

**Before the World Trade Organization**

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

**Responses of Australia to the Panel's Questions**

**27 May 2021**

**Q4. Do you agree with the European Union's description of the applicable standard of review at paragraph 309 of its first written submission?**

1. In relation to the standard of review, Australia agrees with the European Union at paragraph 309 that it would not be appropriate for the Panel to substitute various reports or opinions with its own scientific judgment. However, Australia has concerns with the European Union's further characterisation of the limited role for the Panel in examining scientific evidence – which suggests a passive role for the Panel.
2. Australia recalls that the function of a 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.<sup>1</sup>
3. 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>2</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>3</sup> Australia submits that these factors are relevant to the Panel's role in actively examining scientific evidence in the current case.
4. Further to this, Australia submits that limitations or the lack of available evidence also has probative value and should be taken into account by the Panel. Indeed Australia recalls that in *Australia – Tobacco Plain Packaging* the panel explicitly stated that the available evidence, as well as possible limitations in, or unavailability of, certain evidence, can have an impact on the nature and extent of the conclusions that may be drawn.<sup>4</sup>

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<sup>1</sup> Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

<sup>2</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.627.

<sup>3</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.516.

<sup>4</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, paras 7.938 - 7.943.

**Q5. 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.**

5. Australia understands from the European Union’s first written submission at paragraph 814, that it seeks to rely upon the “precautionary approach” to demonstrate that its measures pursue a legitimate objective. In Australia’s view, consideration of the “precautionary approach” can only be relevant to the Panel’s **factual findings** in this regard.
6. Turning to the interpretation of the TBT Agreement obligations, Australia submits that it would be improper for the Panel to interpret these obligations in light of the “precautionary approach.” In particular, Australia notes 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.
7. Australia further notes that the Appellate Body has developed specific legal tests in relation to the key TBT obligations that are contested in this dispute. For instance, 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>5</sup> Australia recalls that the Appellate Body has established that the degree of achievement of a particular objective can 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>6</sup> Limitations in, or unavailability of, certain evidence can also be taken into account by a panel in reaching its conclusions.<sup>7</sup> Most importantly, it is the role of a panel to, as precisely as possible, ascertain the actual contribution of the measures, as written and applied, to the objective.<sup>8</sup>
8. Accordingly, Australia strongly cautions the Panel from introducing the “precautionary approach” into the interpretation of Article 2.2, or any other obligations under the TBT Agreement. There is no textual support for this interpretation within the TBT Agreement. Further, appropriate and well-established

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<sup>5</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>6</sup> *Ibid.*

<sup>7</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, paras 7.938 - 7.943

<sup>8</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.483.

legal tests that have been developed by the Appellate Body should be applied. With regards to Article 2.2, ‘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. ‘Contribution’ should not be merely assumed or ‘deemed’ to exist through the invocation of the “precautionary approach”. To do so would undermine the legal standard for key TBT obligations and have systemic implications for the rights and obligations of every WTO Member.

**Q7. 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.**

9. Australia agrees with the statements by Canada that the tests that have been developed under each paragraph of Article XX of the GATT 1994 are distinct, are based on the different language used in each paragraph and require that different elements be proven.
10. As outlined in Australia’s written submission, paragraphs (a) and (b) of Article XX require that the measures at issue are “necessary”. The Appellate Body has found in numerous cases that an analysis of ‘necessity’ in the context of Article XX involves a holistic weighing and balancing of a number of distinct factors, such as: the relative importance of the interests or values furthered by the challenged measure; the contribution of the measure to the objectives pursued by it; and the trade restrictiveness of the measure at issue.<sup>9</sup> Further, in most cases, a panel must then compare the challenged measure and possible alternative measures that achieve the same level of protection while being less trade restrictive.<sup>10</sup>
11. By contrast, the standard under paragraph (g) of Article XX, requires that the measures at issue ‘relate to’ the conservation of exhaustible natural resources. In *China – Rare Earths* the Appellate Body held that this standard required “a close and genuine relationship of ends and means” between the measure at issue and the conservation objective.<sup>11</sup> In particular, it would not be sufficient for the GATT-inconsistent measure to be “merely incidentally or inadvertently aimed at a conservation objective”<sup>12</sup>. The Appellate Body further highlighted that the absence of

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<sup>9</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para 178 - 182; Appellate Body Report, *US – Gambling*, para. 307; Appellate Body Report, *Korea – Various Measures on Beef*, para. 164; Appellate Body Report, *Colombia – Textiles*, paras. 5.71-5.74.

<sup>10</sup> *Ibid.*

<sup>11</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.90.

<sup>12</sup> *Ibid.*

a domestic restriction, or the way in which a challenged measure applies to domestic production or consumption, could be relevant to the assessment of whether the challenged measure ‘relates to’ conservation.<sup>13</sup>

12. Accordingly, the different text used in Articles XX(a) and (b) (i.e. “necessary”) and Article XX(g) (“relating to”) sets 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, the legal standards for “necessity” and “relates to” are distinct and should not be conflated.

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<sup>13</sup> Ibid.