the type of entity approving an "international" standard, the ISO/IEC Guide 2: 1991 refers to an "organization", whereas Annex 1.2 to the *TBT Agreement* stipulates that a "standard" is to be approved by a "body". According to the ISO/IEC Guide 2: 1991, a "body" is a "legal or administrative entity that has specific tasks and composition", whereas an "organization" is a "body that is based on the membership of other bodies or individuals and has an established constitution and its own administration".[18] The answer to the question of whether an "international" standard has to be approved by a "body" or an "organization" thus determines whether the entity can be a "legal or administrative entity that has specific tasks and composition", or whether the entity must *also* be "based on the membership of other bodies or individuals" and must have "an established constitution and its own administration".

356. Annex 1.2 to the *TBT Agreement* refers to a "body", not to an "organization", and Annex 1.4 defines an "international body or system", but not an "international organization". This suggests that, for the purposes of the *TBT Agreement*, "international" standards are adopted by "bodies", which may, but need not necessarily, be "organizations". This is also supported by the context provided by other provisions of the *TBT Agreement*. For example, Articles 2.6, 10.1.4, 11.2, 12.5, and 12.6, as well as Annexes 3.G and 3.H to the *TBT Agreement* envisage that international standards are prepared by "international standardizing *bodies*".[19] Since the definitions in Annex 1 to the *TBT Agreement* prevail over the definitions in the ISO/IEC Guide 2: 1991, we find 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*.

357. With respect to other necessary features of a body that can approve an "international" standard, the ISO/IEC Guide 2: 1991 stipulates that it must be a "standardizing/standards" organization. A "standardizing body" is defined as a "body that has recognized activities in standardization", whereas a "standards body" is a "standardizing body recognized at national, regional or international level, that has as a principal function, by virtue of its statutes, the preparation, approval or adoption of standards that are made available to the public."[20] Annex 1.2 to the *TBT Agreement* provides that a "standard" must be approved by a "recognized body". As we see it, the definition of "standardizing body" in the ISO/IEC Guide 2: 1991 does not conflict with the definition in the *TBT Agreement*. Instead, the definition in the ISO/IEC Guide 2: 1991 adds to and complements the definition in the *TBT Agreement*, specifying that a body must be "recognized" with respect to its "activities in standardization".

[17]See Appellate Body Report, *EC – Sardines*, paras. 224 and 225.
[18]ISO/IEC Guide 2: 1991, 4.1 and 4.2. See also Panel Report, para. 7.679.
[19]Emphasis added.
[20]ISO/IEC Guide 2: 1991, 4.3 and 4.4. A Note specifies that "a standards body may also have other principal functions." (*Ibid*.)

358. With regard to the requirement that only a document approved by an "international" standardizing body can be an "international" standard, the ISO/IEC Guide 2: 1991 stipulates that a standardizing organization is "international" if its "membership is open to the relevant national body from every country", whereas Annex 1.5 to the *TBT Agreement* defines an "international body" as a body "whose membership is open to the relevant bodies of at least all Members".

359. We consider, therefore, 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.[21] As we see it, the different components of this definition inform each other. The interpretation of the term "international standardizing body" is therefore a holistic exercise in which the components of the definition are to be considered together.

360. As noted above, the ISO/IEC Guide 2: 1991 defines a "body" as a "legal or administrative entity that has specific tasks and composition". With respect to the specific tasks, the definition specifies that an international standardizing body must have "activities in standardization". "Activity" is defined in the dictionary as the "state of being active".[22] The term "activity" thus may refer to an instance of action, as well as a state. As a result, the use of the plural "activities" does not necessarily imply that a body is, or has been, involved in the development of more than one standard. As we see it, a body simply has to be "active" in standardization in order to have "activities in standardization". The word "standardization" is defined in the ISO/IEC Guide 2: 1991 as the "[a]ctivity of establishing, with regard to actual or potential problems, provisions for common and repeated use, aimed at the achievement of the optimum degree of order in a given context".[23] With respect to the "provisions" that are established through standardization, we recall that the definition of a standard in the *TBT Agreement* refers to a "document … that provides … rules, guidelines or characteristics for products or related processes and production methods" and "may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method".

361. Moreover, the definition of "international standardizing body" provides that the body's activities in standardization must be "recognized". The term "recognize" is defined as "[a]cknowledge the existence, legality, or validity of, [especially] by formal approval or sanction; accord notice or attention to; treat as worthy of consideration".[24] These definitions 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). In interpreting "recognized activities in standardization", we will therefore bear in mind both the factual and the normative dimension of the concept of "recognition".

362. The definition of a "standards body" in the ISO/IEC Guide 2: 1991 sheds light on the question of what it means for a body to have "recognized activities in standardization". We recall that a "standards body" is a "standardizing body recognized at national, regional or international

[21]As noted above, we do not address any additional procedural conditions that may apply for a standard to be "international" within the meaning of the *TBT Agreement*.
[22]*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. I, p. 23.
[23]ISO/IEC Guide 2: 1991, 1.1.
[24]*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. II, p. 2489. See also Panel Report, para. 7.686.

level, that has as a principal function, by virtue of its statutes, the preparation, approval or adoption of standards that are made available to the public."[25] By implication, a "standardizing body", that is, a body with "recognized activities in standardization", does not need to have standardization as its principal function, or even as one of its principal functions.[26] At the same time, we note that the factual dimension of the concept of "recognition" 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.

363. With respect to the question of who has to recognize a body's activities in standardization, we note that Articles 2.6, 11.2, and 12.6 of the *TBT Agreement* contemplate that "Members" participate in international standardizing activities. Article 12.5, Annex 3.G, and Annex 1.4 to the *TBT Agreement*, in turn, foresee the involvement of the "relevant bodies" or "standardizing bodies" of Members in the development of international standards.[27] We further note that, under the *SPS Agreement*, "relevant international organizations" are identified by the SPS Committee, which is composed of all WTO Members.[28] This context suggests that, in examining whether an international body has "recognized activities in standardization", evidence of recognition by WTO Members as well as evidence of recognition by national standardizing bodies would be relevant.

364. With respect to the composition of the body, the definition specifies that membership in an international standardizing body must be "open to the relevant bodies of at least all Members". The term "open" is defined as "accessible or available without hindrance", "not confined or limited to a few; generally accessible or available".[29] 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.

365. We also note that the *TBT Agreement* distinguishes international bodies, "whose membership is open to the relevant bodies of at least all Members", and regional bodies, "whose membership is open to the relevant bodies of only some of the Members".[30] The *TBT Agreement* thus explicitly stipulates that not all transnational standardizing bodies are "international" for the purposes of the *TBT Agreement*.

366. We further note, as did the Panel, that both the United States and Mexico have referred in their arguments to the TBT Committee Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5, and Annex

[25]ISO/IEC Guide 2: 1991, 4.4.
[26]We recall that the definition of "standards body" in the ISO/IEC Guide 2: 1991 is accompanied by a Note that specifies that "a standards body may also have other principal functions." (ISO/IEC Guide 2: 1991, 4.4)
[27]In addition, Article 10.1.4 of the *TBT Agreement* refers to "membership and participation of the Member, or of relevant central or local government bodies within its territory, in international and regional standardizing bodies".
[28]See *SPS Agreement*, Annex A.3(d).
[29]*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. II, p. 2007.
[30]*TBT Agreement*, Annexes 1.4 and 1.5.

3 to the Agreement (the "TBT Committee Decision").[31] This Decision sets out principles and procedures that standardizing bodies should observe when developing international standards.

367. Before the Panel, the United States relied on the TBT Committee Decision in support of its interpretation of the term "international standard" as a standard that is, *inter alia*, adopted by a body whose membership is open to the relevant bodies of at least all WTO Members.[32] The United States argued that the principles enshrined in the Decision "reflect Members' shared views *inter alia* that … international standardizing bodies 'should be open on a non-discriminatory basis to relevant bodies of at least all WTO Members'".[33] The United States also acknowledged a suggestion by Canada that a body may be "recognized" because it develops standards or engages in standardizing activities "in accordance with certain recognized principles, for example, those in the Committee Decision".[34] The United States considered this view as one possible interpretation of the term "recognized body".[35] Mexico claimed that the "AIDCP system operates in conformity with" the TBT Committee Decision.[36]

(…)

369. On appeal, the United States as well as Brazil and Japan reiterate their view that the TBT Committee Decision should inform the interpretation of the concept "international standardizing organization".[37] Japan emphasizes that the Appellate Body's interpretation of Article 2.4 "should apply" the principles of the Decision, and that "no purported international standard should be recognized as such if these six principles were disregarded in its elaboration."[38]

370. The TBT Committee Decision sets out several principles that WTO Members have decided "should be observed" when international standards, guides, and recommendations are elaborated "to ensure transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and to address the concerns of developing countries".[39] The Panel considered it "appropriate to take into account the principles contained in this decision where they may inform [its] understanding of certain aspects of the ISO/IEC Guide definitions such as the terms 'international standardizing/standards organization' and 'made available to the public' in the definition of 'international standard'."[40] The Panel did not explicitly comment on the legal status of the TBT Committee Decision. However, it noted the statement of the panel in *EC – Sardines*

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[31]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. This document is a revised version of G/TBT/1/Rev.9. The text of the Decision is identical in both documents. (See also Panel Report, para. 7.665)

[32]Panel Report, para. 7.642. See also United States' response to Panel Question 59, para. 136.

[33]United States' response to Panel Question 59, para. 136.

[34]Panel Report, para. 7.648.

[35]Panel Report, para. 7.648. See also United States' response to Panel Question 62, paras. 139 and 140.

[36]Panel Report, para. 7.645.

[37]United States' appellant's submission, paras. 139 and 146; Brazil's third participant's submission, paras. 50 and 55.

[38]Japan's third participant's submission, paras. 21 and 23.

[39]TBT Committee Decision, para. 1.

[40]Panel Report, para. 7.665.

that the TBT Committee Decision "is a policy statement of preference and not the controlling provision in interpreting the expression 'relevant international standard' as set out in Article 2.4 of the TBT Agreement".[41]

371. Pursuant to Article 3.2 of the DSU, panels and the Appellate Body are to "clarify" the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". This raises the question on what basis we can take into account the TBT Committee Decision in the interpretation and application of Article 2.4 of the *TBT Agreement*. In particular, the issue is whether the Decision can qualify as a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" within the meaning of Article 31(3)(a) of the *Vienna Convention on the Law of Treaties*[42] (the "*Vienna Convention*"). In this respect, we note that the Decision was adopted by the TBT Committee in the context of the Second Triennial Review of the Operation and Implementation of the *TBT Agreement*, which took place in the year 2000.[43] It was thus adopted subsequent to the conclusion of the *TBT Agreement*. We further note that the membership of the TBT Committee comprises all WTO Members and that the Decision was adopted by consensus.

372. With respect to the question of whether the terms and content of the Decision express an agreement between Members on the interpretation or application of a provision of WTO law, we note that the title of the Decision expressly refers to "Principles for the Development of International Standards, Guides and Recommendations *with Relation to Articles 2, 5 and Annex 3 of the Agreement*".[44] We further note that the TBT Committee undertook the activities leading up to the adoption of the Decision "[w]ith a view to developing a better understanding of international standards within the Agreement"[45] and decided to develop the principles contained in the Decision, *inter alia*, "to ensure the effective application of the Agreement" and to "clarify and strengthen the concept of international standards under the Agreement".[46] We therefore consider that the TBT Committee Decision can be considered as a "subsequent agreement" within the meaning of Article 31(3)(a) of the *Vienna Convention*. The extent to which this Decision will inform the interpretation and application of a term or provision of the *TBT Agreement* in a specific case, however, will depend on the degree to which it "bears specifically"[47] on the

[41]Panel Report, para. 7.665 (quoting Panel Report, *EC – Sardines*, para. 7.91).
[42]*Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.
[43]Committee on Technical Barriers to Trade, Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, in WTO Document G/TBT/9, 13 November 2000.
[44]Emphasis Added. In the deliberations leading up to the adoption of the Decision, the TBT Committee noted: "that international standards, guides and recommendations were important elements of the Agreement and played a significant role in its implementation. Articles 2.4, 2.5, 5.4, and Paragraph F of Annex 3 of the Agreement placed an emphasis on the use of international standards, guides and recommendations as a basis for domestic standards, technical regulations and conformity assessment procedures, with the objective of reducing trade barriers. Articles 2.6, 5.5, and Paragraph G of Annex 3 emphasized the importance of Members' participation in international standardization activities, with a view to harmonizing technical regulations, conformity assessment procedures and standards on as wide a basis as possible." (G/TBT/9, *supra*, footnote 43, para. 17)
[45]G/TBT/9, *supra*, footnote 43, para. 18.
[46]G/TBT/9, *supra*, footnote 43, para. 20; G/TBT/1/Rev.10, p. 12.
[47]See Appellate Body Report, *US – Clove Cigarettes*, para. 265 (quoting Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 390).

interpretation and application of the respective term or provision. In the present dispute, we consider that the TBT Committee Decision bears directly on the interpretation of the term "open" in Annex 1.4 to the *TBT Agreement*, as well as on the interpretation and application of the concept of "recognized activities in standardization".

373. The TBT Committee Decision clarifies the temporal scope of the requirement that a body be "open". It states, in relevant part:

> Membership of an international standardizing body should be open on a non-discriminatory basis to relevant bodies of at least all WTO Members. This would include openness without discrimination with respect to the participation at the policy development level and at every stage of standards development … .[48]

374. Thus, in 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".

375. 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*.

376. In addition, the TBT Committee Decision assists in the determination of whether an international body has "recognized activities in standardization". As an initial matter, we note that the TBT Committee Decision establishes principles and procedures that WTO Members have decided "should be observed" in the development of international standards. Evidence that an international body has followed the principles and procedures of the TBT Committee Decision in developing a standard would therefore be relevant for a determination of whether the body's activities in standardization are "recognized" by WTO Members. More specifically, we recall that the word "recognize" is defined as "[a]cknowledge the existence, legality, or validity of, [especially] by formal approval or sanction; accord notice or attention to; treat as worthy of consideration"[49] and that the concept of "recognition" has a factual and a normative dimension. From a factual perspective, we note that the standardizing activities of a body that disseminates information about its standardization activities, as envisaged by the transparency procedures of the TBT Committee Decision, would presumably be acknowledged to exist, accorded notice or attention, and treated worthy of consideration by all WTO Members that make a good faith effort to follow international standardization activities. In terms of the normative connotation of the concept of "recognition", we observe that, to the extent that a standardizing body complies with the principles and procedures that WTO Members have decided "should be observed" in the development of international standards, it would be easier to find that the body has "recognized activities in standardization".[50]

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[48]TBT Committee Decision, para. 6.

[49]*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. II, p. 2489. See also Panel Report, para. 7.686.

[50]With regard to the importance of the normative dimension, we note the European Union's view that

377. We further note that the objectives expressed in the TBT Committee Decision with respect to the development of international standards are similar to the objectives that the *Code of Good Practice for the Preparation, Adoption and Application of Standards* contained in Annex 3 to the *TBT Agreement* pursues with respect to standards adopted by local, national, and regional governmental and non-governmental standardizing bodies. Pursuant to Article 4.2 of the *TBT Agreement*, "[s]tandardizing bodies that have accepted and are complying with the Code of Good Practice shall be acknowledged by the Members as complying with the principles of this Agreement." As we see it, this provision lends contextual support to our interpretation that evidence of a body's compliance with procedural and substantive safeguards formulated by WTO Members would be relevant for the question of whether its standardizing activities are "recognized" for the purposes of the *TBT Agreement*.

378. In sum, the TBT Committee Decision clarifies the temporal scope of the requirement that an international standardizing body be open to the relevant bodies of at least all WTO Members, and specifies that the body should be open on a non-discriminatory basis. By setting out principles and procedures that WTO Members have decided "should be observed" by international standardizing bodies, the TBT Committee Decision also assists in the determination of whether an international body's activities in standardization are "recognized" by WTO Members.

379. Finally, we consider how the object and purpose of the *TBT Agreement* informs the interpretation of the term "international standardizing body". We note that the *TBT Agreement* explicitly encourages the development of international standards. Thus, the preamble of the *TBT Agreement* states, in relevant part: "*Recognizing* the important contribution that international standards … can make … by improving efficiency of production and facilitating the conduct of international trade; *Desiring* therefore to encourage the development of such international standards". Moreover, contrary to the *SPS Agreement*, which defines "international standards, guidelines and recommendations" by reference to specific organizations[51], the *TBT Agreement* does not contain a list of international standardizing organizations. This suggests that the *TBT Agreement* also aims to encourage the development of international standards by bodies that were not already engaged in standardizing activities at the time of the adoption of the *TBT Agreement*. At the same time, other elements of the *TBT Agreement*, as well as the TBT Committee Decision, reflect the intent of WTO Members to ensure that the development of international standards take place transparently and with wide participation.[52] The obligations and privileges associated with

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"recognition gives documents issued by [international standardizing organizations] the necessary *legitimacy* to justify their potentially far-reaching effects under Article 2.4 of the *TBT Agreement*." (European Union's third participant's submission, para. 85) (original emphasis)

[51]*SPS Agreement*, Annex A.3(a)-(c). The *SPS Agreement* also refers to standards developed by other "relevant international organizations open for membership to all Members, as identified by the Committee". (*SPS Agreement*, Annex A.3(d)) However, the SPS Committee has not identified any such organizations.

[52]See *TBT Agreement*, Article 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."; and Article 12.5: "Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies … are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members". See also *TBT Agreement*, Annex 3.G. We note that WTO Members see representative participation and the observance of due process in the development of international standards as essential to the achievement of the trade

international standards pursuant to Articles 2.4 and 2.5 of the *TBT Agreement* further underscore the imperative that international standardizing bodies ensure representative participation and transparency in the development of international standards. In analyzing whether an entity is an "international standardizing body", a panel needs to balance these considerations.

380. We now turn to review the Panel's interpretation of the term "international standardizing organization".

(a) The Panel's Interpretation of the Term "International"

381. The United States takes issue with the Panel's interpretation of the term "international" in Article 2.4. The United States submits that the Panel's conclusion was based on an "incorrect understanding of what is required for an organization to be 'open'".[53] The United States points out that both Annex 1 to the *TBT Agreement* and the ISO/IEC Guide 2: 1991 refer to the openness of a body in the present tense ("a body that is open"). On this basis, the United States argues that the organization must be open to all Members during the period during which the standard in question was developed and it must remain open thereafter. Mexico does not disagree with the United States' interpretation, but argues that the AIDCP was open when the AIDCP definition of "dolphin-safe" was developed.[54]

382. As noted above, we are of the view that the TBT Committee Decision clarifies the temporal scope of the requirement that a body be "open" to the relevant bodies of at least all WTO Members. Specifically, the body must be open "at every stage of standards development".

383. The United States further argues that the fact that all States whose vessels fished for tuna in the Agreement area during the signature period were eligible to join the AIDCP, and that there were no prohibitions of fishing in the Agreement area at the time, does not mean that the AIDCP was open to all Members, since Members who may have an interest in the AIDCP's activities other than fishing (such as consumer or conservation interests) were ineligible to become parties to the AIDCP. Mexico responds that it is presumably understandable that any State or regional organization that has interest in the AIDCP regulation of tuna fishing techniques can accede today by a simple invitation of the rest of Members.

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facilitating objectives of the *TBT Agreement*. As the Second Triennial Review of the Operation and Implementation of the *TBT Agreement* has noted:

> Adverse trade effects might arise from standards emanating from international bodies as defined in the Agreement which had no procedures for soliciting input from a wide range of interests. Bodies operating with open, impartial and transparent procedures, that afforded an opportunity for consensus among all interested parties in the territories of at least all Members, were seen as more likely to develop standards which were effective and relevant on a global basis and would thereby contribute to the goal of the Agreement to prevent unnecessary obstacles to trade.

(G/TBT/9, *supra*, footnote 43, para. 20)

[53]United States' appellant's submission, para. 138.

[54]Mexico's appellee's submission, para. 207.

384. We agree with the United States that an international standardizing body must not privilege any particular interests in the development of international standards. In this respect, we note that the TBT Committee Decision states, under the heading "Impartiality and Consensus", that:

> All relevant bodies of WTO Members should be provided with meaningful opportunities to contribute to the elaboration of an international standard so that the standard development process will not give privilege to, or favour the interests of, a particular supplier/s, country/ies or region/s.[55]

385. With respect to the Panel's finding that the AIDCP remains open to all Members on a non-discriminatory basis since any State or regional economic integration organization can be invited to accede to the Agreement on the basis of a decision by the parties, the United States asserts that a body in which Members may participate by invitation only is not a body that is open. The United States stresses that becoming a party to the AIDCP is not an option available to at least all Members; it is an option available only to those Members invited. For the United States, it follows therefore that not all Members have the ability to participate in review or revision of the definitions at issue. Mexico responds that being invited to accede to the AIDCP is a "formality".[56]

386. The question whether a body is "open" if all WTO Members or their relevant bodies can accede pursuant to an invitation has to be decided on a case-by-case basis. It is conceivable that an invitation might indeed be a "formality". In our view, this would be the case if the invitation occurred automatically once a Member or its relevant body has expressed interest in joining a standardizing body. A panel must therefore carefully scrutinize the provisions, procedures, and practices governing accession to a standardizing body before concluding that it is "open to the relevant bodies of at least all Members".

(b) The Panel's Interpretation of the Concept of "Recognized Activities in Standardization"

387. The United States also takes issues with the Panel's interpretation of the concept of "recognized activities in standardization". We recall the Panel's finding that "the term 'recognized' refers to the body's activities in standards development, and that the participation in these activities of the countries that are parties to the Agreement is evidence of their recognition."[57] The Panel added that "such recognition may also be inferred from the recognition of the resulting standard, i.e. when its existence, legality and validity has been acknowledged."[58]

388. On appeal, the United States submits that the first criterion articulated by the Panel for assessing whether activities are "recognized" is flawed. According to the United States, by suggesting that participation in standardizing activities is evidence of the recognition of those activities, the Panel effectively reads the term "recognized" out of the definition. The United

[55]TBT Committee Decision, para. 8.
[56]Mexico's appellee's submission, para. 208.
[57]Panel Report, para. 7.686.
[58]Panel Report, para. 7.686.

States suggests that, if the act of creating a standard was at the same time an act of recognition by the creators, there would be no need to specify that standardization activity need to be recognized, since the existence of a standard would, in itself, establish that recognition occurred.

(…)

390. We see no reason why participation in a body's standardizing activities could not constitute evidence suggesting that a body is engaged in "recognized" activities. In our view, the United States' concern that this interpretation "effectively read[s] the term 'recognized' out of the definition"[59] of an "international standard" may have arisen because the Panel was silent on *who* must recognize a body's standardizing activities for the purposes of the *TBT Agreement*. We have already noted above that, in examining whether an international body has recognized activities in standardization, evidence of recognition by WTO Members, as well as evidence of recognition by national standardizing bodies, would be relevant. As we see it, the recognition of those who participate in the development of a standard would not necessarily be sufficient to find that a body has recognized activities in standardization, since the obligations and privileges associated with international standards pursuant to the *TBT Agreement* apply with respect to *all* WTO Members, not merely those who participated in the development of the respective standard. Nevertheless, it seems to us that the larger the number of countries that participate in the development of a standard, the more likely it can be said that the respective body's activities in standardization are "recognized".

391. The United States agrees with the Panel that recognition of standardizing activity may occur "through acknowledgment of a body's standards", but alleges that the Panel did not properly apply this concept.[60] In response, Mexico notes that the fact that the United States does not allow the use of the AIDCP "dolphin-safe" label does not mean that the AIDCP does not have "standardizing activities" or that the AIDCP "dolphin-safe" label is not currently being used.

392. We agree with the Panel that recognition of a body's standardization activities may "be inferred from the recognition of the resulting standard, i.e. when its existence, legality and validity [have] been acknowledged".[61] While we regard the recognition of a body's standards by WTO Members and national standardizing bodies as highly pertinent evidence that a body has recognized activities in standardization, we do not consider that only a body whose standards are widely used can have recognized activities in standardization for the purposes of the *TBT Agreement*.

393. The United States further submits that, in any event, recognition of a single standard would not amount to recognition of a body's "standardizing activities". For the United States, the plural "activities" implies that the body has been involved in the development of more than one standard. Restricting the concept of "recognized activities in standardization" to bodies with a track record of developing standards would also ensure that Members were aware whether a standard being developed in a particular body would trigger the corresponding obligations in the *TBT Agreement*.[62]

[59]United States' appellant's submission, para. 151.
[60]United States' appellant's submission, para. 152.
[61]Panel Report, para. 7.686.
[62]United States' appellant's submission, para. 154.

394. We disagree with this argument. As noted above, the term "activity" may refer to an instance of action, as well as a state. Moreover, we find it difficult to see why an international organization that develops a single standard could not have "recognized activities in standardization" if other evidence suggests that the body's standardization activities are recognized, for example, if a large number of WTO Members participate in the development of the standard, acknowledge the validity and legality of the standard, or the body follows the principles contained in the TBT Committee Decision.

(…)

2. *Whether the Panel Erred in Finding that the AIDCP Standard Is A "Relevant International Standard" within the Meaning of Article 2.4 of the TBT Agreement*

396. We now proceed to evaluate whether the Panel erred in finding that the AIDCP standard is a "relevant international standard" within the meaning of Article 2.4 of the *TBT Agreement*. As noted, the Panel's finding is based on its intermediate conclusions that the AIDCP "dolphin-safe" definition and certification constitute a standard[63], that the AIDCP is an "international standardizing organization"[64], and that the AIDCP standard was made available to the public.[65]

397. We begin by considering whether the Panel erred in concluding that the AIDCP is "international", that is, that membership in the AIDCP is open to the relevant bodies of at least all Members.

398. Mexico suggests that being invited to accede to the AIDCP is a "formality".[66] Mexico also states that "[n]o additional countries or regional economic integration organizations have expressed interest in joining the AIDCP" and that "it is common that during the AIDCP meetings, Parties to the Agreement invite observer countries that regularly attend such meetings with the intention in the future to become Parties."[67] We have stated above that, in order to show that an invitation to accede to the AIDCP is a "formality", Mexico would have to prove that the issuance of an invitation occurs automatically once a WTO Member has expressed interest in joining. This Mexico has not shown. It is uncontested that the parties to the AIDCP have to take the decision to issue an invitation by consensus.[68] Overall, we are not persuaded that being invited to join the AIDCP is a mere "formality". In the light of the provisions for accession to the AIDCP, it therefore appears that the AIDCP is not an "international" body for the purposes of the *TBT Agreement*.

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[63]Panel Report, para. 7.677.
[64]Panel Report, para. 7.693.
[65]Panel Report, para. 7.695.
[66]Mexico's appellee's submission, para. 208.
[67]Mexico's appellee's submission, para. 209.
[68]As pointed out by the United States at the oral hearing, Mexico itself has encountered difficulties in joining another fisheries management organization, the Western and Central Pacific Fisheries Commission (WCPFC). (See Panel Report, footnote 505 to para. 7.327)

399. In the light of the above, we conclude that the Panel erred in finding, in paragraph 7.693 of the Panel Report, that the AIDCP is "open to the relevant body of every country and is therefore an international standardizing organization" for the purposes of the *TBT Agreement*. Instead, we find that the AIDCP is not open to the relevant bodies of at least all Members and thus not an "international standardizing body" for purposes of the *TBT Agreement*.[69] It follows that the Panel also erred in finding, in paragraph 7.707 of the Panel Report, that the "AIDCP dolphin-safe definition and certification" constitute a "relevant international standard" within the meaning of the *TBT Agreement*.

(…)

D. Conclusion

401. In the light of the above, we *reverse* the Panel's finding, in paragraph 7.693 of the Panel Report, that the AIDCP is "open to the relevant body of every country and is therefore an international standardizing organization" for the purposes of Article 2.4 of the *TBT Agreement*. We also *reverse* the Panel's finding, in paragraph 7.707 of the Panel Report, that the "AIDCP dolphin-safe definition and certification" constitute a "relevant international standard" within the meaning of the *TBT Agreement*. In the light of this, the Panel's finding, in paragraph 8.1(c) of the Panel Report, that the measure at issue is not inconsistent with Article 2.4 of the *TBT Agreement* stands.

* * *

[69]Having found that the AIDCP is not "international" for the purposes of the *TBT Agreement*, we do not need to address the question of whether the AIDCP is a "body" and has "recognized activities in standardization".