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ical regulations except when such international standards or relevant parts would be an ctive or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance use of fundamental climatic or geographical factors or fundamental technological problems. A

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

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

1.2 Article 2.1

1.2.1 General

1. The Appellate Body observed that Article 2.1 of the TBT Agreement contains a national3 0 Td[(.6 (M)

technical regulation at issue in its assessment of the products' physical characteristics and consumers' tastes and habits.[6] According to the Appellate Body:

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

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

> "More importantly, however, we do not consider that the concept of 'like products' in Article 2.1 of the TBT Agreement lends itself to distinctions between products that are based on the regulatory objectives of a measure. As we see it, the concept of 'like products' serves to define the scope of products that should be compared to establish whether less favourable treatment is being accorded to imported products. If products that are in a sufficiently strong competitive relationship to be considered like are excluded from the group of like products on the basis of a measure's regulatory purposes, such products would not be compared in order to ascertain whether less favourable treatment has been accorded to imported products. This would inevitably distort the less favourable treatment comparison, as it would refer to a 'marketplace'

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*

originating in any other country; and (ii) whether such detrimental impact "stems exclusively from a legitimate regulatory distinction".[18]

1.2.4.2 Burden of proof

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

> "In the context of Article 2.1 of the *TBT Agreement*, the complainant must prove its claim by showing that the treatment accorded to imported products is 'less favourable' than that accorded to like domestic products or like products originating in any other country. If it has succeeded in doing so, for example, by adducing evidence and arguments sufficient to show that the measure is not even-handed, this would suggest that the measure is inconsistent with Article 2.1.[19] 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."[20]

16. In *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, the Appellate Body, however, reproached the Panel for not recognizing the responsibilities of both parties in its discussion of the burden of proof.[21] While the Appellate Body affirmed its earlier jurisprudence that places the burden of showing less favourable treatment on the complainant[22], it opined that the respondent will be best situated to adduce arguments and evidence with respect to the second element of the assessment under Article 2.1 – whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction:

and reduced the competitive opportunities of imported livestock as compared to domestic livestock.[33] On appeal, the Appellate Body rejected the United States' contention that the Panel had

1.2.4.5 Legitimate regulatory distinctions

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

> "We recall that the stated objective o/P ≠MCpC2e mdw 13.4 0 Td( )T22.80.006 Tc 0.3891 Tw T*[(1 Tw5d[(th)0

> 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 methods other than setting on dolphins outside the ETP'. In these circumstances, we are not persuaded that the United States has demonstrated that the measure is even-handed in the relevant respects, even accepting that the fishing technique of setting on dolphins is particularly harmful to dolphins."[46]

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

> "In our view, these findings provide a sufficient basis for us to determine whether the detrimental impact on Canadian and Mexican livestock stems exclusively from a legitimate regulatory distinction. That is, these findings allow us to pronounce on whether the COOL measure is designed and applied in an even-handed manner, or whether it lacks even-handedness, for example, because it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination, and thus reflects discrimination in violation of Article 2.1 of the *TBT Agreement*. If we determine that the regulatory distinctions drawn by the COOL measure are designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination, those distinctions cannot be considered 'legitimate', and the COOL measure will be inconsistent with Article 2.1. In order to make this determination, we proceed to scrutinize 'the particular circumstances' of this case, including 'the design, architecture, revealing structure, operation, and application' of the COOL measure."[47]

27. The Appellate Body found that the detrimental impact of the COOL measure on Canadian

same considerations, in our view, are valid in the context of the second step of the

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1.3.2 Second sentence

1.3.2.1 "legitimate objective"

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

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

> "Accordingly, in adjudicating a claim under Article 2.2 of the *TBT Agreement*, a panel must assess what a Member seeks to achieve by means of a technical regulation. In doing so, it may take into account the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure. A panel is not bound by a Member's characterization of the objectives it pursues through the measure, but must independently and objectively assess them. Subsequently, the analysis must turn to the question of whether a particular objective is legitimate, pursuant to the parameters set out above."[67]

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

> "Because, however, the Panel ultimately evaluated all relevant features relating to the COOL measure's objective, including evidence and arguments presented by the parties relating to the measure's text, design, architecture, structure, and legislative history, as well as its operation, we do not agree with Canada and Mexico that the Panel erred in its application of Article 2.2 of the TBT Agreement by determining the objective of the COOL measure in the 'abstract', and solely on the basis of the United States' declared objective."[68]

40. The Panel in *US – Clove Cigarettes* considered that "it would be entirely possible, both as a factual and a legal matter, for a single technical regulation to pursue more than one objective"[69], while the Panel in *US – Tuna II (Mexico*) concluded that the measures at issue in that dispute had two different objectives, namely consumer information and dolphin protection.[70]

41. According to the Panel in *Australia – Tobacco Plain Packaging*, the identification of the objective of a challenged measure is designed to clarify its "underlying purpose.[71] In that case, the

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[65] *(footnote original)* Appellate Body Report, *US – Tuna II (Mexico)*, para. 318.
[66] Appellate Body Reports, *US – COOL*, para. 369.
[67] Appellate Body Report, *US – Tuna II (Mexico)*, para. 314. See also Appellate Body Reports, *US – COOL*, paras. 371-372.
[68] Appellate Body Reports, *US – COOL*, para. 396. See also paras. 391 and 424.
[69] Panel Report, *US – Clove Cigarettes*, para. 7.342.
[70] Panel Report, *US – Tuna II (Mexico*), para. 7.407.
[71] Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.198 and 7.229.

Panel was careful to distinguish between the identification of the objective that is pursued by or through a measure, on the one hand, and the level at which a Member aims to achieve that objective, which is a separate question, on the other hand.[72] Additionally, the Panel explained that the identification of the objective of a measure is distinct from the question of how or through what means that objective is to be pursued.[73]

1.3.2.1.2 The legitimacy of the objective

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

"[T]he word 'objective' describes a 'thing aimed dg gjEMCd47.32 707.b( )T(i)-6im d.Tce96.7 (tTT3 1 Tf)6.9

> "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.[87] In particular, it may be relevant for the purpose of this comparison to consider whether the proposed alternative is less trade restrictive, whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and whether it is reasonably available."[88]

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

> "The Appellate Body in *US – Tuna II (Mexico)* found that, while, read in isolation, the word 'fulfil' could be understood to signify the *complete*

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51. Recalling the sixth recital of the preamble to the TBT Agreement, the Appellate Body in *US – COOL (Article 21.5 – Canada and Mexico)*, the Appellate Body observed that, while Article 2.12 does not explicitly prescribe, in rigid terms, the sequence and order of analysis in Article 2 of the TBT Agreement

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56. The Panel considered it appropriate to begin its examination by analysing the "design, structure, and operation of the measures".[103] In this connection, it noted the importance of examining the actual "impact" of the measure on smokers' behaviour, because modification of such behaviour was the measure's objective.[104]

itself, demonstrate their trade-restrictiveness within the meaning of Article 2.2".[114] According to the Panel, the existence of some modification "of the conditions under which all manufacturers will compete against each other on the market would [not], in itself, be sufficient to demonstrate the[] trade-restrictiveness" of the measures at issue. Rather, what must be established is that the challenged measures have a "limiting effect on international trade".[115] Thus, according to the Panel, a complainant needs to show how any modification of the conditions of competition give rise to a

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

> "[C]ertain statements by Honduras might be read as suggesting that there is *no* circumstance in which any evidence other than the design and structure of a measure is necessary for a complainant to demonstrate the trade restrictiveness of the measure within the meaning of Article 2.2. We disagree. In certain circumstances, a measure's design and structure may be insufficient for a panel to anticipate whether and to what extent the measure will have a limiting effect on international trade. If a panel is unable to anticipate whether and to what extent a measure is trade-restrictive based exclusively on its examination of the design and structure of the measure (for instance, because the measure's design and structure leads the panel to conclude that the measure could have both trade-enhancing and trade-reducing effects), then the panel *must* take into account the additional evidence and arguments adduced by the parties. Such additional evidence might include evidence of actual trade effects or evidence of a qualitative or quantitative nature that may inform the panel's determination of the anticipated effects of the measure.
>
> In any event, there is no obligation on a panel to cease its analysis of the trade restrictiveness of a measure after examining only a subset of the evidence (such as the design and structure of the measure, or more generally the evidence related to the anticipated effects of the measure). Indeed, it is appropriate for panels to take into account all relevant evidence adduced by the parties before concluding on the degree of trade restrictiveness. For instance, in *US – COOL*, the Appellate Body considered the Panel's examination of the actual trade effects to be relevant to the determination of the degree of trade restrictiveness, notwithstanding that the design and structure of the measure revealed that it was trade-restrictive. In short, there is no obligation on a panel to exclude any evidence in assessing the trade restrictiveness of the measure and an examination of additional available evidence (such as evidence of actual trade effects) may be necessary in order for the panel to determine the trade restrictiveness of the measure."[124]

66. The Appellate Body proceeded to reject the appellants' claims that the Panel erred in its application of Article 2.2 by failing to conclude that a reduction in the opportunity to differentiate

the Panel erred by failing to find that the reduction in the opportunity to differentiate between different products caused by the TPP measures necessarily amounts to a limiting effect on international trade.

Having upheld the Panel's determination that it was unable to conclude on the degree of trade restrictiveness on the basis of its examination of the design and structure of the TPP measures, we also disagree with the appellants that the Panel required evidence of 'actual trade effects' or applied a 'higher evidentiary burden' on the basis that the TPP measures were not shown to be discriminatory. There is no indication that the Panel's conclusions with respect to brand differentiation were exclusively based on the fact that the TPP measures were non-discriminatory. To the contrary, the Panel's rejection of the argument that the reduction in the opportunity to brand-differentiate measures werse9.3 (dop)2.(e)be t.3 (e)13.4 (a)-2 TJ0 c 0 Tw (')Tj0.006 Tc -0.006 Tw 0.44 0 T-1 9[(m)3.7

maximum price that consumers are willing to pay and the minimum price that producers are willing to accept. It seems clear that a measure can have a causal impact on price by affecting various actors in the market. Consequently, in our view, by looking at the impact of the TPP measures on prices, the Panel was effectively examining the relevant facts in order to conclude on the degree of trade restrictiveness of the TPP measures, based on the complainants' own arguments that the TPP measures led to a decrease in value.

With this in mind, the jurisprudence cited by the Dominican Republic regarding the possible actions of private entities to mitigate a finding of WTO-inconsistency does not appear to be relevant. Rather, the Panel simply examined the facts of the case in order b 3 (r) 6 . 4 1 (e) 1 . i t i n e i o n i . 3 ( ) 0 . 7 t . 6 (h

> necessary'. Rather, the complainants had to demonstrate that the TPP measures are more trade-restrictive than necessary because an equivalent degree of contribution could be achieved through less trade-restrictive alternative means."[162]

1.4 Article 2.3

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

> "The language of Article 2.3 suggests that Members are to eliminate technical regulations that no longer serve their purpose or amend them if the changed circumstances or objectives can be addressed in a less trade-restrictive manner. This requirement also applies to technical regulations that were enacted before the TBT Agreement came into force. Thus, Members would be under an obligation to periodically evaluate their technical regulations and either discontinue them if they no longer serve their objectives or change them if there is a less trade-restrictive manner in which to achieve the underlying objectives of the regulations."[163]

1.5 Article 2.4

1.5.1 General

1.5.1.1 Three-step analysis

90. Referring to the findings of the Panel and the Appellate Body *EC – Sardines*, the Panel in *US – Tuna II (Mexico)* considered the following three elements in its assessment of Mexico's claim under Article 2.4 of the TBT Agreement: (i) the existence or imminent completion of a relevant international standar-7 (co)7ar-7 (1 ( )]TJ-0.001 Tc 0.001 is)7 ( )7ar-7 0.014 Tw 4.373)2 (c)2 (r)19.6 i7 (B)1Tc 0 Tw28.347 5j

> a relevant international standard whose completion is imminent with respect to their existing technical regulations."[166]

92. In *EC – Sardines,* the Appellate Body also agreed with the Panel that the Appellate Body's findings in *EC – Hormones* with respect to the applicability of the SPS Agreement to measures enacted before 1995 that continue to be in force thereafter were relevant to its analysis.[167]

93. In *EC – Sardines,* the Appellate Body further agreed with the Panel's reliance on Articles 2.5 and 2.6 as relevant context in the interpretation of Article 2.4, supporting the conclusion that Article 2.4 is applicable to measures enacted before the TBT Agreement that continue to be in force thereafter.[168] In this regard, the Panel had noted that Article 2.5 speaks of "preparing, adopting or *applying*" a technical regulation, while Article 2.6 states that Members are to participate in preparing international standards by the international standardizing bodies for products which they have either "*adopted*, or expect to adopt technical regulations."[169] The Appellate Body found additional contextual support in the object and purpose of the TBT Agreement, title of Article 2 of the TBT Agreement, which reads "Preparation, Adoption and *Application* of Technical Regulations by Central Government Bodies", as well as Article XVI:4 of the WTO Agreement, which requires that "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."[170]

1.5.2 Relevant international standard

1.5.2.1 "International standard"

94. The Appellate Body in *US – Tuna II (Mexico*) provided a number of clarifications with respect to the meaning of the concept of "international standard" in Article 2.4, based on the contextual elements of the TBT Agreement, the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities[171] (the "ISO/IEC Guide 2: 1991"), and taking into account the TBT Committee Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5, and Annex 3 to the Agreement (the "TBT Committee Decision")[172].

95. The Appellate Body on bst

> "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."[197]

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

114. The Appellate Body agreed with the Panel's interpretation of the terms "ineffective" and "inappropriate" and "that it is conceptually possible that a measure could be effective but inappropriate, or appropriate but ineffective".[204]

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> regulations that are prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in Article 2.2, and that are in accordance with relevant international standards."[210]

1.6.2 First sentence

119. The Appellate Body in *EC – Sardines* observed that Article 2.5 of the TBT Agreement "establishes a *compulsory* mechanism requiring the supplying of information by the regulating Member".[211]

120. The Panel in *US – Clove Cigarettes* considered that the first sentence of Article 2.5 includes the following four elements: "(i) the Member in question is 'preparing, adopting or applying a technical regulation'; (ii) this measure 'may have a significant effect on trade of other Members'; (iii) there is a 'request of another Member'; and (iv) the Member in question is to 'explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4' of Article 2".[212] In the course of its analysis of Indonesia's claim under Article 2.5, the Panel found that "Indonesia did *not* make a request pursuant to the first sentence of Article 2.5 of the *TBT Agreement*".[213] The Panel thus concluded that one of the necessary elements of Article 2.5 was missing, and rejected Indonesia's claim.[214]

1.6.3 Second sentence

1.1. In *Australia – Tobacco Plain Packaging*, the Panel considered in some detail the meaning of the second sentence of Article 2.5.[215] The Panel noted that, although Articles 2.4 and 2.5 of the TBT Agreement are similarly worded, the latter is narrower in scope than the former (since it only applies to technical regulations that pursue one of the legitimate objectives explicitly mentioned in Article 2.2)[216], and also requires a closer connection between the measure at issue and the relevant international standard (since Article 2.5 requires that the measure at issue be "in accordance with" the relevant international standard, rather than merely relying on "the relevant parts" thereof).[217]

1.2. Despite these differences, the Panel held the guidance provided in previous cases concerning the meaning of the term "international standard" as used in Article 2.4 of the TBT Agreement would be "equally relevant" to the meaning of the term as used in Article 2.5.[218] Thus, according to the Panel, for an instrument to be considered an "international standard" under Article 2.5, it would need to (a) constitute a "standard" under Annex 1.2 of the TBT Agreement, and (b) be "international", a condition primarily predicated upon w"y(n)ean3tedy(n)ea19.7 (n)-d13.3 1tPl1-.159 ans3o.3i1-.15

1.7 Article 2.6

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

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

technical regulation by stipulatin