

BEFORE THE WORLD TRADE ORGANIZATION

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

**Australia's Third Party Executive Summary**

**3 June 2021**

**TABLE OF CASES**

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US – COOL (Article 21.5 – Canada and Mexico)	Appellate Body Reports, United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico, WT/DS384/AB/RW / WT/DS386/AB/RW, adopted 29 May 2015, DSR 2015:IV, p. 1725
US – Gasoline	Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Tuna II (Mexico)	Panel Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/R adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012:IV, p.2013
US – Tuna II (Mexico)	Appellate Body Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837

## I. INTRODUCTION

1. These proceedings initiated by Indonesia raise significant issues concerning the substantive legal obligations and rights of WTO Members under the Agreement on Technical Barriers to Trade (TBT Agreement) and the General Agreement on Tariffs and Trade 1994 (the GATT 1994). The European Union's (EU) palm oil and oil palm crop-based biofuel measures at issue in this dispute test the boundaries of those rights and obligations
2. Australia's submissions in this dispute have focussed on the proper legal analysis that should be applied under the TBT Agreement and Article XX of the GATT 1994. In particular, Australia has:
  - outlined the Panel's active role in examining scientific evidence in the context of the TBT Agreement, and in accordance with its obligations under Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU);
    - demonstrated that the obligations under the TBT Agreement should not be interpreted in light of the "precautionary approach";
    - set out the correct legal standard for 'trade restrictiveness', 'contribution' and 'less trade restrictive alternatives' under Article 2.2 of the TBT Agreement; and
    - highlighted the distinct legal tests for 'necessity' under Articles XX(a) and (b), and 'relates to' under Article XX(g) of the GATT 1994.

## II. Evaluation of Scientific Evidence Within the Context of the TBT Agreement

3. Article 11 of the DSU provides, in relevant part, that the role of the Panel is to:

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
4. Australia submits that in fulfilling this obligation, it is appropriate for a panel to actively consider the extent to which the body of evidence before it, as a whole, provides a reasonable basis in support of the proposition for which it is being invoked<sup>1</sup>. In this assessment, to the extent that scientific evidence is being relied upon, a panel should have regard to whether such evidence "comes from a qualified and respected source", whether it has the "necessary scientific and methodological rigor to be considered reputable science" or reflects "legitimate science according to the standards of the relevant scientific community", and "whether the reasoning articulated on the basis of the scientific evidence is objective and coherent."<sup>2</sup>
5. Australia further submits that limitations or the lack of available evidence also has probative value and should be taken into account by a panel.<sup>3</sup>

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<sup>1</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.627.

<sup>2</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.516.

<sup>3</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, paras 7.938 - 7.943.

### III. interpretation of THE TBT Agreement

#### A. The “Precautionary Approach”

6. Australia submits that there is no textual basis in the TBT Agreement to support a ‘reading in’ of the “precautionary approach” to the obligations for technical regulations, conformity assessment procedures or standards, nor is it necessary to do so to properly decide this dispute. The Appellate Body has set out the correct legal tests in relation to the key TBT obligations that are contested in this dispute. As noted below, in relation to Article 2.2, the Appellate Body has held that the assessment of ‘necessity’ involves consideration of a range of factors, including the **degree of contribution that the technical regulation makes to the achievement of a legitimate objective**.<sup>4</sup> ‘Contribution’ should be discerned from the design, structure, and operation of the technical regulation, evidence relating to the application of the measure, as well as any limitations in the evidence.<sup>5</sup> It should not be merely assumed or ‘deemed’ to exist through the invocation of the “precautionary approach”. To do so would undermine the basic legal standards for a key TBT obligation. This would have systemic implications for the rights and obligations of every WTO Member.<sup>6</sup>

#### B. Article 2.2 of the TBT Agreement

7. Article 2.2 of the TBT Agreement 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

8. The assessment of ‘necessity’ in the context of Article 2.2, involves a ‘relational analysis’ of the following factors: (i) the trade restrictiveness of the technical regulation; (ii) the degree of contribution that the technical regulation makes to the achievement of a legitimate objective; and (iii) the risks non-fulfilment would create.<sup>7</sup> In most cases, when considering whether a technical regulation is “more trade-restrictive than necessary”, a comparison of the challenged measure and possible alternative measures should also be undertaken.<sup>8</sup>

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<sup>4</sup> See e.g., Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.484 (quoting Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.210).

<sup>5</sup> See e.g., Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.938 - 7.943 and 7.483 – 7.484 (quoting Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.210).

<sup>6</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, paras 7.938 - 7.943

<sup>7</sup> Appellate Body Reports, *US – COOL*, para. 374 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 318). Restated in Appellate Body Report, *Australia – Tobacco Plain Packaging*, para 6.3.

<sup>8</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 322. See also Appellate Body Reports, *US – COOL*, paras. 374-378; *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.197; and *Australia – Tobacco Plain Packaging*, para 6.4.

9. The Appellate Body has confirmed that a technical regulation is ‘trade restrictive’ when it has a limiting effect on international trade.<sup>9</sup> To determine the extent of ‘trade restrictiveness’ a panel should examine the structure, design and operation of the measure, as well as take into account all relevant evidence adduced by the parties.<sup>10</sup> Australia does not agree with the EU’s suggestion, that in the absence of a complete prevention of market access, the trade restrictiveness of a measure will necessarily be “minimal.”<sup>11</sup> Further, Australia recalls that the existence of discrimination (in a finding under Article 2.1 of the TBT Agreement) may contribute to the establishment of ‘trade restrictiveness’ within the meaning of Article 2.2.<sup>12</sup>
10. With regards to the degree of contribution that a technical regulation makes to the achievement of the legitimate objectives, there is no single approach that is suited to conducting this type of analysis in all cases.<sup>13</sup> In *Australia – Tobacco Plain Packaging* the panel, quoting the Appellate Body in *US – COOL (Article 21.5 – Canada and Mexico)*, observed that 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.<sup>14</sup> Australia reiterates its previous statements that limitations in, or unavailability of, certain evidence, can have an impact on the nature and extent of the conclusions that may be drawn by a panel in determining a measure’s ‘degree of contribution’.<sup>15</sup>
11. Lastly, in relation to the comparison of the challenged measure and possible alternative measures, Australia recalls that the Appellate Body has stated that:
 

It would appear incongruous to expect a complainant, under Article 2.2 of the TBT Agreement, to provide detailed information on how a proposed alternative would be implemented by the respondent in practice, and precise and comprehensive estimates of the cost that such implementation would entail.<sup>16</sup>
12. In Australia’s view, this suggests that the complainant need not provide an extensive or complete evidence-base for establishing that a proposed alternative measure is reasonably available. Rather, it would be more appropriate for the respondent, once a complainant has made a prima facie case, to establish that a proposed alternative measure is not reasonably available.<sup>17</sup>

### C. Article XX of the GATT

13. It is important to note that the specific exceptions listed in paragraphs (a) – (j) of Article XX set different standards for establishing the relationship between the measure at issue and the relevant policy objective. This key distinction was highlighted by the Appellate Body in *US – Gasoline* when it noted:

<sup>9</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

<sup>10</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.392-6.393.

<sup>11</sup> European Union’s First Written Submission, paras 823 - 826.

<sup>12</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.384-6.386. See also, Appellate Body Report, *US – COOL*, para. 477 (quoting Panel Reports, *US – COOL*, para. 7.574)

<sup>13</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.484

<sup>14</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.484 (quoting Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.210).

<sup>15</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, paras 7.938 - 7.943.

<sup>16</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para 5.338

<sup>17</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para 5.338

Article XX uses different terms in respect of different categories: ‘necessary’ – in paragraphs (a), (b) and (d); ‘essential’ – in paragraph (j); ‘relating to’ – in paragraphs (c), (e) and (g); ‘for the protection of’ – in paragraph (f); ‘in pursuance of’ – in paragraph (h); and ‘involving’ – in paragraph (i).

It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized.<sup>18</sup>

14. In Australia’s view, the European Union has improperly sought to combine the legal tests for Articles XX(a) and (b) (i.e. “necessary”) and Article XX(g) (“relating to”). Australia submits that the ‘necessity’ and the “relating to” tests set considerably different legal standards. Reliance upon Articles XX(a) and (b) requires more than the mere establishment of a “close and genuine relationship of ends and means” between the measure at issue and the legitimate policy objectives. It requires the weighing and balancing of a range of factors, and often a comparison with less trade restrictive alternatives, to determine that the measure is actually “necessary” to achieve that objective. In Australia’s view, such differing legal standards are distinct and should not be conflated.

#### **IV. CONCLUSION**

15. Key considerations for the Panel in this case will relate to the ‘necessity’ of the European Union’s trade restrictive measures. For the reasons discussed above, Australia respectfully submits that the Panel follow the existing established legal analysis for ‘necessity’ that has been developed by the Appellate Body in the interpretation of the TBT Agreement and the GATT 1994.

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<sup>18</sup> Appellate Body Report, *US – Gasoline*, paras. 17 – 18.