European Union – Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels
(DS593)

U.S. RESPONSES TO QUESTIONS FROM THE PANEL TO THE THIRD PARTIES

May 27, 2021

1. Please comment on the United States' arguments at paragraphs 11 to 20 of its third-party submission concerning the interpretation of Article 2.1 of the TBT Agreement and in particular the term "less favourable treatment".

1. In the paragraphs referenced in the Panel's question, the United States focused on three aspects of "less favourable treatment" under Article 2.1 of the TBT Agreement. First, we explained that Article 2.1 only prohibits measures that accord less favorable treatment to imported products as compared to like domestic products *based on origin*. Second, we explained that the Appellate Body's recent rulings, which hold that any detrimental impact on imported products will constitute a breach of Article 2.1 unless the "detrimental impact on imports *stems exclusively from* legitimate regulatory distinctions,"[1] is erroneous and unsupported by the text of the TBT Agreement. Third, we explained that to determine if a detrimental impact is based on national origin—as opposed to regulatory distinctions—a panel must take account of all relevant facts. If, for example, the regulatory purpose invoked to justify the measure bears a rational relationship to the measure at issue, this would be indicative of non-discrimination.

2. In its third-party oral statement, Canada stated that it "disagrees with the repeatedly-dismissed argument that Article 2.1 of the TBT Agreement … require[s] an assessment of whether a detrimental impact on foreign products is related to the foreign origin of the products…."[2] However, Canada did not address any of the United States' arguments—or the multiple references to the text of the relevant agreements—which appear in our written third-party submission. In that submission, we noted for instance, that Article 2.1 itself compares the treatment accorded to different products on the basis of origin: "products imported from the territory of any Member", "products of national origin", and "products originating in any other Member". Similarly, we observed that the preamble to the Agreement reflects that measures should not be "applied in a manner which would constitute a means of arbitrary or unjustifiable *discrimination between countries* where the same conditions prevail".[3]

3. During the third-party session, Japan also disagreed with the U.S. position on less favourable treatment under Article 2.1, arguing that an analysis of "whether the detrimental impact on imports stems exclusively from legitimate regulatory distinctions" is appropriate.[4] In an effort to support this position, Japan cited the Appellate Body's report in *US – Clove Cigarettes*. However, as the United States explained in its written third-party submission, the findings in *US – Clove Cigarettes* were erroneous, and inconsistent with the text of the TBT Agreement. Japan did not address these arguments or the text of Article 2.1 itself.

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[1] *US – Clove Cigarettes (AB)*, para. 174 (emphasis added); *US - Tuna II (Mexico) (AB)*, para. 7.30; *US – COOL (AB)*, para. 268.

[2] Canada's third-party oral statement, para. 17.

[3] TBT Agreement, preamble, fifth para. *See also* TBT Agreement, Art. 5.1.1 ("[C]onformity 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[.]" (italics added)).

[4] Japan's third-party oral statement, paras. 2 *et seq*.

4. As the United States explained, based on the text of Article 2.1, that provision only prohibits measures that accord less favorable treatment to imported products as compared to like domestic products *based on origin*.

2. In *US - Clove Cigarettes*, the Appellate Body found that:

> ***In determining what are the "like products of national origin and like products originating in any other country", a panel must seek to establish, based on the nature and extent of the competitive relationship between the products in the market of the regulating Member, the products of domestic (and other) origin(s) that are like the products imported from the complaining Member. In determining what the like products at issue are, a panel is not bound by its terms of reference to limit its analysis to those products identified by the complaining Member in its panel request. Rather, Article 2.1 requires the panel to identify the domestic products that stand in a sufficiently close competitive relationship with the products imported from the complaining Member to be considered like products within the meaning of that provision.***
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> ***To be clear, a panel's duty under Article 2.1 to identify the products of domestic and other origins that are like the products imported from the complaining Member does not absolve the complainant from making a prima facie case of violation of Article 2.1. Ordinarily, in discharging that burden, the complaining Member will identify the imported and domestic products that are allegedly like and whose treatment needs to be compared for purposes of establishing a violation of Article 2.1. The products identified by the complaining Member are the starting point in a panel's likeness analysis. However, Article 2.1 requires panels to assess objectively, on the basis of the nature and extent of the competitive relationship between the products in the market of the regulating Member, the universe of domestic products that are like the products imported from the complaining Member.***
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> **Please comment on the legal and practical implications of these findings for the Panel's "likeness" analysis in the case at hand, taking into account the formulation of the claims by Indonesia.**

5. At the outset, the United States would like to reiterate that the claims and defenses in this dispute—and in all other WTO disputes—pertain to rights and obligations in the covered agreements. The Panel is to examine the matter and make an objective assessment of the applicability of and conformity with the covered agreements by (per DSU Article 3.2) applying the customary rules of interpretation of public international law to the text of the cited provisions of those agreements. Any implied notion of precedent or "case law" from prior dispute settlement reports is directly contrary to the function of a panel as set out in the DSU.

6. Under DSU Article 7.1, the Panel's terms of reference call on the Panel to examine the matter referred to the DSB by the Member and "to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in [the covered agreements]." This dual function of panels is confirmed in DSU Article 11, which states that the "function of panels" is to make "an objective assessment of the matter before it" and "such other findings as

will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

7. In addition to describing the "function of panels", Article 11 of the DSU describes the standard of review to be applied by panels. Article 11 of the DSU provides that:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

8. In making that objective assessment of the applicability of and conformity with the relevant covered agreements, a WTO adjudicator is to apply the "customary rules of interpretation of public international law" pursuant to Article 3.2 of the DSU.

9. As prescribed by Article 3.2 of the DSU, the appropriate course for a WTO panel is to apply the "customary rules of interpretation of public international law." Those customary rules of interpretation, as reflected in Articles 31-33 of the Vienna Convention on the Law of Treaties, do not assign any interpretive role to dispute settlement reports. Article 31 of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." As part of engaging in that interpretive exercise, a WTO panel may consider it appropriate to consider a prior report for the assistance it may give in properly understanding a WTO provision interpreted according to customary rules of interpretation – that is, a prior report may be examined for its persuasive value.

10. However, Appellate Body findings are not themselves covered agreements, have no superior status under the customary rules of interpretation, and are not assigned any special weight under the DSU. Under the DSU, the DSB has no authority to adopt an authoritative interpretation of the covered agreements that is binding on WTO Members – and, therefore, neither the Appellate Body nor any panel can issue such an authoritative interpretation that would have "legal and practical implications . . . for the Panel's . . . analysis in the case at hand," as the Panel's question suggests. In fact, Article 3.9 of the DSU explicitly states that "the provisions of [the DSU] are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement." Per Article IX:2 of the WTO Agreement, that "exclusive authority" is reserved to the Ministerial Conference or the General Council acting under a special procedure. Accordingly, a WTO dispute settlement panel has no authority under the DSU or the WTO Agreement simply to follow or apply a panel or Appellate Body interpretation from a prior dispute. Thus, Appellate Body "findings" are not authoritative interpretations, and *only an authoritative interpretation* would have such "implications . . . for the Panel's . . . analysis in the case at hand".

11. Therefore, the Panel should base its analysis on the text of the relevant provisions, and not the findings of previous panels or the Appellate Body.

12. Regarding the substantive question at issue, we note that Articles 7.1 and 6.2 of the DSU set out panels' terms of reference. Under Article 7.1, when the DSB establishes a panel, the panel's terms of reference are (unless otherwise decided) "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. Under Article 6.2, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "a brief summary of the legal basis of the complaint."

13. Thus, under the DSU, a panel's terms of reference define which measures and which claims it may consider. A panel may not consider any measures or claims not set out in the complaining Member's panel request. However, a panel's terms of reference do not define the scope of products a panel may analyze with respect to a discrimination claim. In particular, a panel's terms of reference do not limit the arguments a complainant might make in substantiating a claim, or the defenses and arguments a responding party may invoke.

14. In this dispute, Indonesia's selection of like products in its panel request does not limit the scope of the panel's less favorable treatment analysis, and, in particular, does not limit the defenses the EU may raise, including defenses concerning products alleged to be "like." However, that the panel request does not prescribe the scope of the like products to be addressed in this dispute does not mean that the Panel may, of its own accord, determine for itself which products might fall within this scope. Indonesia has identified those products which it considers to be "like" for purposes of its less favourable treatment claims, and the EU has responded, including with its own discussion of the relevant product scope. The Panel should confine itself, therefore, to the products identified and the evidence submitted by the parties. The panel may pose questions to the parties "in order to clarify and distill the legal arguments" at issue, including questions concerning "like" products. But the Panel may not use its interrogative powers to develop a record for a different case, or what the Panel may consider to be a better case, than that brought by the complaining or responding Member.[5]

3. Please explain the relationship between Article III:4 and Article XI:1 of the GATT 1994. Can there be an overlap in the scope of application of these provisions or are they mutually exclusive?

In addressing this question, please elaborate on whether:

a. The same aspect of a measure can be a measure "on importation" within the meaning of Article XI:1 and, at the same time, an internal measure within the meaning of Article III?

[5] Numerous prior reports have reached a similar conclusion that a WTO adjudicator is not to make a case out for a complaining or a responding party. *US — Wool Shirts and Blouses (AB)*, p. 16; *India – Patents (US) (AB)*, para. 73; *US – COOL (AB)*, para. 286; *US – Gambling (AB)*, para. 140; *US – Certain EC Products (AB)*, para. 113; *Canada – Wheat Exports and Grain Imports (AB)*, para. 191.

b. A detrimental impact on competitive opportunities for imported products, for the purposes of Article III:4, would always also amount to a "limiting effect" on importation for the purposes of Article XI:1?

15. As the United States noted during the third-party session, Article III:4 and Article XI:1 of the GATT 1994 are mutually exclusive provisions. Article III:4 relates to "laws, regulations and requirements affecting … *internal* sale, offering for sale, purchase, transportation, distribution or use", while Article XI:1 relates to "prohibitions or restrictions … on the *importation* of any product." It follows that Article III:4 applies to measures related to *internal* transactions, while Article XI:1 applies to measures applied solely at the border, such as a fee or a limitation on the quantity of a good that can be imported.

16. The Ad Note to Article III makes this distinction clear. It states that: "[a]ny internal tax or other internal charge, or any law, regulation or requirement … which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge." This statement clarifies that Article III:4 applies to all "internal" measures—which could apply to both imported and domestic goods—regardless of when those measures are enforced. Article XI:1, on the other hand, applies to measures applied only on imported goods at the border.

17. The panel in *Turkey – Rice* reasoned similarly, noting that "Article III:4 of the GATT 1994, on one hand, and, on the other, Article XI:1 of the GATT 1994 … have distinct scopes of application. The former deals with measures affecting imported products inside domestic markets, whereas the latter … provision[] deal[s] with border measures that prohibit or restrict imports."[6]

18. For these reasons, the Panel should interpret Articles III:4 and XI:1 of the GATT so as to preserve their distinct scopes of coverage. It follows that, with respect to subpart (a) of the Panel's question, the answer is "no"—the same aspect of a measure *cannot* be a measure "on importation" within the meaning of Article XI:1 and, at the same time, an internal measure within the meaning of Article III. Furthermore, given the distinct nature of the analyses under Article XI:1 and Article III, a panel need not reach the question posed in subpart (b).

4. Do you agree with the European Union's description of the applicable standard of review at paragraph 309 of its first written submission?

19. In paragraph 309 of its first written submission, the European Union states that:

> At the outset, it must be emphasised that, when considering the scientific reports discussed below, it is not the Panel's task to choose one among the various expert opinions available or to substitute its own scientific judgement. Rather, the Panel's task should be limited to examine whether, insofar as the policy choices which are

[6] *Turkey – Measures Affecting the Importation of Rice (Panel)*, para. 7.189. *See also Canada – FIRA (Panel)*, para. 5.14; *India – Autos (Panel)*, para. 7.220.

> reflected in the 'measures' at issue purport to be based on science, such choices can find adequate support on qualified scientific opinions, irrespective of whether they represent the majority view.[7]

20. First, we note that the European Union does not characterize this paragraph as a statement setting out a "standard of review," as the question suggests, and we do not consider it necessary or helpful for the Panel to view the statement in that way. With respect to the substance of the statement, the United States agrees that it is not the Panel's role to second guess a Member's interpretation and application of scientific research. As discussed in the response to Question 5, below, a Member is free to choose the level of protection it believes appropriate in developing domestic policies. This includes the way in which that Member responds to the available scientific research, and therefore also means that a Member need not base its regulations on the majority scientific view in all cases, provided it respects its SPS commitments, such as to maintain its measures with sufficient scientific evidence.[8]

5. At paragraph 814 of its first written submission, the European Union submits that its "conservative threshold of 10% … is in line with the precautionary principle". In your view, how, if at all, is the "precautionary principle" relevant to the TBT Agreement, taking into account, inter alia, Articles 2.2, 2.3, 2.4, 2.10, 2.12, 5.2.7, 5.7, 5.9 and Annex 3.L of the TBT Agreement.

21. The EU states at paragraph 814 of its first written submission:

> A WTO Member is free to set high its standard of protection of a certain value, provided that it does it in a non-discriminatory way. The conservative threshold of 10% . . . is in line with the precautionary principle, which is an acknowledged legitimate approach to environmental protection.

22. Under Article 2.2 of the TBT Agreement, a Member may choose its own level of protection. Article 2.2 refers to the "fulfill[ment]" of objectives. In light of the sixth preambular recital of the TBT Agreement, this "fulfill[ment]" refers to a Member's right to achieve legitimate objectives "at the levels it considers appropriate."[9] To the extent that the precautionary principle is germane to the interpretation of the TBT Agreement, that principle is reflected in the text of the TBT Agreement itself. The Panel thus should interpret the text according to customary rules of international law, as is required by the DSU.

6. Do you consider that only measures that define the composition of products or regulate market access conditions can constitute technical regulations within the meaning of Annex 1.1 of the TBT Agreement? In addressing this question, please comment on the following findings by the Appellate Body in US - Tuna II:

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[7] The European Union's First Written Submission, para. 309.

[8] SPS Agreement, para. 2.2 ("Members shall ensure" measure "is based on scientific principles and is not maintained without sufficient scientific evidence").

[9] *See, e.g.*, *US – Tuna II (Mexico) (AB)*, para. 316.

> ***The text of Annex 1.1 to the TBT Agreement does not use the words 'market' or 'territory'. Nor does it indicate that a labelling requirement is 'mandatory' only if there is a requirement to use a particular label in order to place a product for sale on the market. To us, the mere fact that there is no requirement to use a particular label in order to place a product for sale on the market does not preclude a finding that a measure constitutes a 'technical regulation' within the meaning of Annex 1.1. Instead, in the context of the present case, we attach significance to the fact that, while it is possible to sell tuna products without a 'dolphin-safe' label in the United States, any 'producer, importer, exporter, distributor or seller' of tuna products must comply with the measure at issue in order to make any 'dolphin-safe' claim. (Appellate Body Report, US - Tuna II (Mexico), para. 196).***

23. Article 1.2 of the TBT Agreement states that "for the purposes of this Agreement the meaning of the terms given in Annex 1 applies." Annex 1.1 of the TBT Agreement defines a "technical regulation" as:

> 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, marketing or labeling requirements as they apply to a product, process or production method.

24. To "lay down" is defined as "establish, formulate definitively (a principle, a rule); prescribe (a course of action, limits, etc.)."[10] Thus, the first sentence provides that a measure is a technical regulation if it is a document that either sets out that a product possess or not possess a particular characteristic, or that prescribes certain processes or production methods related to a product characteristic.[11] A characteristic is an "objectively definable" feature or quality, such as "a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity."[12]

25. The second sentence of Annex 1.1 begins: "It may *also include or deal exclusively with*" and then states the elements of "terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method." From the structure of the definition, the use of the introductory phrase "also include or deal exclusively with" indicates that what follows is something that is not encompassed in the first sentence. Rather, this introductory phrase and the structure of the definition indicate that these elements are something in addition to product characteristics, not examples of product characteristics.[13] Therefore, a

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[10] *See EC – Seal Products (AB)*, para. 5.10 (quoting *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.), vol. 1, p. 1562).

[11] *See EC – Asbestos (AB)*, para. 69.

[12] *EC – Asbestos (AB)*, para. 67; *EC – Seal Products (AB)*, para. 5.11.

[13] In paragraph 67, the Appellate Body report in *EC – Asbestos* states: "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'." However, the textual basis for perceiving these as examples of product characteristics was unclear, and, as discussed in text, the natural reading of the two sentences together

measure that does not prescribe product characteristics or their related processes and production methods may still be a technical regulation under Annex 1.1, if it falls within the scope of the second sentence.

26. In *US – Tuna II*, the dispute referred to in the Panel's question, the panel and Appellate Body erred in finding that the regulation at issue was "mandatory" within the meaning of the Annex, and therefore a "technical regulation" for purposed of the TBT Agreement. Therefore, the Appellate Body's analysis in that dispute is of limited utility. In addition, however, the Appellate Body did not find that the U.S. tuna measure was a technical regulation within the meaning of Annex 1.1 because it "set down product characteristics or their related processes and production methods."[14] Rather, the basis of the original panel's finding that the measure was a technical regulation, which the Appellate Body affirmed, was that the measure established "labelling requirements" within the meaning of the second sentence of Annex 1.1.[15]

27. In this, dispute, however, neither party has argued that the challenged measure is a technical regulation based on the second sentence of Annex 1.1.[16] Indonesia argues that the measure sets down product characteristics or their related processes and production methods within the meaning of the first sentence of Annex 1.1, while the EU contends that it does not. Therefore, the Panel's analysis should focus on whether the challenged measure is a technical regulation for that reason and not for another reason, such as the Appellate Body found in *US – Tuna II*.

28. Finally, the definition of "technical regulation" does not refer to the second category of measures mentioned in the panel question, namely measures that "regulate market access conditions." Indeed, measures that "regulate market access conditions" may not be technical regulations. For example, a measure that simply prohibits the sale of a product certainly regulates market access conditions. However, because it does not prescribe a product characteristic or deal exclusively with labelling, for example, such a ban would not be a "technical regulation" under the TBT Agreement.[17]

7. To all third parties: Please comment on the statements by Canada, at paragraphs 27 to 32 of its oral statement, concerning the importance of maintaining distinct legal tests for Articles XX(a), (b) and (g) in the GATT 1994.

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suggests that they are not examples of "product characteristics." The Appellate Body in *EC – Seal Products* agreed with that assessment of the text and departed from the analysis of the Appellate Body in *EC – Asbestos*. *See EC – Seal Products (AB)*, para. 5.14.

[14] *See US – Tuna II (AB)*, para. 197 ("[T]he measure in the present case does not relate to product characteristics that tuna products must meet to be sold on the US market.").

[15] *US – Tuna II (Panel)*, paras. 7.74, 7.79; *see US – Tuna II (AB)*, para. 197-199.

[16] *See* EU's First Written Submission, para. 392 (stating it is clear that the second sentence of Annex 1.1 is not "directly in issue in these proceedings").

[17] *See EC – Asbestos (AB)*, para. 71; *EC – Seal Products (AB)*, para. 5.58.

29. The United States generally agrees with Canada's statement at paragraphs 27-32 of its oral statement on respecting the precise texts in different subparagraphs of Article XX. As we noted in our own oral statement, the EU has argued that the measures at issue in this dispute are part of a comprehensive set of policies taken to address multiple objectives that are "within the framework of the values recognized as legitimate objectives by Article XX(a), (b) and (g) of the GATT 1994."[18] The EU also suggests that, because the legal requirements of each of these subparagraphs are "*in practice* very similar"[19], the Panel may perform a single analysis whereby it assesses whether the measure is "rational and reasonable both in its design and application."[20] Specifically, the EU asks the Panel to assess "whether the claimed objectives are 'public morals', 'life or health of humans, animals or plants' and 'exhaustible natural resources' objectives within the meaning of Article XX(a), (b) and (g), and whether the measures are 'designed' to protect those objectives (in other words, whether the measures are not incapable of contributing to those objectives)."[21]

30. Although the EU characterizes the objective of its measures as being comprehensive and falling under multiple subparagraphs, that does not relieve the EU of its burden to articulate and substantiate the relationship between the measure and the objective identified in each of the various subparagraphs in the manner required—*i.e.*, to demonstrate that it is "necessary to" or "relating to" the given objective. Many, if not all, domestic measures have multiple objectives. Where that is the case, respondents have—as the EU has here—invoked multiple subparagraphs of Article XX. As Canada noted correctly in its oral submission, to prevail on those claims, the respondent must substantiate each Article XX defense according to its own requirements.

8. Please comment on the United States' argument at paragraph 11 of its oral statement that "while it would not be appropriate for the Panel to review the EU's measure under multiple subparagraphs together, the text and aim of the chapeau could require examination of multiple objectives of the measure at issue".

31. We refer the Panel to the statements that the United States made on this issue in its oral statement during the third-party session.

9. How does an assessment of whether technical regulations "do not create unnecessary obstacles to exports from developing country Members" within the meaning of Article 12.3 of the TBT Agreement differ, if at all, from an assessment of whether the same technical regulations are "more trade-restrictive than necessary" under Article 2.2 of the TBT Agreement?

32. The United States responds to Questions 9 and 10 together below.

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[18] EU First Written Submission, paras 1308-1309.

[19] EU First Written Submission, para. 1249 (original emphasis).

[20] EU First Written Submission, para. 1252.

[21] EU First Written Submission, para. 1310.

10. Please describe the kind of evidence that would be sufficient to demonstrate that a Member applying a technical regulation or conformity assessment procedure did "take account of" the needs of developing country Members under Article 12.3 of the TBT Agreement.

33. With respect to Questions 9 and 10, we note in the first instance that Articles 12.3 and 2.2 of the TBT Agreement contain distinct obligations. Article 12.3 requires that Members "take account of" the needs of developing country Members "with a view to ensuring that" the relevant measures "do not create unnecessary obstacles to exports" from such Members. Separately, Article 2.2 requires that Members "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."

34. With respect to Article 12.3, the phrase "take account of" means "to consider along with other factors in reaching a decision."[22] Thus, Article 12.3 simply requires a developed country Member to "consider" the special needs of developing country Members "with a view to ensuring that" their measures do not create unnecessary obstacles to trade"; Article 12.3 *does not* require a developed country Member to ensure that its measures do not have such effect on such Members. It follows that to substantiate a claim under Article 12.3, a complainant would need to show evidence that a respondent did not "consider" the needs of developing countries when designing the measure at issue. Such evidence could take various different forms depending on the specific facts of the case at hand.

35. This interpretation contrasts to the mandatory language reflected in Article 2.2, which requires Members to ensure that their measures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.

11. Please comment on arguments at paragraph 12 of Canada's oral statement at the first substantive meeting relating to the importance of distinguishing the factors that are relevant for the "necessity test" under Article 2.2 from those relevant for the "necessity test" under Article 5.1.2 of the TBT Agreement, and the "risk that the conceptually similar but distinct elements of the two provisions will be conflated, altering the substantive obligations of WTO Members beyond what is contemplated by the text".

36. The United States responds to Questions 11 and 12 together below.

12. Please comment on arguments at paragraph 19 of Canada's oral statement at the first substantive meeting (quoting Panel Report, Russia - Railway Equipment, para. 7.420) that while the "legitimate objective" of the technical regulation is one of the factors relevant for assessing necessity under Article 2.2, under the second sentence of Article 5.1.2, "the only 'relevant objective … is that of giving the importing Member adequate confidence of conformity.'" (emphasis by Canada).

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[22] *The Concise Oxford Dictionary*, 10th edn., J. Pearsall (ed.) (Clarendon Press, 1999).

37. Article 5.1.2 of the TBT Agreement provides that, Members shall ensure that:

> [C]onformity 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.

38. Thus, to establish that a measure is inconsistent with Article 5.1.2, a complaining Member must show that the measure involves a conformity assessment procedure (CAP) that is "prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade."

39. The second sentence then describes a way in which a measure, or its application, could contravene the obligation set out in the first sentence.[23] It explains that an "unnecessary obstacle" is one that is not "necessary to give the importing Member adequate confidence" that products conform to the applicable technical regulation or standard. As to the level of confidence, it refers to "adequate confidence . . . taking account of the risks non-conformity would create." That is, a procedure that is more strict (or more strictly applied) than is necessary to provide to the importing Member the sufficient confidence that the products do conform – for example, because sufficient confidence can be provided through a less strict CAP – would breach Article 5.1.2.

40. The text of Article 5.1.2 does not require a complaining Member to identify and establish a less trade-restrictive alternative measure that provides "adequate confidence" of conformity.[24] However, in referring to "necessary," the second sentence provides that proving the existence of an available, less "strict" or "strictly applied" alternative CAP that provides such "adequate confidence" would establish that a challenged CAP is inconsistent with Article 5.1.2.

41. The text of Article 5.1.2 must be the starting point for interpreting that provision. In particular, there are significant textual differences between Article 5.1.2 and Article 2.2. First, Article 5.1.2 and Annex 1.3 specify the purpose of conformity assessment procedures as being to ensure that products conform to the relevant technical regulation or standard, while Article 2.2 refers to an open list of "legitimate objectives."[25] Second, Article 2.2 refers to the "fulfill[ment]" of objectives, which, in light of the sixth preambular recital of the TBT Agreement, has been interpreted as referring to a Member's right to achieve legitimate objectives "at the levels it considers appropriate."[26] Article 5.1.2, by contrast, refers to the "adequate confidence" of a Member that products conform with a technical regulation or standard.

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[23] *EC – Seals (Panel)*, paras. 7.512-513.

[24] *See* U.S. Third Party Submission, para. 40; *US – Tuna II (Mexico) (AB)*, para. 322; *but see* Russia's Written Submission, para. 93.

[25] *See* U.S. Third Party Written Submission, para. 41.

[26] *See US – Tuna II (Mexico) (AB)*, para. 316.

42. Thus, the text of Article 5.1.2 must be the basis for interpreting that provision; similarities to other provisions should not interfere with faithfully interpreting the provision itself.