ESCOLA DE ECONOMIA DE SÃO PAULO DA FUNDAÇÃO GETULIO VARGAS

CENTRO DO COMÉRCIO GLOBAL E INVESTIMENTO

Coordenadoras

Vera Thorstensen
Luciana Maria de Oliveira

RELEITURA DOS ACORDOS DA OMC COMO INTERPRETADOS PELO ÓRGÃO DE APELAÇÃO:

Efeitos na aplicação das regras do comércio internacional

Acordo sobre Barreiras Técnicas ao Comércio

Organizadores

José Setti Diaz

Autores

Beatriz Machado Granziera
Bruno Said Haidar
Cinthia Battilani Giantomassi Medeiros
Érica Cristina Iwano Lourenço
Fernanda Zanetta
Felipe Herzog
Fernando Benjamin Bueno
José Setti Diaz
Julia Young Soo Kim
Lucas Mandelbaum Bianchini
Lucas Queiroz Pires
Luciana Dutra de Oliveira Silveira
Marina Egydio de Carvalho
Victor Bovarotti Lopes

INTRODUÇÃO

Análise do texto do Acordo sobre Barreiras Técnicas ao Comércio e da jurisprudência consolidada pelo Órgão de Solução de Controvérsias (DSB) da OMC

ACORDO SOBRE BARREIRAS TÉCNICAS AO COMÉRCIO

➢ Artigo 1

Lucas Queiroz Pires

IA. <u>Texto do Artigo em Inglês</u>

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.

IB. <u>Texto do Artigo em Português</u>

Artigo 1
Disposições Gerais

1.1 Os termos gerais para normalização e procedimentos de avaliação de conformidade terão normalmente o significado que lhes dão as definições adotadas pelo sistema das Nações Unidas e pelos organismos internacionais de normalização, levando em consideração seu contexto e à luz do objetivo e propósito deste Acordo.

1.2 Entretanto, para os efeitos deste Acordo, o significado dos termos listados no Anexo 1 será o que ali se precisa.

1.3 Todos os produtos, incluindo os industriais e agropecuários, estarão sujeitos às disposições deste Acordo.

1.4 As especificações de compra estabelecidas pelos órgãos governamentais para requisitos de produção e consumo de órgãos governamentais não estarão sujeitas às disposições deste Acordo, mas estarão cobertas pelo Acordo de Compras Governamentais, conforme a abrangência do mesmo.

1.5 As disposições deste Acordo não se aplicam a medidas sanitárias e fitossanitárias tal como definidas no Anexo A do Acordo sobre a Aplicação de Medidas Sanitárias e Fitossanitárias.

1.6 Todas as referências deste Acordo a regulamentos técnicos, normas e procedimentos de avaliação de conformidade incluirão quaisquer emendas ao mesmos e quaisquer adições às regras ou aos produtos nelas referidos, exceto as emendas e adições de natureza insignificante.

(Decreto nº 1.355, de 30 de dezembro de 1994)

IC. Comentários sobre a Tradução

Considera-se mais adequado incluir a expressão "deverão ter" no lugar de "terão" para refletir a expressão *"shall normally have"*, de forma a enfatizar a obrigação dos Membros. Ao invés de "será o que ali se precisa", o melhor seria "se aplica", ou "aplicável". Ademais, "Agrícolas" é a melhor tradução para "agricultural", e não "agropecuários". Por fim, sugere-se "deverão ser desenvolvidos de forma a incluir" ao invés de "incluirão", para ficar mais próximo do significado na versão em inglês.

II. Interpretação e Aplicação do Artigo 1

1. Escopo do Acordo sobre Barreiras Técnicas

Relatório do Painel no caso *European Communities - Measures Affecting Asbestos and Products Containing Asbestos* *(EC - Asbestos)*, Demandante: Canadá, WT/DS135/R, para. 8.72(a)

O Painel rejeitou o argumento do Canadá em relação ao enquadramento da medida da França como uma *"technical regulation"*.

Para. 8.72 (a). "(…) the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products" did not constitute a "technical regulation"."

Relatório do Órgão de Apelação no caso *European Communities - Measures Affecting Asbestos and Products Containing Asbestos* (*EC - Asbestos*), Demandante: Canadá, WT/DS135/AB/R, para. 64

Contudo, o Órgão de Apelação reverteu o entendimento acima:

Para. 64. "[T]he proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole…. 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 product 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."

2. Artigo 1.5

Relatório do Painel no caso *European Communities - Measures Concerning Meat and Meat Products (Hormones) (EC - Hormones)*, Demandante: EUA, WT/DS26/R/USA, para. 8.29

Para. 8.29. "The Panel, referring to Article 1.5 of the TBT Agreement, found that, since the measures at issue were sanitary measures, the TBT Agreement was not applicable to the dispute."

3. Relação entre os Acordos TBT e SPS

Relatório do Painel no caso *European Communities - Measures Affecting the Approval and Marketing of Biotech Products (EC - Approval and Marketing of Biotech Products)*, WT/DS291, 292, 293/R - WorldTradeLaw.net Dispute Settlement Commentary (DSC), p. 19

Seguem trechos do Relatório, demonstrando o entendimento do Painel sobre a relação entre os Acordos TBT e SPS:

TBT Agreement Article 1.5 - Relationship of TBT and SPS Agreements

Para. 7.167. "The European Communities argued that a law, or a requirement contained therein, may be deemed to embody an SPS measure as well as a non-SPS measure. In addressing this issue, the Panel said that "to the extent the requirement at issue is applied for a purpose not covered by Annex A(1) of the SPS Agreement, it can be viewed as embodying a non-SPS measure." It then noted that by its terms, TBT Agreement Article 1.5 is not applicable to non-SPS measures. However, the Panel said, where a requirement is assumed to be part of a technical regulation, "it falls to be assessed under the TBT Agreement, to the extent it embodies a non-SPS measure."

Para. 7.3412. "Later, Canada argued that if the Panel determines that "parts" of the relevant member State safeguard measures are covered by the TBT Agreement in addition to the SPS Agreement, Canada's claims under the TBT Agreement are to be considered as cumulative rather than alternative. However, the Panel noted that each of the safeguard measures challenged by Canada "constitutes in its entirety an 'SPS measure' within the meaning of Annex A(1) of the SPS Agreement and hence falls to be assessed under that Agreement." Thus, the Panel said, in view of this finding and TBT Agreement Article 1.5, it did not consider that parts of the safeguard measures are covered by the TBT Agreement."

III. Comentários

Houve menção ao dispositivo no caso *EC - Asbestos*, reforçando a necessidade de se analisar os elementos permissivos e proibitivos de uma "*technical regulation"* para enquadrá-la como dentro do escopo do TBT.

Ademais, merece destaque a interpretação do Painel em *EC - Hormones* e em *EC - Biotech*, reforçando o entendimento de que caso uma medida seja sanitária, não se aplica o TBT de acordo com o Artigo 1.5.

- **Artigo 2**

Bruno Said Haidar
Cinthia Battilani Giantomassi Medeiros
Érica Cristina Iwano Lourenço
Felipe Herzog
Fernanda Zanetta
Fernando Benjamin Bueno
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Luciana Dutra de Oliveira Silveira
Lucas Queiroz Pires
Marina Egydio de Carvalho

IA. Texto do Artigo em Inglês

Article 2
Technical Regulations and Standards
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.

IB. <u>Texto do Artigo em Português</u>

Artigo 2
Regulamentos Técnicos e Normas
Preparação, Adoção e Aplicação de Regulamentos Técnicos por Instituições do Governo Central

No que se refere às instituições de seu governo central:

2.1 Os Membros assegurarão, a respeito de regulamentos técnicos, que os produtos importados do território de qualquer Membro recebam tratamento não menos favorável que aquele concedido aos produtos similares de origem nacional e a produtos similares originários de qualquer outro país.

2.2 Os Membros assegurarão que os regulamentos técnicos não sejam elaborados, adotados ou aplicados com a finalidade ou o efeito de criar obstáculos técnicos ao comércio internacional. Para este fim, os regulamentos técnicos não serão mais restritivos ao comércio do que o necessário para realizar um objetivo legítimo tendo em conta os riscos que a não realização criaria. Tais objetivos legítimos são, *inter alia*, imperativos de segurança nacional, a prevenção de práticas enganosas, a proteção da saúde ou segurança humana, da saúde ou vida animal ou vegetal ou do meio ambiente. Ao avaliar tais riscos, os elementos pertinentes a serem levados em consideração são, *interalia*, a informação técnica e científica disponível, a tecnologia de processamento conexa ou os usos finais a que se destinam os produtos.

2.3 Os regulamentos técnicos não serão mantidos se as circunstâncias ou objetivos que deram origem à sua adoção deixaram de existir ou se modificaram de modo a poderem ser atendidos de uma maneira menos restritiva ao comércio.

2.4 Quando forem necessários regulamentos técnicos e existam normas internacionais pertinentes ou sua formulação definitiva for iminente, os Membros utilizarão estas normas ou seus elementos pertinentes como base de seus regulamentos técnicos, exceto quando tais normas internacionais ou seus elementos pertinentes sejam um meio inadequado ou ineficaz para a realização dos objetivos legítimos perseguidos, por exemplo, devido a fatores geográficos ou climáticos fundamentais ou problemas tecnológicos fundamentais.

2.5 Um Membro que prepare, adote ou aplique um regulamento técnico que possa ter um efeito significativo sobre o comércio de outros Membros, deverá, sob solicitação de outro Membro, apresentar a justificativa para este regulamento técnico, nos termos das disposições dos parágrafos 2 a 4. Sempre que um regulamento técnico seja elaborado, adotado ou aplicado em função de um dos objetivos legítimos explicitamente mencionados no parágrafo 2 e esteja em conformidade com as normas internacionais pertinentes, presumir-se-á, salvo refutação, que o mesmo não cria um obstáculo desnecessário ao comércio.

2.6 Com o objetivo de harmonizar o mais amplamente possível os regulamentos técnicos os Membros, participarão integralmente, dentro do limite de seus recursos, da preparação pelas instituições de normalização internacionais apropriadas, de normas internacionais para os produtos para os quais tenham adotado ou prevejam adotar regulamentos técnicos.

2.7 Os Membros examinarão favoravelmente a possibilidade de aceitar os regulamentos técnicos de outros Membros como equivalentes, mesmo que estes regulamentos difiram dos seus, desde que estejam convencidos de que estes regulamentos realizam adequadamente os objetivos de seus próprios regulamentos.

2.8 Sempre que apropriado, os Membros especificarão os regulamentos técnicos baseados em prescrições relativas a produtos antes em termos de desempenho do que em termos de desenho ou características descritivas.

2.9 Sempre que não existir uma norma internacional pertinente ou o conteúdo técnico de um projeto de regulamento técnico não estiver em concordância com o conteúdo técnico danorma internacional pertinente e se o regulamento técnico puder ter um efeito significativo sobre o comércio de outros Membros, os Membros

2.9.1 publicarão uma nota numa publicação com antecedência suficiente para que todas as partes interessadas existentes em outros Membros possam tomar conhecimento de que planejam introduzir um determinado regulamento técnico;

2.9.2 notificarão os outros Membros por meio do Secretariado sobre os produtos a serem cobertos pelo regulamento técnico planejado, junto com uma breve indicação de seu objetivo e arrazoado. Tais notificações serão feitas com a antecedência suficiente, quando emendas ainda possam ser introduzidas e comentários levados em consideração;

2.9.3 quando se lhes solicite, fornecerão a outros Membros pormenores ou cópias do projeto de regulamento técnico e, sempre que possível, identificarão as partes que difiram em substância das normas internacionais pertinentes;

2.9.4 concederão, sem discriminação, um prazo razoável para que outros Membros façam comentários por escrito, discutirão estes comentários, caso solicitado, e levarão em consideração estes comentários escritos e o resultado destas discussões;

2.10 Sem prejuízo das disposições do *caput* do parágrafo 9, quando surgirem ou houver ameaça de que surjam problemas urgentes de segurança, saúde, proteção do meio ambiente ou segurança nacional para um Membro, este Membro poderá omitir os passos enunciados no parágrafo 9 que julgue necessário, desde que o Membro, quando da adoção da norma:

2.10.1 notifique imediatamente os outros Membros, por meio do Secretariado, sobre o regulamento técnico em questão e os produtos cobertos, com uma breve indicação do objetivo e arrazoado do regulamento técnico, inclusive a natureza dos problemas urgentes;

2.10.2 quando se lhes solicite, forneça a outros Membros cópias do regulamento técnico;

2.10.3 sem discriminação, permita que outros Membros façam comentários por escrito, discuta estes comentários caso solicitado e leve em consideração estes comentários escritos e o resultado destas discussões;

2.11 Os Membros assegurarão que todos os regulamentos técnicos que tenham sido adotados sejam prontamente publicados ou colocados à disposição de outra forma, de modo a permitir que em outros Membros as partes interessadas tomem conhecimento dos mesmos;

2.12 Exceto nas circunstâncias urgentes a que se faz referência no parágrafo 10, os Membros deixarão um intervalo razoável entre a publicação dos regulamentos técnicos e sua entrada em vigor, de forma que os produtores dos Membros exportadores, particularmente os dos países em desenvolvimento Membros, disponham de tempo para adaptar seus produtos ou métodos de produção às exigências do Membro importador.

(Decreto nº 1.355, de 30 de dezembro de 1994)

IC. Comentários sobre a Tradução

Traduziu-se *"unnecessary obstacles"* por "obstáculos técnicos". O mais adequado seria traduzir a referida expressão por "obstáculos desnecessários", por dois motivos: em primeiro lugar, a palavra "técnicos" não está presente no acordo original, em inglês; em segundo lugar, suprimiu-se da tradução a expressão em inglês *"unnecessary"*, considerada fundamental para o sentido do dispositivo, pois expressa a ideia de inutilidade ou dispensabilidade do obstáculo criado, a qual não é transmitida pela expressão "obstáculos técnicos".

Além disso, considera-se mais adequado incluir a expressão "deverão assegurar" no lugar de "assegurarão" para refletir a expressão *"shall ensure"*, de forma a enfatizar a obrigação dos Membros. De qualquer forma, o tempo verbal no futuro simples não exime os Membros de cumprirem tal obrigação.

Considera-se mais adequado o uso do termo "padrão" para traduzir a palavra "*standard*" porque reflete com maior abrangência o sentido do termo em inglês. "Padrão" abrange comportamentos internacionais que não estejam regulamentados ou normatizados oficialmente, mas que exprimem determinado consenso internacional.

O termo *"international trade"* foi traduzido por, simplesmente, "comércio". Acreditamos que o termo mais correto e completo, seria "comércio internacional". Além disso, considera-se mais adequado o uso do termo "padrão" para traduzir a palavra *"standard"* porque reflete com maior abrangência o sentido do termo em inglês. "Padrão" abrange comportamentos internacionais que não estejam regulamentados ou normatizados oficialmente, mas que exprimem determinado consenso internacional.

Sugestão: Recomendamos a seguinte tradução "Sempre que apropriado, os Membros especificarão os regulamentos técnicos baseados em requisitos relacionados ao produto, no que tange o desempenho ao invés de desenho ou características descritivas".

O termo **"**norma" talvez não seria a melhor tradução para "*standard*". Sugere-se "padrão" ou "requisitos". No mesmo parágrafo, sugere-se *"*de acordo", por soar melhor do que "em concordância". Ainda, sugere-se a Inclusão de "referido" para facilitar compreensão, bem como a inclusão de "deverão" ao final do caput tendo em vista que o texto em inglês é "shall", conforme abaixo:

2.9. Sempre que não existir uma norma internacional pertinente ou o conteúdo técnico de um projeto de regulamento técnico não estiver em concordância com o conteúdo técnico da norma internacional pertinente e se o [referido] regulamento técnico puder ter um efeito significativo sobre o comércio de outros Membros, os Membros [deverão]:

Dessa forma, considera-se mais adequado incluir as expressões "publicar", "notificar", "deverão ser", "fornecer". "discutir" e "levar" no lugar da sua forma no futuro simples, para concordar com a expressão sugerida "deverão" (*"shall")*, de forma a enfatizar a obrigação dos Membros.

Ainda, sugere-se a alteração de alguns termos, por soar melhor na língua portuguesa, quais sejam, "embasamento" no lugar de "arrazoado", "de forma que" no lugar de "quando", "solicitadas" no lugar de "se lhes solicite".

No contexto do dispositivo, os termos "Argumentação", "Lógica" ou "Embasamento" seriam melhores para *rationale* do que "arrazoado". Na mesma linha, "Solicitado" é melhor do que "se lhes solicite".

A palavra "deixarão" poderia ser substituída por "devem estabelecer" ou "estabelecerão".

II. Interpretação e Aplicação do Artigo 2

1. Geral

Relatório do Órgão de Apelação no caso *European Communities - Trade Description of Sardines* (*EC - Sardines),* Demandante: Peru, WT/DS231/AB/R, paras. 195, 233, 282 e 287-290

Nesta controvérsia, o Órgão de Apelação manteve o entendimento do Painel de que o regulamento das Comunidades Europeias é um instrumento técnico, nos termos do Anexo 1.1 do Acordo TBT, e que o Codex Stan 94 é uma Norma internacional relevante de acordo com o Artigo 2.4 do Acordo TBT. Contudo, o Órgão de Apelação reformou o posicionamento do Painel acerca do ônus da prova e estabeleceu que cabe ao demandante, no caso o Peru, provar que a Norma internacional relevante, no caso o Codex Stan 94, é eficaz e apropriado. Tendo em vista que o Peru foi capaz de demonstrar tais condições, o Órgão de Apelação concluiu que as CE não basearam o seu regulamento técnico em uma Norma internacional relevante e por esta razão violaram o Artigo 2.4 do Acordo TBT.

Para. 195. "We, therefore, uphold the Panel's finding, in paragraph 7.35 of the Panel Report, that the EC Regulation is a "technical regulation" for purposes of the TBT Agreement, because it meets the three criteria we set out in EC - Asbestos as necessary to satisfy the definition of a "technical regulation" under the TBT Agreement."

VI. The Temporal Scope of Application of Article 2.4 of the TBT Agreement

Para. 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"."

Para. 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."

Para. 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. In such an event, Codex Stan 94 must, consistent with the European Communities' obligation under the TBT Agreement, be used "as a basis for" any European Communities regulation on the marketing of preserved sardines, because Codex Stan 94 will have been shown to be both effective and appropriate to fulfil the "legitimate objectives" pursued by the European Communities. Further, in such an event, as we have already determined that Codex Stan 94 was not used "as a basis for" the EC Regulation, we would then have to find as a consequence that the European Communities has acted inconsistently with Article 2.4 of the TBT Agreement."

Para. 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."

Para. 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. 210 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."

Para. 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." 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". 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, 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". 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."

Relatório do Painel no caso *European Communities - Trademarks and Geographical Indications (EC - Geographical Indications)*, Demandante: EUA, DS174/DS290, WT/DS174/R, paras. 7466-7.471 e 7.475

Nesta controvérsia, ao proceder à análise do Artigo 2.1 do Acordo TBT, o Painel observou que este Artigo refere-se à obrigação do tratamento nacional. Para que fosse constatada uma violação, o regulamento técnico deveria conceder um tratamento menos favorável ao produto importado, se comparado ao produto nacional similar. Todavia, o Painel entendeu que a Austrália não forneceu provas suficientes de que a diferença na linguagem entre os requerimentos direcionados ao produto importado e ao produto similar nacional resultava em tratamentos diferentes. Assim sendo, o Painel concluiu que a Austrália não provou um caso de violação *prima facie* ao Artigo 2.1 do Acordo TBT.

Para. 7.466. "The United States claims that this labelling requirement only applies to third country GIs, not the GI located in the European Communities with which they are identical. It argues that this requirement does not address the conditions of registration of GIs located in the European Communities. There is simply no basis for reading this as applying also to GIs located in the European Communities."

Para. 7.467. "The United States argues that there is nothing in Article 6(6) of the Regulation that would permit the Commission to import the requirement of Article 12(2) into the registration of a GI located in the European Communities. Under Article 6(6), an EC GI that gives rise to a "clear distinction in practice" with a homonymous prior registered GI would have to be registered without indicating the country of origin on the label of products. Under Article 12(2), a third country GI must be accompanied by the country of origin."

Para. 7.468. "The European Communities responds that the second subparagraph of Article 12(2) only applies to the GIs in the situation referred to in its first subparagraph. It only applies in cases of identical or homonymous names and not to third country names in general. It confirms that there have been no cases in which this provision has been applied in practice."

Para. 7.469. "The European Communities argues that "such names" in the second subparagraph refers to both "a protected name of a third country" and a "Community protected name", so that the requirement to indicate the country of origin can apply to both the third country name and the Community name. In practice, this would mean that whichever indication is registered later would normally be required to indicate the country of origin. In both these terms, "protected" means, in principle, "protected under Regulation 2081/92" but "the provision also applies where protection is sought for a protected name from a third country". "Community protected name" covers only protected names of geographical areas located in the European Communities.406 Article 12(2) covers both a situation where a third country GI is a homonym of an EC GI already on the register, as well as an EC GI which is a homonym of a third country GI already on the register.407 "Such names" is written in the plural which clearly indicates that the requirement can relate to both the EC and third country GIs.408 Nothing in the wording of the provision prevents it applying to GIs from both third countries and the European Communities. Even if "Community protected name" referred to EC and third country names already on the register, "protected name of a third country" should be interpreted to include names protected in a third country, whether or not from the European Communities or a third country. In the European Communities' view, Article 12(2) has no specific link with Article 12(1)."

Para. 7.470. "The European Communities argues that, in cases of homonymous GIs from the European Communities, the last indent of Article 6(6) also requires a clear distinction in practice between them which would normally, in practice, require the indication of the country of origin. The only reason why the last indent of Article 6(6) does not explicitly require the indication of the country of origin is that this provision deals with a wider set of conflicts than Article 12(2). There is no difference between the word "homonymous" in Article 6(6) and "identical" in Article 12(2) as the English definitions of those words are synonymous and the French and Spanish versions use the same term in both provisions. Article 6(6) deals with a wider set of conflicts than Article 12(2), such as homonyms from within the European Communities, homonyms from within the same third country or different third countries. Article 6(6) simply refers to "protected names" from the European Communities and a third country, without specifying which of these is the one the subject of an application and which is already on the register."

Para. 7.471. "The European Communities argues that "clearly and visibly indicated" must be evaluated in each specific case from the point of view of what a normally attentive consumer can easily notice and not be induced in error as to the origin of the product."

Para. 7.475. "The Panel observes that the scope of the labelling requirement is indicated by its subject: "[u]se of such names". "Such" is a demonstrative adjective that refers to something previously specified, which expressly requires an examination of the context. The context indicates that "such names" refers to the subject of the previous indent, which is eligible GIs from third countries that are identical to a Community protected name. This is confirmed by the content of the two indents: the first refers to practical risks of confusion, and the second imposes a requirement that a detail be clearly and visibly indicated, which appears to be a specific requirement that addresses the more general consideration in the first. Whilst it is possible to look back further in the context and read the phrase "[u]se of such names" as referring to the names or GIs in the preceding paragraph 1, such a reading is, in our view, constrained. We note that the position of paragraph 2 near the beginning of Articles 12 through 12d might suggest that it is a more general provision, but its position can perhaps be explained by the fact that it is one of the two original provisions on GIs from third countries that predate the insertion of Articles 12(3) and 12a through 12d. The European Communities has confirmed that "such names" refers to the previous indent, which covers only identical GIs. On the basis of the text of the provision, which has not been applied, the Panel agrees."

Relatório do Painel do caso *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US - Tuna II)*, Demandante: México, WT/DS381/R, paras. 7.620-7.623, 7.734-7.740 e 7.746-7.748

Nesta controvérsia, o Painel determinou que a medida adotada pelos EUA é inconsistente com o Artigo 2.2 do Acordo TBT. Por fim, o Painel rejeitou as alegações mexicanas de que a medida seria inconsistente com os Artigos 2.1 e 2.4 do Acordo TBT.

Para. 7.620. "In light of our determinations above in relation to both objectives of the US dolphin-safe provisions, we find that these measures are more trade-restrictive than necessary to fulfil their legitimate objectives, taking account of the risks non-fulfilment would create. Consequently, the Panel finds that the US dolphin-safe provisions are inconsistent with Article 2.2 of the TBT Agreement."

Para. 7.621. "As described above, we make this determination taking into account our finding that the US dolphin-safe measures, as applied, only partly address the adverse effects on dolphins of tuna fishing that the United States has identified as relevant it the context of its objectives of informing consumers and contributing to the protection of dolphins in relation to the impact of such fishing techniques. Specifically, 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. Similarly, the proposed AIDCP dolphin-safe standard which Mexico identified as part of its proposed alternative measure would also not address the entirety of the adverse effects identified by the United States, insofar as it would not address unobserved mortalities from setting on dolphins, and any resulting adverse effects on dolphin populations."

Para. 7.622. "We also recall, in this context, our determination that the choice of the level of protection to be achieved in pursuance of the legitimate objectives identified is the prerogative of the Member taking the measures, and we therefore make no determination as to what might be an appropriate level of protection to achieve in relation to the objectives identified by the United States for the information of consumers and the protection of dolphins in relation to the manner in which tuna is caught."

Para. 7.623. "Finally, we note that, as reflected in our analysis above, our findings take into account the information, including scientific information concerning the effects of tuna fishing on dolphins that is available to us for the purposes of these proceedings. From these elements, it appears that a number of aspects of this issue are not fully documented and that further research may be necessary in order to ascertain the exact situation in various areas."

Para. 7.734. "Mexico's main argument in support of its assertion that the AIDCP standard is an effective means for achieving the objective of protecting dolphins is that the objective of the US dolphin-safe labelling provisions relate solely to adverse effect on dolphins that occur when nets are set upon dolphins, but that the measures have no objectives concerning adverse effects on dolphins resulting from other fishing methods or occurring in ocean regions other than the ETP. Mexico also argues that the US dolphin-safe labelling provisions are based on the underlying assumption that the fishing method used by the Mexican fleet and regulated by the AIDCP adversely affects dolphins, which it deems is unsupported by reliable evidence. Mexico focuses on the dolphin stocks recovery and affirms that the best available scientific evidence shows that dolphin mortalities in the ETP are negligible and are not affecting populations of any of the dolphin stocks. Mexico underlines the fact that the IATTC has also questioned whether the overall United States' analytical approach to evaluating dolphin populations is sound. To summarize, Mexico argues that there is "no scientific evidence that setting upon dolphins in a manner consistent with the AIDCP adversely affects dolphins from a stock sustainability perspective." It holds that the most recent study, a 2008 US DOC study, indicated that dolphin stocks are recovering, indicating that the fishing methods are not having adverse effect on dolphins."

Para. 7.735. "Mexico argues that the US dolphin-safe labelling provisions are based on the assumption that one of the fishing method used by the ETP fishing fleets adversely affects dolphins which is, in turn, based on the assumption that dolphin stocks are not recovering. As explained in paragraph 7.550 above, however, we are not persuaded that the objective of protecting dolphins through the US dolphin-safe provisions is to be understood exclusively, or even primarily, in terms of dolphin population

recovery. Rather, both US objectives are defined in terms of "adverse effects" of fishing practices on dolphins. As described above, this includes observed mortality from tuna fishing as well as unobserved consequences of setting on dolphins. As also described above, the United States has indicated that this "may also be considered as seeking to conserve dolphin populations". This suggests to us that the US objective of seeking to minimize observed and unobserved mortality and injury to dolphins is not conditioned upon or dependent on dolphin populations being depleted."

Para. 7.736. "As we understand it therefore, the United States' assumption that setting on dolphins is harmful to dolphins is not premised only on the lack of dolphin stocks recovery. As mentioned above, the United States has referred to a diversity of adverse effects of setting on dolphins, emphasizing both the individual dolphin mortality (observed or delayed) as well as the issue of the recovery of dolphin stocks. As a study presented as evidence by Mexico itself states describes, there are ecological but also other concerns for dolphins and various target levels of either dolphin population size or mortality. We note that this study also suggests that the difficulty presented by the tuna-dolphin issue as an international problem is due to differing conservation ethics, and suggests that the United States' laws and policies have the goal of preventing all dolphin mortality from tuna fishing, while the laws and policies of other nations and more often directed toward conserving dolphin populations but not necessarily preventing all mortality."

Para. 7.737. "As explained earlier in the context of our determinations under Article 2.2 in relation to the legitimate objectives pursued by the United States, the Panel has considered that despite the existence of a degree of uncertainty in relation to the extent to which setting on dolphins may have adverse impact on dolphins beyond observed mortality, sufficient evidence has been put forward by the United States to raise a presumption that genuine concerns exist in this respect and that the method of setting on dolphins "has the capacity" of resulting in observed and unobserved adverse effects on dolphins ."

Para. 7.738. "We acknowledge that the AIDCP standard contributes importantly, as the United States itself observes, to the reduction of dolphin mortality from setting on dolphins within the ETP. It may even contribute to the protection of dolphin stocks and progressive recovery of depleted populations. However, taken alone, it fails to address unobserved adverse effects derived from repeated chasing, encircling and deploying purse seine nets on dolphins, such as separation of mothers and their dependent calves, killing of lactating females resulting in higher indirect mortality of dependent calves and reduced reproductive success due to acute stress caused by the use of helicopters and speedboats during the chase."

Para. 7.739. "We also note that, to the extent that the AIDCP standard addresses setting on dolphins and not other fishing techniques that may also result in adverse effects on dolphins, it would also not provide an effective or appropriate means of fulfilling the US objectives in this respect."

Para. 7.740. "For all these reasons, we find that Mexico has failed to demonstrate that the AIDCP dolphin-safe standard is an effective and appropriate means to fulfil the US objectives at the United States' chosen level of protection."

Para. 7.746. "We note that Mexico's claims under the GATT 1994 are non-discrimination claims under Articles I:1 and III:4. We also note that in the context of considering Mexico's claims under the TBT Agreement, we have considered among others, Mexico's non-discrimination claims under Article 2.1 of that Agreement."

Para. 7.747. "We further recall that, in the presentation of its arguments to the Panel under the TBT Agreement, Mexico consistently referred the Panel to its arguments under Articles I.1 and III:4 of the GATT 1994 (and the United States similarly referred to its own responses under the GATT 1994). In that context, Mexico argued that Article 2.1 of the TBT Agreement contains two non-discrimination obligations applicable to technical regulations, one that is similar to the national treatment obligation in

Article III:4 and the other that is similar to the most-favoured-nation obligation in Article I:1, and that although language used in Article 2.1 is different from that used in Articles III:4 and I:1, both of these GATT 1994 provisions offer guidance on how to interpret Article 2.1.985 Mexico has not provided any explanation for its contrary view expressed in the context of its request that the Panel refrain from exercising judicial economy, that it was necessary to rule on these claims under both agreements and under both contexts (national treatment and MFN) because the nature, scope and application of the claims under Articles I:1 and III:4 of the GATT 1994, and Article 2.1 of the TBT Agreement, are different, and address different rights and obligations which, in turn, will have different implications during the implementation phase of this dispute."

Para. 7.748. "In light of the fact that we have addressed, in the context of our examination of Mexico's claims under the TBT Agreement, all aspects of Mexico's claims, including non-discrimination aspects under Article 2.1, and other aspects under Article 2.2 and 2.4, and in light of our findings under these provisions, we are not persuaded that it is necessary for us to consider separately and additionally Mexico's claims under Articles I:1 and III:4 of the GATT 1994. Accordingly, we exercise judicial economy in respect of these claims and decline to rule on them."

Relatório do Órgão de Apelação no caso *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* *(US - Tuna II),* Demandante: México, WT/DS381/AB/R, paras. 298-299 e 330-331

O Órgão de Apelação reverteu o entendimento do Painel, determinando que a medida adotada pelos EUA estava inconsistente com o Artigo 2.1 e em consonância com o Artigo 2.2 do Acordo TBT.

Para. 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" 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." 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."

Para. 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*."

Para. 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, even under the restrictions contained in the AIDCP rules. Since under the proposed 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". 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."

Para. 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*."

Relatório do Painel do caso *United States - Certain Country of Origin Labelling COOL Requirements* *(US - COOL)*, Demandantes: Canadá, WT/DS384/R, paras. 7.420 e 7.547-7.548; México, WT/DS386/R, paras. 7.716-7.720 e 7.736

O Painel concluiu que a medida COOL é inconsistente com os Artigos 2.1 e 2.2 do Acordo TBT. Ademais, o Painel rejeitou as alegações canadenses e mexicanas de que a medida seria, ainda, inconsistente com os Artigos 2.4, 12.1, 12.3 do Acordo TBT.

Para. 7.420. "In light of our analysis of the parties' arguments, we find that, in the context of the muscle cut labels, the COOL measure creates an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock. Accordingly, we also find that, in the context of muscle cut labels, the COOL measure de facto discriminates against imported livestock by according less favourable treatment to Canadian cattle and hogs, and to Mexican cattle, especially Mexican feeder cattle, than to like domestic livestock."

Para. 7.547. "We have found above that the complainants have demonstrated that the COOL measure fulfils all three elements of the legal test under Article 2.1 of the TBT Agreement."

Para. 7.548. "Accordingly, we conclude that the COOL measure, in particular in regard to muscle cuts, violates Article 2.1 of the TBT Agreement."

Para. 7.716. "Overall, the mandatory labelling scheme under the COOL measure falls short of providing consumers with information on the country of origin of meat products in an accurate and clear manner."

Para. 7.717. "We acknowledge that labels required to be affixed to meat products according to the requirements under the measure provide additional country of origin information that was not available prior to the COOL measure. We also agree that the labelling requirements under the COOL measure may have reduced consumer confusion that existed under the pre-COOL measure and USDA grade labelling system."

Para. 7.718. "However, we agree with the complainants that origin information on labels as prescribed by the measure does not ensure meaningful information for consumers, except origin information on Label A. Specifically, considered in light of the origin definition as determined by the United States for meat products, the description of origin for Label B and Label C is confusing in terms of the meaning of multiple country names listed in these labels. Moreover, the possibility of interchangeably using Label

B and Label C for all categories of meat based on commingling does not contribute in a meaningful way to providing consumers with accurate information on origin of meat products."

Para. 7.719. "We therefore conclude that the COOL measure does not fulfil the identified objective within the meaning of Article 2.2 because it fails to convey meaningful origin information to consumers. Given this conclusion, we do not consider it necessary to proceed with the next step of the analysis, namely whether the COOL measure is "more trade-restrictive than necessary" based on the availability of less trade-restrictive alternative measures that can equally fulfil the identified objective."

Para. 7.720. "For the foregoing reasons, we conclude that the complainants have demonstrated that the COOL measure does not fulfil the objective of providing consumer information on origin, particularly with respect to meat products, within the meaning of Article 2.2. We therefore find that the United States has acted inconsistently with Article 2.2."

Para. 7.736. "In light of the foregoing, we find that Mexico has not established that the COOL measure violates Article 2.4."

Relatório do Órgão de Apelação no caso *United States - Certain Country of Origin Labelling COOL Requirements (US - COOL),* Demandantes: Canadá, WT/DS384/AB/R; México, WT/DS386/AB/R, paras. 292, 432, 433, 453 e 491

O Órgão de Apelação manteve, apesar de fazê-lo por diferentes razões das apresentadas pelo Painel, que a medida aplicada pelos EUA foi inconsistente com o Artigo 2.1 do TBT e, apesar de reverter o entendimento de que a medida seria inconsistente com o Artigo 2.2, não completou a sua análise sobre este Artigo por faltarem evidências fáticas demonstradas pelo Painel.

Para. 292. "Based on the foregoing, we find that the Panel did not err, in paragraphs 7.372, 7.381, and 7.420 of the Panel Reports, in finding that the COOL measure modifies the conditions of competition in the US market to the detriment of imported livestock by creating an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock."

Para. 432. "We have found above that, although the Panel unnecessarily conducted two analyses of the objective pursued by the United States through the COOL measure, it did not err under Article 2.2 of the TBT Agreement. We so found because the Panel's finding that the objective of the COOL measure is to provide to consumers information on origin was, ultimately, based on a global assessment of the United States' declared objective together with evidence relating to the text, design, structure, and legislative history of the COOL measure. We have rejected arguments by Canada and by Mexico that, in its treatment of the evidence relating to the COOL measure's design, structure, and legislative history, the Panel failed to make an objective assessment of the matter, as required under Article 11 of the DSU. We have also rejected the United States' argument that the Panel erred in applying Article 2.2 of the TBT Agreement and acted inconsistently with its obligations under Article 11 of the DSU in its characterization of the United States' chosen "level of fulfilment". Finally, we have rejected Canada's argument that the Panel erred by failing to define the objective of the COOL measure at a "sufficiently detailed level"."

Para. 433. "On the basis of the above, we find that the Panel did not err, in paragraphs 7.617, 7.620, and 7.685 of the Panel Reports, in identifying the objective pursued by the United States through the COOL measure as being to provide consumer information on origin."

Para. 453. "Based on all of the above, we see no reason to disturb the Panel's finding with respect to the legitimacy of the objective pursued by the United States through the COOL measure, namely, to provide consumers with information on the countries in which the livestock from which the meat they purchase is produced were born, raised, and slaughtered. The Panel's analysis reveals that the arguments and evidence submitted by the complainants failed to persuade the Panel that providing consumers with information on origin, as defined under the COOL measure, is not a legitimate objective. On appeal,

Canada has not shown that the Panel erred in rejecting its arguments and evidence in this regard. We therefore dismiss this ground of Canada's appeal and find that the Panel did not err, in paragraph 7.651 of the Panel Reports, in finding the provision of consumer information on origin is a legitimate objective within the meaning of Article 2.2 of the TBT Agreement."

Para. 491. "Overall, due to the absence of relevant factual findings by the Panel, and of sufficient undisputed facts on the record, we are unable to complete the legal analysis under Article 2.2 of the TBT Agreement and determine whether the COOL measure is more trade restrictive than necessary to fulfil its legitimate objective."

Relatório do Painel do caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US - Clove Cigarettes)*, Demandante: Indonésia, WT/DS406/R, paras. 7.293, 7.294, 7.429-7.432, 7.461-7.463, 7.496-7.497, 7.542, 7.549, 7.595 e 7.649

O Painel considerou que a medida contestada pela Indonésia é incompatível com o Artigo 2.1 do Acordo TBT e que o processo para a sua adoção descumpriu as obrigações contidas nos Artigos 2.9.2 e 2.12 do referido Acordo. O Painel concluiu, ainda, que não restou comprovada a incompatibilidade entre a medida norte-americana e os Artigos 2.2, 2.5, 2.8, 2.9.3 e 12.3 do Acordo TBT.

Para. 7.293. "Having concluded that (i) Section 907(a)(1)(A) is a technical regulation within the definition of Annex 1.1 of the TBT Agreement; (ii) clove cigarettes and menthol cigarettes are like products for the purpose of Article 2.1 of the TBT Agreement and (iii) by banning clove cigarettes while excepting menthol cigarettes from the ban, Section 907(a)(1)(A) does accord imported clove cigarettes less favourable treatment than that it accords to domestic menthol cigarettes, for the purpose of Article 2.1 of the TBT Agreement, we find that Section 907(a)(1)(A) is inconsistent with Article 2.1 of the TBT Agreement."

Para. 7.294. "Having found that Section 907(a)(1)(A) is inconsistent with Article 2.1 of the TBT Agreement, we will therefore not examine Indonesia's alternative claim under Article III:4 of the GATT 1994."

Para. 7.429. "We began by setting out a two-step analysis to structure our examination of Indonesia's claim under Article 2.2 of the TBT Agreement. The first step of our analysis was to consider whether the ban on clove cigarettes pursues a "legitimate objective". The second step of our analysis was to consider whether the ban on clove cigarettes is "more trade restrictive than necessary" to fulfil its legitimate objective of reducing youth smoking (taking into account the risks that non-fulfilment would create)."

Para. 7.430. "Under the first step of our analysis, we concluded that (i) Indonesia has demonstrated that the objective of the ban on clove cigarettes is to reduce youth smoking; and (ii) the objective of the ban on clove cigarettes is "legitimate". Thus, we concluded that the ban on clove cigarettes pursues a "legitimate objective" within the meaning of Article 2.2 of the TBT Agreement."

Para. 7.431. "Under the second step of our analysis, we concluded that: (i) the jurisprudence developed under Article XX(b) of the GATT 1994 is relevant to the interpretation of the "more trade-restrictive than necessary" standard in Article 2.2 of the TBT Agreement; (ii) Indonesia has not demonstrated that the ban on clove cigarettes exceeds the "level of protection" sought by the United States; (iii) Indonesia has not demonstrated that the ban on clove cigarettes makes no "material contribution" to the objective of reducing youth smoking; and (iv) Indonesia has failed to demonstrate that there are less-trade restrictive alternative measures that would make an equivalent contribution to the achievement of the objective at the level of protection sought by the United States. Thus, we concluded that Indonesia has failed to demonstrate that the ban on clove cigarettes is "more trade restrictive than necessary" to fulfil its legitimate objective, taking into account the risks that non-fulfilment would create."

Para. 7.432. "For these reasons, we find that Indonesia has failed to demonstrate that the ban on clove cigarettes imposed by Section 907(a)(1)(A) is more trade-restrictive than necessary to fulfil the legitimate objective of reducing youth smoking, taking account of the risks non-fulfilment would create. Accordingly, we find that Indonesia has failed to demonstrate that Section 907(a)(1)(A) is inconsistent with Article 2.2 of the TBT Agreement."

Para. 7.461. "The Panel therefore finds that Indonesia did not request the United States to explain the justification for Section 907(a)(1)(A) "in terms of Articles 2.2 to 2.4 of the TBT Agreement" through its questions in document G/TBT/W/323. Thus one of the necessary elements of Article 2.5 is missing."

Para. 7.462. "We note that in addition to claiming that Indonesia did not invoke Article 2.5 of the TBT Agreement, the United States says that it complied with Article 2.5 and that it did provide the required information. Given our finding that the United States was not required to provide the explanation referred to in Article 2.5, it is not strictly speaking necessary for this Panel to consider whether the United States would have been in compliance had the request under Article 2.5 in fact been made by Indonesia. Having said that, we note that the United States did in fact provide an explanation with respect to the enactment of Section 907(a)(1)(A) at the TBT Committee Meeting in November 2009 in response to Indonesia's request in document G/TBT/W/323."

Para. 7.463. "Accordingly, we find that Indonesia has failed to demonstrate that the United States acted inconsistently with Article 2.5 of the TBT Agreement."

Para. 7.496. "We further observe that, insofar as Indonesia is arguing that (i) there is a relevant international standard in existence (i.e., ASTM E679 - 04 "Standard Practice for Determination of Odor and Taste Thresholds By a Forced-Choice Ascending Concentration Series Method of Limits") and that (ii) the United States should have used this relevant international standard as a basis for its technical regulation, its argument actually appears to relate to Article 2.4 of the TBT Agreement. In this regard, Indonesia's claim and argument under Article 2.8 of the TBT Agreement once again seems misplaced. In making this observation, we are obviously not expressing any view on whether the United States has acted consistently with Article 2.4 given that Indonesia has made no such claim."

Para. 7.497. "For these reasons, the Panel concludes that Indonesia has not demonstrated that it would be "appropriate" to formulate the technical regulation in Section 907(a)(1)(A) in terms of "performance"."

Para. 7.542. "Accordingly, in the absence of a notification to WTO Members through the Secretariat of the products to be covered by the proposed Section 907(a)(1)(A), together with a brief indication of its objective and rationale, at an early appropriate stage, i.e., when amendments and comments were still possible, the Panel finds that the United States has failed to comply with its obligations under Article 2.9.2 of the TBT Agreement."

Para. 7.549. "Accordingly, we find that, by failing to demonstrate that it had requested the United States to provide particulars or copies of Section 907(a)(1)(A) while it was still in draft form, Indonesia has failed to demonstrate that the United States acted inconsistently with Article 2.9.3 of the TBT Agreement."

Para. 7.595. "The Panel finds that, by not allowing an interval of no less than six months between the publication and the entry into force of Section 907(a)(1)(A), the United States acted inconsistently with Article 2.12 of the TBT Agreement."

Para. 7.649. "The Panel therefore finds that, by failing to demonstrate that the United States did not take account of the special development, financial and trade needs of Indonesia, in the preparation and application of Section 907(a)(1)(A), Indonesia has failed to demonstrate that the United States acted inconsistently with Article 12.3 of the TBT Agreement."

Relatório do Órgão de Apelação do caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US - Clove Cigarettes)*, Demandante: Indonésia, WT/DS406/AB/R, paras. 156, 160, 196, 222, 225 e 233-234

O Órgão de Apelação concordou com o Painel quanto à inconsistência da medida dos EUA com o Artigo 2.1 do TBT, mas chegou à conclusão em apreço, por diferentes métodos de interpretação, nem sempre concordando com a metodologia previamente adotada pelo Painel.

Para. 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."

Para. 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."

Para. 196. "With respect to the group of imported products, the United States claims that the Panel erred in failing to include in its analysis treatment accorded to menthol cigarettes imported into the United States from all Members. We cannot agree. As noted earlier, the national treatment obligation of Article 2.1 calls for a comparison of treatment accorded to the group of like products imported from the Member alleging a violation of Article 2.1, and treatment accorded to the group of like domestic products. It follows that the Panel did not err in finding that a determination of Indonesia's claims under Article 2.1 required an examination of whether Section 907(a)(1)(A) accords to the group of products imported from Indonesia less favourable treatment than that accorded to the group of like products of US origin."

Para. 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 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. The Panel also noted that the "vast majority" of clove cigarettes consumed in the United States came from Indonesia. 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)", 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". 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"."

Para. 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. To the extent that this particular characteristic is present in both clove and menthol cigarettes, 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."

Para. 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."

Para. 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 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."

2. Artigo 2.1

a) "Tratamento não menos favorável"

Relatório do Painel no caso *European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (EC - Trademarks and Geographical Indications),* Demandante: Austrália, WT/DS290/R; EUA, WT/DS174/R, para. 7.469

O Painel entendeu que o simples fato de haver disposições legais distintas para os produtos das Comunidades Europeias não é, por si só, uma violação ao princípio do tratamento nacional. Deve-se analisar a igualdade nas condições de competição entre os produtos e restar comprovado que tais condições são piores para produtos estrangeiros.

Para. 7.469. "The Panel does not consider that the mere fact that imported products and products of European Communities' origin are subject to different legal provisions is in itself conclusive in establishing an inconsistency with the national treatment obligation in Article 2.1 of the TBT Agreement. Nor is it conclusive that the indication of the "country of origin" is both mandatory and express in the Regulation for imported products only, since the Regulation does not mandate that the European Communities must not impose the same labeling requirement on domestic products."

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US - Clove Cigarettes),* Demandante: Indonésia, WT/DS406/R, paras. 7.268-7.269

O Painel entendeu que é necessário comprovar a relação entre medidas que têm impacto negativo na concorrência e a origem estrangeira do produto analizado, caso contrário não há violação ao Artigo III:4 do GATT de 1994.

Para. 7.268. "Therefore, we understand from the above jurisprudence under Article III:4 of the GATT 1994 that what should be considered is whether the equality of competitive conditions between imported and domestic products is affected.(footnote omitted) The Appellate Body indicated in *Korea – Various Measures on Beef* that imported products are treated less favourably than like products if a measure modifies the conditions of competition in the relevant market to the detriment of imported products.494 However, as observed by the Appellate Body in *Dominican Republic – Import and Sale of Cigarettes*, "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, such as the market share of the importer in this case." (footnote omitted) Hence, it is not sufficient to find inconsistency with Article III:4 solely on the basis that the measure at issue adversely affects the conditions of competition for an imported product. The complainant must also show that those adverse effects are related to the foreign origin of the product at issue."

Sobre a matéria, o Órgão de Apelação estabeleceu as seguinte diretrizes:

Para. 7.269. "Overall, the Appellate Body's jurisprudence on the less favourable treatment element under Article III:4 of the GATT 1994 imparts the following guidance: (i) the less favourable treatment test relates to the impact of the measure on the competitive relationship of groups of imports versus groups of domestic like products; (ii) less favourable treatment will exist if the measures modify these conditions of competition to the detriment of the group of imported like products; (iii) a panel is required to consider whether the detrimental effect(s) can be explained by factors or circumstances unrelated to the foreign origin of the product, and (iv) no separate demonstration that the measures are applied "so as to afford protection" is required."

O Painel entendeu, ainda, que o processo para a adoção da medida descumpriu as obrigações contidas nos Artigos 2.9.2 **(1)** e 2.12 **(2)** do Acordo TBT. Por outro lado, o Painel concluiu que não restou comprovada a incompatibilidade entre a medida norte-americana e os Artigos 2.2 **(3)**, 2.5 **(4)**, 2.8 **(5)**, 2.9.3 **(6)** e 12.3 **(7)** do Acordo TBT. Ademais, por motivos de economia judicial, o Painel entendeu desnecessário avaliar o pleito de incompatibilidade entre a medida e o Artigo III.4 do GATT. Com base no mesmo fundamento, o Painel não se manifestou a respeito da defesa dos EUA pelo Artigo XX (b) do GATT em resposta à possível violação ao Artigo III.4 do GATT.

Relatório do Órgão de Apelação no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US - Clove Cigarettes)*, Demandante: Indonésia, WT/DS406/AB/R, paras. 169, 173, 179, 181 e 190

O Órgão de Apelação manteve o entendimento de que a medida adotada pelos EUA não respeitava a regra de não discriminação. Em sua interpretação, o Órgão de Apelação determinou que o Artigo 2.1 não deveria ser lido no sentido de que, qualquer distinção adotada por um Membro, deve significar que esta concede tratamento menos favorável, mas que a medida pode perseguir os seus objetivos, contanto que não seja aplicada de uma forma que constitua um meio de discriminação arbitrária ou injustificável. Cumpridos estes termos, o Órgão entendeu que a medida não poderá modificar as condições de concorrência no mercado, em detrimento do grupo de produtos importados vis-á-vis o grupo de produtos domésticos.

Para. 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."

Para. 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."

Para. 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."

Para. 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, the "treatment no less favourable" requirement of Article 2.1 only prohibits de jure and de facto discrimination against the group of imported products."

Para. 190. "Article 2.1 provides that "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 like products originating in any other country". The text of Article 2.1 thus calls for a comparison of treatment accorded to, on the one hand, products imported from any Member alleging a violation of Article 2.1, and treatment accorded to, on the other hand, like products of domestic and any other origin. Therefore, for the purposes of the less favourable treatment analysis, treatment accorded to products imported from the complaining Member is to be compared with that accorded to like domestic products and like products of any other origin."

Relatório do Painel no caso *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US - Tuna II)*, Demandante: México, WT/DS381/R, paras. 7.275-7.276

O Painel considerou que o tratamento distinto concedido a produtos com base em certas características, como o processo de produção, não é uma violação ao Artigo 2.1 do TBT. Porém, caso a distinção seja aplicada em detrimento de certas origens, restará caracterizada a violação ao referido Artigo.

Para. 7.275. "In our view, such "equality" of treatment does not necessarily imply identity of treatment for all products, but rather an absence of inequality to the detriment of imports from any Member.Here, we see some commonality between this requirement and the non-discrimination obligations embodied in Articles III:4 and Article I:1 of the GATT 1994. Under Article III:4, the Appellate Body thus observed that:

> [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. (Appellate Body Report, EC – Asbestos, para. 100)

Para. 7.276. "The same reasoning extends also to Article 2.1 of the TBT Agreement. The essence of the measures covered under this provision is to set out certain product characteristics or their related processes and production methods (or terminology, symbols, packaging, marking or labelling requirements as they apply to products or related processes and production methods), that must be complied with. Distinctions in treatment may therefore arise in this context, but they must not be designed or applied to the detriment of imports or imports of certain origins. In the context of Article 2.1 of the TBT Agreement, this question is also informed by the terms of the preamble, 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."

Ao final, ainda que uma violação ao Artigo 2.1 não tenha sido estabelecida, por motivos de economia judicial, o Painel se absteve de analisar as alegações relacionadas ao GATT:

Relatório do Órgão de Apelação no caso *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US - Tuna II)*, Demandante: México, WT/DS381/AB/R, paras. 211, 215, 221, 226-227, 231, 239-240, 284 e 298-299

O Órgão de Apelação reverteu o entendimento do Painel, e considerou que, para avaliar se há uma violação à regra de não discriminação deve-se considerar se a medida em questão modifica as condições de competição no mercado, e se os efeitos prejudiciais desta se traduzem em discriminação.

Para. 211. "Article 2.1 of the *TBT Agreement* applies "in respect of technical regulations". A technical regulation is defined in Annex 1.1 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. Article 2.1 should not be read therefore to mean that any distinctions, in particular ones that are based exclusively on particular product characteristics or on particular processes and production methods, would *per se* constitute "less favourable treatment" within the meaning of Article 2.1." (footnote omitted)

Para. 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. The existence of such a detrimental effect is not sufficient to demonstrate less favourable treatment under Article 2.1. 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." (footnote omitted)

Para. 221. "An enquiry into whether a measure comports with the "treatment no less favourable" requirement in Article 2.1 does not hinge on whether the imported products could somehow get access to an advantage, for example, by complying with all applicable conditions. Rather, as explained above, a determination of whether imported products are accorded "less favourable treatment" within the meaning of Article 2.1 of the *TBT Agreement* calls for an analysis of whether the contested measure modifies the conditions of competition to the detriment of imported products. Contrary to what the Panel appears to have assumed, the fact that a complainant could comply or could have complied with the conditions imposed by a contested measure does not mean that the challenged measure is therefore consistent with Article 2.1 of the *TBT Agreement"*.

Para. 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. As noted, technical regulations inherently establish 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."

Para. 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."

Para 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. Second, we will review whether any detrimental impact reflects discrimination against the Mexican tuna products."

Para. 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. 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."

Para. 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."

Para. 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 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."

Para. 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" 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." 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."

Para. 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."

Relatório do Painel no caso *United States - Certain Country of Origin Labelling COOL Requirements (US - COOL),* Demandantes: Canadá, WT/DS384/R; México, WT/DS386/R, paras. 7.275-7.277

O Painel entendeu que o Artigo III:4 do GATT de 1994 estabelece o contexto para interpretar o Artigo 2.1 do TBT. Destarte, o sentido previsto no primeiro Artigo significa "garantir um tratamento não menos favorável do que os produtos de origem nacional".

Para. 7.275. "We have noted the similarities between the text and structure of the national treatment obligations under Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, and that, according to its preamble, the TBT Agreement serves "to further the objectives of GATT 1994". (footnote omitted) Hence, we have concluded that Article III:4 of the GATT 1994 provides relevant context for interpreting Article 2.1 of the TBT Agreement – in particular, for interpreting the term "treatment no less favourable than that accorded to like products of national origin"." (footnote omitted)

Para. 7.276. "We recall that Article III:4 of the GATT 1994 ultimately serves to further the "equality of competitive conditions for imported products in relation to domestic products" or "the equal competitive relationship between imported and domestic products", rather than "expectations ... of any particular trade volume". (Appellate Body Report, Japan – Alcoholic Beverages II, p. 16. See also Appellate Body Report, EC – Asbestos, para. 93) Further, in *Korea – Various Measures on Beef,* the Appellate Body held, in the context of Article III:4 of the GATT 1994, that "[a]ccording 'treatment no less favourable' means ... according conditions of competition no less favourable to the imported product than to the like domestic product"." (Appellate Body Report, Korea – Various Measures on Beef, para. 135) (See also ibid., paras. 136-137)

Para. 7.277. "We bear this and the interpretation of Article III:4 of the GATT 1994 in mind in analysing whether the COOL measure involves less favourable treatment for imported livestock under Article 2.1 of the TBT Agreement."

Relatório do Órgão de Apelação no caso *United States - Certain Country of Origin Labelling COOL Requirements (US - COOL),* Demandantes: Canadá, WT/DS384/AB/R; México, WT/DS386/AB/R, paras. 267-271 e 349-350

O Órgão de Apelação confirmou o entendimento do Painel, determinando que a medida produz um impacto negativo decorrente de uma discriminação e que esta é arbitrária e injustificável.

Para. 267. "Article 2.1 contains both a national treatment obligation and a most favoured nation ("MFN") treatment obligation. The MFN treatment obligation prohibits discrimination through technical regulations among like products imported from different countries, while the national treatment obligation prohibits discrimination between domestic and imported like products. In order to establish a violation of the national treatment obligation in Article 2.1, a complainant must demonstrate three elements: (i) that the measure at issue is a "technical regulation" as that term is defined in Annex 1.1 to the TBT Agreement; (ii) that the imported and domestic products at issue are "like products"; and (iii) that the measure at issue accords less favourable treatment to imported products than to like domestic products. The first two of these elements have previously been addressed by the Appellate Body, and are not at issue in this appeal."

Para. 268. "With regard to the national treatment obligation, which is the particular obligation before us in these disputes, an analysis of less favourable treatment involves an assessment of 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. At the same time, the specific context of Article 2.1 of the TBT Agreement - which includes Annex 1.1; Article 2.2; and the second, fifth, and sixth recitals of the preamble - supports a reading that Article 2.1 does not operate to prohibit a priori any restriction on international trade. As the Appellate Body has already observed, technical regulations are measures that, by their very nature, establish distinctions between products according to their characteristics, or related processes and production methods, as reflected in Annex 1.1 to the TBT Agreement. Therefore, Article 2.1 should not be read to mean that any distinctions, in particular ones that are based exclusively on such particular product characteristics or on particular processes and production methods, would per se constitute less favourable treatment within the meaning of Article 2.1."

Para. 269. "The Appellate Body recognized in US - Clove Cigarettes and US - Tuna II (Mexico) that relevant guidance for interpreting the term "treatment no less favourable" in Article 2.1 may be found in the jurisprudence relating to Article III:4 of the GATT 1994. As under Article III:4, the national treatment obligation of Article 2.1 prohibits both de jure and de facto less favourable treatment. That is, "a measure may be de facto inconsistent with Article 2.1 even when it is origin-neutral on its face." In such a case, the panel must take into consideration "the totality of facts and circumstances before it", and assess any "implications" for competitive conditions "discernible from the design, structure, and expected operation of the measure". Such an examination must take account of all the relevant features of the market, which may include the particular characteristics of the industry at issue, the relative market shares in a given industry, consumer preferences, and historical trade patterns. That is, a panel must examine the operation of the particular technical regulation at issue in the particular market in which it is applied."

Para. 270. "In the context of both Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement, for a measure to be found to modify the conditions of competition in the relevant market to the detriment of imported products, there must be a "genuine relationship" between the measure at issue and the adverse impact on competitive opportunities for imported products. In each case, the relevant question is whether it is the governmental measure at issue that "affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory". While a measure may not require certain treatment of imports, it may nevertheless create incentives for market participants to behave in certain ways, and thereby treat imported products less favourably. However, changes in the competitive conditions in a marketplace that are "not imposed directly or indirectly by law or governmental regulation, but [are] rather solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits", cannot be the basis for a finding that a measure treats imported products less favourably than domestic like products. In every case, it is the effect of the measure on the competitive opportunities in the market that is relevant to an assessment of whether a challenged measure has a detrimental impact on imported products."

Para. 271. "If a panel determines that a measure has such an impact on imported products, however, this will not be dispositive of a violation of Article 2.1. This is because not every instance of a

detrimental impact amounts to the less favourable treatment of imports that is prohibited under that provision. Rather, some technical regulations that have a de facto detrimental impact on imports may not be inconsistent with Article 2.1 when such impact stems exclusively from a legitimate regulatory distinction. In contrast, where a regulatory distinction is not designed and applied in an even handed manner - because, for example, it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination - that distinction cannot be considered "legitimate", and thus the detrimental impact will reflect discrimination prohibited under Article 2.1. In assessing even handedness, 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"."

Para. 349. "In sum, our examination of the COOL measure under Article 2.1 reveals that its recordkeeping and verification requirements impose a disproportionate burden on upstream producers and processors, because the level of information conveyed to consumers through the mandatory labelling requirements is far less detailed and accurate than the information required to be tracked and transmitted by these producers and processors. It is these same recordkeeping and verification requirements that "necessitate" segregation, meaning that their associated compliance costs are higher for entities that process livestock of different origins. Given that the least costly way of complying with these requirements is to rely exclusively on domestic livestock, the COOL measure creates an incentive for US producers to use exclusively domestic livestock and thus has a detrimental impact on the competitive opportunities of imported livestock. Furthermore, the recordkeeping and verification requirements imposed on upstream producers and processors cannot be explained by the need to convey to consumers information regarding the countries where livestock were born, raised, and slaughtered, because the detailed information required to be tracked and transmitted by those producers is not necessarily conveyed to consumers through the labels prescribed under the COOL measure. This is either because the prescribed labels do not expressly identify specific production steps and, in particular for Labels B and C, contain confusing or inaccurate origin information, or because the meat or meat products are exempt from the labelling requirements altogether. Therefore, the detrimental impact caused by the same recordkeeping and verification requirements under the COOL measure can also not be explained by the need to provide origin information to consumers. Based on these findings, we consider that the regulatory distinctions imposed by the COOL measure amount to arbitrary and unjustifiable discrimination against imported livestock, such that they cannot be said to be applied in an even-handed manner. Accordingly, we find that the detrimental impact on imported livestock does not stem exclusively from a legitimate regulatory distinction but, instead, reflects discrimination in violation of Article 2.1 of the TBT Agreement."

Para. 350. "We therefore uphold, albeit for different reasons, the Panel's ultimate finding, in paragraph 7.548 of the Panel Reports, that the COOL measure, particularly in regard to the muscle cut meat labels, is inconsistent with Article 2.1 of the TBT Agreement because it accords less favourable treatment to imported livestock than to like domestic livestock."

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes* (*US - Clove Cigarettes),* Demandante: Indonésia, WT/DS406/R, paras. 7.91-7.93 e 7.114-7.117

O Painel entendeu que o conceito de "similaridade" deve ser considerado à luz do Artigo III:4 do GATT de 1994.

Para. 7.91. "We must decide how we will approach the interpretation of the national treatment component of Article 2.1 of the TBT Agreement, in particular with respect to our "likeness" analysis. We see several options open to us. First, we could interpret Article 2.1 of the TBT Agreement following Article III:4 of the GATT 1994 jurisprudence. Under this approach, the jurisprudence under Article III:4 of the GATT 1994, which is mainly focussed on the nature and extent of a competitive relationship between the domestic and imported products at issue, would be directly transposable in its entirety to Article 2.1 of the TBT Agreement, based on the similarity of their respective language."

Para. 7.92. "Second, we could interpret Article 2.1 of the TBT Agreement in the context of the provision itself and that of the TBT Agreement, without transposing any of the jurisprudence on Article III:4 of the GATT 1994, as this is but one of the concepts of "like products" found in the WTO Agreement. Under this approach, one would not focus on the competition-based approach that has been developed in the jurisprudence on Article III:4 of the GATT 1994."

Para. 7.93. "Third, we could follow the approach suggested by the parties, which consists of interpreting Article 2.1 of the TBT Agreement taking into account both the jurisprudence under Article III:4 of the GATT 1994 and the context of the TBT Agreement. We could also follow the United States' suggestion to take into account the "public health objectives" of Section 907(a)(1)(A) when interpreting likeness under Article 2.1 of the TBT Agreement."

Para. 7.114. "In our view, the sixth preambular recital combined with the necessity requirement in Article 2.2 of the TBT Agreement (footnote omitted) 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, given the nature of the measures contemplated under the TBT Agreement."

Para. 7.115. "The United States also argues that this means that the "likeness" analysis under both the GATT1994 and the TBT Agreement should be informed by the specific context of the TBT Agreement by considering "not only the nature of the competitive relationship among and between products but also the nature of the public health basis upon which the technical regulation at issue is based". (footnote omitted) In particular, the United States has asked the Panel to "carefully parse the significance of traits that are generally shared among all cigarettes and traits that are significant with respect to the public health objective of the measure at issue." (footnote omitted) The United States tells us that the public health basis of Section 907(a)(1)(A) should be considered for the "likeness" analysis under Article 2.1 of the TBT Agreement, "as there are certain 'contextual principles' that inform the national treatment obligation". (footnote omitted) We note that this position goes further than that explained above about taking into account the immediate purpose of Section 907(a)(1)(A) as a technical regulation, which is to regulate cigarettes with characterizing flavours."

Para. 7.116. "We agree that, in the context of the TBT Agreement and in the light of its object and purpose expressed by the preambular recitals referred to above, we must bear in mind the significance of the public health objective of a technical regulation and how certain features of the relevant products, their end-uses as well as the perception consumers have about them, must be evaluated in the light of that objective. In the present case, the declared legitimate public health objective of Section 907(a)(1)(A), i.e., the reduction of youth smoking, must permeate and inform our likeness analysis."

Para. 7.117. "On the basis of the considerations above, we conclude that our approach to interpreting Article 2.1 of the TBT Agreement must ensure that the TBT Agreement is addressed first as immediate context of Article 2.1 of the TBT Agreement. The jurisprudence under Article III:4 of the GATT 1994, which provision also serves as context albeit not immediate, may also be considered. In our view, such jurisprudence is relevant because Article III:4 of the GATT 1994 shares almost identical wording with Article 2.1 of the TBT Agreement."

Relatório do Painel no caso *United States - Measures Concertning the Importation, Marketing and Sale of Tuna and Tuna Products (US - Tuna II)*, Demandante: México, WT/DS381/R, paras. 7.222-7.225

O Painel aplicou por analogia a jurisprudência do Artigo III:4 do GATT 1994 em relação a "produtos similares", porém alegou ser necessário se pautar no contexto oferecido pelo preâmbulo do TBT. Segue, abaixo, trechos do Relatório.

Para. 7.222. "Accordingly, our understanding of how narrowly or broadly the accordion of likeness "stretches and squeezes" for the purposes of our examination of Mexico's claims under Article 2.1 of the TBT Agreement in this case or, in other words, the "degree or extent to which products must share

qualities or characteristics" and the perspective from which this is to be examined in the case at hand, must be informed by the fact that our examination takes place under Article2.1 of the TBT Agreement, as well as by the context and circumstances that prevail in this case."

Para. 7.223. "We also note that the terms of this provision very closely mirror those of Article III:4, the national treatment obligation in the GATT 1994, so that it may be possible to seek guidance from the interpretation of that provision. At the same time, we are mindful that Article2 of the TBT Agreement does not contain an introductory paragraphcomparable to ArticleIII:1 of the GATT 1994, setting out a "general principle" that would inform our understanding of the exact degree or extent to which products must share qualities or characteristics so as to be considered like in the context of Article 2, and the perspective from which this is to be examined. In the context of Article III:4, the Appellate Body determined that:

> As products that are in a competitive relationship in the marketplace could be affected through treatment of imports 'less favourable' than the treatment accorded to domestic products, it follows that the word 'like' in Article III:4 is to be interpreted to apply to products that are in such a competitive relationship. Thus, a determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products." (Appellate Body Report, EC – Asbestos, para. 99)

Para. 7.224. "Although this statement was made in the context of Article III:4 of the GATT 1994, we find it pertinent also to an interpretation of the terms "like products" in Article 2.1 of the TBT Agreement."

Para. 7.225. "The TBT Agreement applies to a limited set of measures, and our understanding of its terms, including the terms "like products" must be informed by this context. As expressed in the preamble of the TBT Agreement, this Agreement reflects the intention of the negotiators to:

> [E]nsure 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 trade. To the extent that Article 2.1 contributes to avoiding "unnecessary obstacles to trade" arising from undue discrimination with respect to technical regulations, it seeks to preserve the competitive opportunities of products originating in any Member, in relation to technical regulations. Thus, the term "like products" under Article 2.1 of the TBT Agreement may be similarly understood as relating to "the nature and extent of a competitive relationship" between and among products."

Relatório do Painel no caso *United States - Certain Country of Origin Labelling COOL Requirements* *(US - COOL)*, Demandante: Canadá, WT/DS384, 386/R, paras. 7.230-7.234

O Artigo III:4 do GATT 1994 compartilha de duas características essenciais do Artigo 2.1 do TBT ("produtos similares" e "tratamento não menos favorável"), por esse motivo deve ser considerado um contexto relevante para o último.

Para. 7.230. "Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 both set out, in relevant part, a "national treatment obligation" (footnote omitted) and have textual similarities.(footnote omitted) They contain the same key phrase: "treatment no less favourable than that accorded to like products of national origin". Two parts of this phrase, "like products" and "treatment no less favourable", serve also as key elements of the legal test under both provisions. The above-quoted formulation of these two elements under the legal test for Article 2.1 of the TBT Agreement (footnote omitted) is quite similar to relevant elements of the legal test under Article III:4 of the GATT 1994." (footnote omitted)

Para. 7.231. "As Mexico points out, in US – Section 211 Appropriations Act the Appellate Body found that, given the fundamental role of the national treatment principle for the TRIPS Agreement and the

similarity in the language of the relevant provisions, "Article III:4 of the GATT 1994 may be useful in interpreting the national treatment obligation in the TRIPS Agreement"." (Appellate Body Report, *US – Section 211 Appropriations Act*, para. 242)

Para. 7.232. "Further, the panel in *Japan – Film* noted that the term "no less favourable treatment" is "to be found throughout the General Agreement and later Agreements negotiated in the GATT framework as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given either to other foreign products, under the most favoured nation standard, or to domestic products, under the national treatment standard of Article III." (original footnote omitted) (Panel Report, *Japan – Film*, para. 10.379)

Para. 7.233. "According to its preamble, the TBTAgreement serves "to further the objectives of GATT 1994". (footnote omitted) Also, "no conflicting, i.e. mutually exclusive, obligations arise" (footnote omitted) from Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 in the sense of the General Interpretive Note to Annex 1A to the WTO Agreement."

Para. 7.234. "In light of the above similarities and linkages between the two provisions, and taking into account the above-quoted Appellate Body and panel reports, we conclude that Article III:4 of the GATT 1994 provides relevant context for interpreting Article 2.1 of the TBT Agreement, in particular for interpreting the term "no less favourable treatment than that accorded to like products of national origin."

b) "like products"

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US - Clove Cigarettes)*, Demandante: Indonésia, WT/DS406/R, paras. 7.121 e 7.148

O Painel entendeu que o conceito de "similaridade" deve ser considerado à luz de quatro critérios gerais (conforme o "Report of the GATT Working Party on Border Tax Adjustments"): (i) as propriedades, natureza e qualidade dos produtos; (ii) os usos a que os produtos forem destinados; (iii) preferências dos consumidores; e (iv) a classificação tarifária.

Para. 7.121. "The Report of the GATT Working Party on Border Tax Adjustments outlines an approach for analysing "likeness" that has since been followed and developed by panels and the Appellate Body. 264 This approach consists, essentially, of employing four general criteria in analysing "likeness":

> (a) the properties, nature and quality of the products;
> (b) the end-uses of the products;
> (c) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and
> (d) the tariff classification of the products." (footnote omitted)

Para. 7.148. "With that in mind, we will examine each of the four criteria of the traditional likeness analysis in turn. We recall that the Appellate Body has ruled that panels which decide to follow this path must examine "the evidence relating to each of those four criteria and, then, weigh ... all of that evidence, along with any other relevant evidence, in making an overall determination of whether the products at issue could be characterized as 'like'". We also recall that the Panel, once all the relevant evidence has been examined, must determine whether "that evidence, as a whole, indicates that the products in question are 'like' in terms of the legal provision at issue", i.e., in terms of Article 2.1 of the TBT Agreement."

Relatório do Órgão de Apelação no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US - Clove Cigarettes)*, Demandante: Indonésia, WT/DS406/AB/R, paras. 108, 111-112, 136, 145 e 158-160

O Órgão de Apelação, apesar de confirmar o entendimento do Painel quanto à similaridade dos produtos, o fez por diferentes razões. Explicou que se deve dar preferência à análise do relacionamento competitivo entre os produtos mais do que à análise dos objetivos regulatórios da medida, mesmo que estes parâmetros sejam adotados. Utilizou também do entendimento sobre os usos finais dos produtos, da preferência dos consumidores e da não contestada classificação tarifária similar.

Para. 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 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."

Para. 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 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."

Para. 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."

Para. 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. 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."

Para. 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."

Para. 158. "In respect of end use, we have disagreed with the Panel's conclusion that the end use of clove and menthol cigarettes is simply "to be smoked". Nevertheless, we have considered, based on the Panel's findings, that both clove and menthol cigarettes are capable of performing the more specific end uses put forward by the United States, that is, "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke". We have thus concluded that the different end uses of clove and menthol cigarettes support the Panel's overall finding of likeness."

Para. 159. "Finally, we observe that the United States has not appealed the Panel's findings regarding the physical characteristics and the tariff classification of clove and menthol cigarettes. The Panel found that clove and menthol cigarettes are physically similar as "they share their main traits as cigarettes, that is, having tobacco as a main ingredient, and an additive which imparts a characterizing flavour, taste and aroma, and reduces the harshness of tobacco"; and that they are both classified under subheading 2402.20 of the Harmonized Commodity Description and Coding System."

Para. 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."

Relatório do Painel no caso *United States - Measures Concertning the Importation, Marketing and Sale of Tuna and Tuna Products* (*US - Tuna II),* Demandante: México, WT/DS381/R, paras 7.240-7.241

Constatou-se, no entanto, que a adoção de um parâmetro específico para analisar provas específicas não exclui o dever ou a necessidade de examinar todas as provas pertinentes.

Para. 7.240. "In light of our earlier conclusions in paragraph 7.223 above, and in the circumstances of this case, we find it a priori appropriate to consider the four general criteria used by Mexico, to determine whether Mexican and other tuna products are like within the meaning of Article2.1 of TBT Agreement. These elements are apt to provide information about the extent and nature of the similarities between these products, so as to ascertain the nature and extent of their (actual or expected) competitive relationship."

Para. 7.241. "We take note also of the Appellate Body's observation, in the context of Article III:4 of the GATT 1994 that "the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, all of the pertinent evidence". (footnote omitted) This consideration applies similarly in the context of Article 2.1 of the TBT Agreement."

Relatório do Painel no caso *United States - Certain Country of Origin Labelling COOL Requirements* *(US - COOL),* Demandante: Canadá, WT/DS384, 386/R, para. 7.254

Produtos que foram discriminados exclusivamente com base em suas origens foram considerados similares por toda a jurisprudência abaixo.

Para. 7.254. "We recall that, in previous disputes, products that are distinguished solely on the basis of their origin were found to be like products within the meaning of Article III:4." (Panel Report, *Turkey – Rice*, para. 7. 214. See also ibid., para. 7.216, Panel Report, Canada – Autos, para. 10.74, Panel Report, *US – FSC* (Article 21.5 – EC), para. 8.133, Panel Report, *India – Autos*, para. 7.174 and Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.164 and footnote 246). The guidance of these panels is also relevant for the complainants' claims under Article 2.1 of the TBT Agreement in this dispute)."

c) "economia judicial"

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US - Clove Cigarettes)*, Demandante: Indonésia, WT/DS406/R, paras. 7.294 e 7.306-7.307

A seguir, o entendimento do Painel sobre o tema "economia judicial":

Para. 7.294. "Having found that Section 907(a)(1)(A) is inconsistent with Article 2.1 of the TBT Agreement, we will therefore not examine Indonesia's alternative claim under Article III:4 of the GATT 1994."

Para. 7.306. "We recall that the Panel has found that Section 907(a)(1)(A) is inconsistent with Article 2.1 of the TBT Agreement. More specifically, we have found that Section 907(a)(1)(A) accords clove cigarettes (a product imported from Indonesia) less favourable treatment than that accorded to a like product of national origin (i.e., menthol cigarettes)." (footnote omitted)

Para. 7.307. "We also recall that, having reached this conclusion, we decided not to examine Indonesia's alternative claim under Article III:4 of the GATT 1994, and, therefore, we have made no finding of violation in respect of this provision. It follows that there is no need for the Panel to consider the question of whether a violation of that provision could be justified under Article XX(b) of the GATT 1994. Thus, as a consequence of our decision to not examine Indonesia's claim of violation of ArticleIII:4 of the GATT1994, we refrain from considering the UnitedStates' defence, under Article XX(b) of the GATT 1994, to the alleged violation of Article III:4 of the GATT 1994.547."

Relatório do Painel no caso *United States - Measures Concertning the Importation, Marketing and Sale of Tuna and Tuna Products (US - Tuna II)*, Demandante: México WT/DS381/R, paras 7.746-7.748

Abaixo trecho do Relatório do Painel sobre economia judicial:

Para. 7.746. "We note that Mexico's claims under the GATT 1994 are non-discrimination claims under Articles I:1 and III:4. We also note that in the context of considering Mexico's claims under the TBT Agreement, we have considered among others, Mexico's non-discrimination claims under Article 2.1 of that Agreement."

Para. 7.747. "We further recall that, in the presentation of its arguments to the Panel under the TBT Agreement, Mexico consistently referred the Panel to its arguments under Articles I.1 and III:4 of the GATT 1994 (and the United States similarly referred to its own responses under the GATT 1994). In that context, Mexico argued that Article 2.1 of the TBT Agreement contains two non-discrimination obligations applicable to technical regulations, one that is similar to the national treatment obligation in Article III:4 and the other that is similar to the most-favoured-nation obligation in Article I:1, and that although language used in Article 2.1 is different from that used in Articles III:4 and I:1, both of these GATT 1994 provisions offer guidance on how to interpret Article 2.1.985 Mexico has not provided any explanation for its contrary view expressed in the context of its request that the Panel refrain from exercising judicial economy, that it was necessary to rule on these claims under both agreements and under both contexts (national treatment and MFN) because the nature, scope and application of the claims under Articles I:1 and III:4 of the GATT 1994, and Article 2.1 of the TBT Agreement, are different, and address different rights and obligations which, in turn, will have different implications during the implementation phase of this dispute." (footnote omitted)

Para. 7.748. "In light of the fact that we have addressed, in the context of our examination of Mexico's claims under the TBT Agreement, all aspects of Mexico's claims, including non-discrimination aspects under Article 2.1, and other aspects under Article 2.2 and 2.4, and in light of our findings under these

provisions, we are not persuaded that it is necessary for us to consider separately and additionally Mexico's claims under Articles I:1 and III:4 of the GATT 1994. Accordingly, we exercise judicial economy in respect of these claims and decline to rule on them." (footnote omitted)

Relatório do Órgão de Apelação no caso *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US - Tuna II)*, Demandante: México, WT/DS381/AB/R, paras. 403-406

O Órgão de Apelação entendeu que o Painel aplicou incorretamente o conceito de economia processual, e que tal instrumento pode ser usado desde que isto não leve a uma resolução parcial da matéria em questão.

Para. 403. "We recall that the principle of judicial economy "allows a panel to refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute." Consequently, "[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute." Nonetheless, the Appellate Body also cautioned that:

> [t]he principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and "to secure a positive solution to a dispute". To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members." (footnotes omitted)

Para. 404. "Accordingly, "panels may refrain from ruling on every claim as long as it does not lead to a 'partial resolution of the matter'."

Para. 405. "To us, it seems that the Panel's decision to exercise judicial economy rested upon the assumption that the obligations under Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994 are substantially the same. This assumption is, in our view, incorrect. In fact, as we have found above, the scope and content of these provisions is not the same. Moreover, in our view, the Panel should have made additional findings under the GATT 1994 in the event that the Appellate Body were to disagree with its view that the measure at issue is a "technical regulation" within the meaning of the TBT Agreement. As a result, it would have been necessary for the Panel to address Mexico's claims under the GATT 1994 given that the Panel found no violation under Article 2.1 of the TBT Agreement. By failing to do so, the Panel engaged, in our view, in an exercise of "false judicial economy" and acted inconsistently with its obligations under Article 11 of the DSU."

Para. 406. "In response to questioning at the oral hearing in this appeal, Mexico explained that it was not requesting that we complete the legal analysis by ruling on Mexico's claims under the GATT 1994 if we were to find the US measure to be inconsistent with Article 2.1 of the TBT Agreement. As we have found the US "dolphin-safe" labelling provisions to be inconsistent with Article 2.1, we consider it not necessary for us to complete the legal analysis in this case. Accordingly, we make no finding in relation to Mexico's separate claims that the US "dolphin-safe" labelling provisions are inconsistent with Article I:1 and Article III:4 of the GATT 1994."

d) "discriminação 'de jure' e 'de facto'"

Relatório do Painel no caso *United States - Certain Country of Origin Labelling COOL Requirements (US - COOL)*, Demandante: Canadá, WT/DS384/R e WT/DS386/R, paras. 7.300-7.301 e 7.403-7.404

O Painel entendeu que o Artigo 2.1 do TBT não deve ser limitado às discriminações de direito, aplicando-se também às discriminações de fato.

Para. 7.300. "To effectively ensure equality of competitive conditions, Article 2.1 of the TBT Agreement cannot exclude measures that discriminate in effect. Limiting Article 2.1 of the TBT Agreement to de jure discrimination would facilitate circumvention. As the Appellate Body explained in *EC – Bananas III* with regard to Article II of the GATS:

> [I]f Article II was not applicable to de facto discrimination, it would not be difficult – and, indeed, it would be a good deal easier in the case of trade in services, than in the case of trade in goods – to devise discriminatory measures aimed at circumventing the basic purpose of that Article." (Appellate Body Report, EC – Bananas III, para. 233)

Para. 7.301. "As the TBT Agreement serves "to further the objectives of GATT 1994", it would be incongruous to interpret Article 2.1 of the TBT Agreement as excluding de facto discriminatory treatment, while the corresponding national treatment provision in Article III:4 of the GATT 1994 covers that type of discrimination."

Para. 7.403. "It is the result of the COOL measure, in particular the 2009 Final Rule (AMS), that in the circumstances of the US market, market participants, when faced with the choice between a scenario involving exclusively domestic livestock and a scenario involving both domestic and imported livestock, opted predominantly for the former. While the small market share of imported livestock influenced this choice, that very choice was made necessary by the COOL measure. Indeed, as the history of the COOL measure shows, market participants would not have opted this way, and the small market share of imported livestock per se did not dictate such an option either."

Para. 7.404. "Thus, in the circumstances of the US market, the COOL measure, in particular the 2009 Final Rule (AMS), creates an incentive in favour of domestic livestock and negatively affects the competitive conditions of imported livestock. Hence, we disagree with the United States that this effect is attributable exclusively to factors distinct from the COOL measure."

Ademais, o Painel concluiu que há violação ao Artigo 2.2 do Acordo TBT, **(8)** bem como ao Artigo X:3 do GATT. **(9)** Por outro lado, o Painel rejeitou as alegações canadenses e mexicanas de que a medida seria, ainda, inconsistente com os Artigos 2.4 **(10)**, 12.1 **(11)** e 12.3 **(12)** do Acordo TBT. Por motivos de economia judicial, o Painel não analisou as alegações relacionadas ao Artigo III:4 do GATT.

Relatório do Órgão de Apelação no caso *United States - Certain Country of Origin Labelling COOL Requirements* *(US - COOL)*, Demandantes: Canadá, WT/DS384/AB/R; México, WT/DS386/AB/R, paras. 277-279, 286 e 289

O Órgão de Apelação confirmou a análise feita pelo Painel de que todas as circunstâncias factuais que possam criar qualquer impacto adverso na conjuntura competitiva do mercado devem ser levadas em consideração na análise do Artigo 2.1. Considerou, então, que a medida dos EUA cria factualmente um incentivo para os produtores americanos discriminarem produtos de origens estrangeiras.

Para. 277. "As discussed above, a finding of formal different treatment is not required for a finding of de facto less favourable treatment to be made. In the context of Article III:4 of the GATT 1994, the Appellate Body has expressly found that "[a] formal difference in treatment between imported and like domestic products is … neither necessary, nor sufficient, to show a violation" of the national treatment obligation."

Para. 278. "In any event, we do not consider that the Panel in this case relied on any instance of different treatment explicitly provided for under the COOL measure to support its ultimate finding that the COOL measure accords less favourable treatment to imported livestock than to like domestic

livestock. As described above, the statement challenged by the United States was made as part of the Panel's explanation of the terms and requirements of the COOL measure, and the Panel itself did not characterize it as a finding or a legal conclusion. Indeed, the Panel expressly recognized that the formally different treatment of imported and like domestic products does not necessarily constitute less favourable treatment. Moreover, the Panel stated that "this difference" under the COOL measure was only "the starting point" of its analysis, and highlighted that the claims before it were claims of de facto less favourable treatment."

Para. 279. "The statement challenged by the United States thus forms part of an introductory section setting out the Panel's understanding of the measure's de jure structure and operation, and precedes its indepth analysis of de facto discrimination. We view the statement, made at this initial stage of the Panel's reasoning, merely as a passing observation regarding the extent to which the COOL measure de jure treats imported livestock differently than domestic livestock. Furthermore, the Panel's later conclusions with regard to the COOL measure's de facto inconsistency with Article 2.1 are not based on this statement, or even directly connected to it. We also note that the United States does not challenge under Article 11 of the DSU any of the explanations or assessments made by the Panel in this initial section of its analysis setting out its understanding of the relationships among muscle cut labels under the COOL measure. For these reasons, we find that the Panel did not err, in paragraph 7.295 of the Panel Reports, in stating that the COOL measure treats imported livestock differently than domestic livestock."

Para. 286. "We first recall that, as explained above, Article 2.1 of the TBT Agreement prohibits both de jure and de facto discrimination between domestic and like imported products. Therefore, where a technical regulation does not discriminate de jure, a panel must determine whether the evidence and arguments adduced by the complainant in a specific case nevertheless demonstrate that the operation of that measure, in the relevant market, has a de facto detrimental impact on the group of like imported products. A panel's analysis must take into consideration the totality of the facts and circumstances before it, including any implications for competitive conditions discernible from the design and structure of the measure itself, as well as all features of the particular market at issue that are relevant to the measure's operation within that market. In this regard, "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" to a panel's assessment of less favourable treatment under Article 2.1."

Para. 289. "We furthermore agree with Canada and Mexico that the Panel's findings indicate that the COOL measure itself, as applied in the US livestock and meat market, creates an incentive for US producers to segregate livestock according to origin, in particular by processing exclusively US origin livestock. We thus reject the United States' contention that the Panel wrongly attributed to the COOL measure a detrimental impact on imports caused exclusively by factors "external" to that measure. A market's response to the application of a governmental measure is always relevant to an assessment of whether the operation of that measure accords de facto less favourable treatment to imported products. That is, if a specific technical regulation adopted by a Member gives rise to adverse effects in the market, which disparately impact imported products, such effects will be attributable to the technical regulation for purposes of examining less favourable treatment under Article 2.1."

Relatório do Órgão de Apelação no caso *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* *(US - Tuna II),* Demandante: México, WT/DS381/AB/R, para. 225

O Órgão de Apelação reverteu o entendimento do Painel, considerando a possibilidade de discriminação de fato da medida, mesmo que aparentemente esta seja neutra.

Para. 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." 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."

3. Artigo 2.2

a) "ônus da prova"

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US - Clove Cigarettes)*, Demandante: Indonésia, WT/DS406/R, paras. 7.331 e 7.346

O Painel entendeu que o Membro que alega a violação tem o ônus da prova, porém, isso não significa que existe uma presunção de que a medida questionada não é uma barreira desnecessária ao comércio.

Para. 7.331. "The parties also agree that Indonesia carries the burden of proof in respect of its claim under Article 2.2 of the TBT Agreement. (footnote omitted) On this point, the parties agree that there is a significant difference between Article 2.2 and Article XX(b) of the GATT 1994. (footnote omitted) Again, we see no reason to disagree. Thus, we proceed with our analysis on the understanding that Indonesia must demonstrate that the ban on clove cigarettes is more trade-restrictive than necessary to fulfil a legitimate objective (taking account of the risks non-fulfilment would create). At the same time, the parties agree that there is no "relevant international standard" within the meaning of Article 2.5 of the TBT Agreement. (footnote omitted) Accordingly, while Indonesia carries the burden of proof to establish a violation of Article 2.2, we do not begin from any rebuttable presumption that the ban on clove cigarettes is not an unnecessary obstacle to trade." (footnote omitted)

Para. 7.346. "As the party challenging the legitimacy of the identified objective, Indonesia carries the burden to establish that the objective concerned is not "legitimate" within the meaning of Article 2.2 of the TBT Agreement."

Relatório do Painel no caso *United States - Measures Concertning the Importation, Marketing and Sale of Tuna and Tuna Products (US - Tuna II)*, Demandante: México, WT/DS381/R, para. 7.392

O trecho seguinte do Relatório define que o ônus da prova, para caracterizar uma violação ao Artigo 2.2 do Acordo TBT, é do demandante.

Para. 7.392. "Similarly under Article 2.2 of the TBT Agreement, which also relies on the notion of "legitimate objective" pursued by the measures, the burden is on the complainant, i.e. in this case Mexico, to establish the existence of a violation of this provision, including that the measures are "more trade-restrictive than necessary to fulfil a legitimate objective", and this necessarily involves a determination of what such objective is and its legitimacy within the meaning of Article 2.2. (Appellate Body Report, *EC – Sardines*, paras. 282) As we understand it, the Appellate Body's observations with respect to the complainant's role in discharging its burden of proof are intended to make clear that a complainant is not relieved of its duty to present a prima facie case by the fact that some aspects of the provision at issue relate to the objectives of the measures, which are determined by the Member taking the measure. This does not imply, however, that the objectives of the measures as defined by that

Member itself are not relevant to this determination. It only assumes that the complainant is expected to present its claims taking into account the information at its disposal in this respect."

Relatório do Órgão de Apelação no caso *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US - Tuna II)*, Demandante: México, WT/DS381/AB/R, para. 323

O trecho seguinte do Relatório corrobora a visão do Painel de que o ônus da prova para caracterizar uma violação ao Artigo 2.2 do Acordo TBT é do demandante.

Para. 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. 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."

Relatório do Órgão de Apelação no caso *United States - Certain Country of Origin Labelling COOL Requirements (US - COOL)*, Demandantes: Canadá, WT/DS384/AB/R; México, WT/DS386/AB/R, para. 379

O Órgão de Apelação definiu, em concordância com outras decisões, que o ônus da prova para demonstrar a inconsistência de uma medida com o Artigo 2.2 é do demandante.

Para. 379. "Finally, we recall the burden of proof under Article 2.2. In order to demonstrate that a technical regulation is inconsistent with Article 2.2, the complainant must make a prima facie case by presenting 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 objective, taking account of the risks non-fulfilment would create. A complainant may, and in most cases will, 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, for example, by demonstrating 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."

b) "Interpretação"

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US - Clove Cigarettes)*, Demandante: Indonésia, WT/DS406/R, paras 7.429-7.432

A análise do Painel compreendeu dois passos: (i) considerou se a medida possuia um objetivo legítimo; e (ii) definiu que a medida era mais restritiva ao comércio do que o necessário. Em relação ao segundo passo, considerou-se que a jurisprudência do Article XX(b) é relevante.

Para. 7.429. "We began by setting out a two-step analysis to structure our examination of Indonesia's claim under Article 2.2 of the TBT Agreement. The first step of our analysis was to consider whether the ban on clove cigarettes pursues a "legitimate objective". The second step of our analysis was to consider whether the ban on clove cigarettes is "more trade restrictive than necessary" to fulfil its legitimate objective of reducing youth smoking (taking into account the risks that non-fulfilment would create)."

Para. 7.430. "Under the first step of our analysis, we concluded that (i) Indonesia has demonstrated that the objective of the ban on clove cigarettes is to reduce youth smoking; and (ii) the objective of the ban on clove cigarettes is "legitimate". Thus, we concluded that the ban on clove cigarettes pursues a "legitimate objective" within the meaning of Article 2.2 of the TBT Agreement."

Para. 7.431. "Under the second step of our analysis, we concluded that: (i) the jurisprudence developed under Article XX(b) of the GATT 1994 is relevant to the interpretation of the "more trade-restrictive than necessary" standard in Article 2.2 of the TBT Agreement; (ii) Indonesia has not demonstrated that the ban on clove cigarettes exceeds the "level of protection" sought by the United States; (iii) Indonesia has not demonstrated that the ban on clove cigarettes makes no "material contribution" to the objective of reducing youth smoking; and (iv) Indonesia has failed to demonstrate that there are less-trade restrictive alternative measures that would make an equivalent contribution to the achievement of the objective at the level of protection sought by the United States. Thus, we concluded that Indonesia has failed to demonstrate that the ban on clove cigarettes is "more trade restrictive than necessary" to fulfil its legitimate objective, taking into account the risks that non- fulfilment would create."

Para. 7.432. "For these reasons, we find that Indonesia has failed to demonstrate that the ban on clove cigarettes imposed by Section 907(a)(1)(A) is more trade-restrictive than necessary to fulfil the legitimate objective of reducing youth smoking, taking account of the risks non-fulfilment would create. Accordingly, we find that Indonesia has failed to demonstrate that Section 907(a)(1)(A) is inconsistent with Article 2.2 of the TBT Agreement."

Relatório do Painel no caso *United States - Measures Concertning the Importation, Marketing and Sale of Tuna and Tuna Products (US - Tuna II),* Demandante: México, WT/DS381/R, paras 7.620-7.623

O Painel entendeu que a medida adotada pelos EUA era inconsistente com o Artigo 2.2 do Acordo TBT, pois configurava uma barreira mais restritiva ao comércio do que o necessário para atingir os seus objetivos.

Para. 7.620. "In light of our determinations above in relation to both objectives of the US dolphin-safe provisions, we find that these measures are more trade-restrictive than necessary to fulfil their legitimate objectives, taking account of the risks non-fulfilment would create. Consequently, the Panel finds that the US dolphin-safe provisions are inconsistent with Article 2.2 of the TBT Agreement."

Para. 7.621. "As described above, we make this determination taking into account our finding that the US dolphin-safe measures, as applied, only partly address the adverse effects on dolphins of tuna fishing that the United States has identified as relevant it the context of its objectives of informing consumers and contributing to the protection of dolphins in relation to the impact of such fishing techniques. Specifically, 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. Similarly, the proposed AIDCP dolphin-safe standard which Mexico identified as part of its proposed alternative measure would also not address the entirety of the adverse effects identified by the United States, insofar as it would not address unobserved mortalities from setting on dolphins, and any resulting adverse effects on dolphin populations."

Para. 7.622. "We also recall, in this context, our determination that the choice of the level of protection to be achieved in pursuance of the legitimate objectives identified is the prerogative of the Member

taking the measures, and we therefore make no determination as to what might be an appropriate level of protection to achieve in relation to the objectives identified by the United States for the information of consumers and the protection of dolphins in relation to the manner in which tuna is caught."

Para. 7.623. "Finally, we note that, as reflected in our analysis above, our findings take into account the information, including scientific information concerning the effects of tuna fishing on dolphins that is available to us for the purposes of these proceedings. From these elements, it appears that a number of aspects of this issue are not fully documented and that further research may be necessary in order to ascertain the exact situation in various areas."

Relatório do Órgão de Apelação no caso *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US - Tuna II)*, Demandante: México, WT/DS381/AB/R, paras. 328-331

O Órgão de Apelação reverteu o entendimento do Painel, e entendeu que não foi demonstrado que a medida dos EUA consiste em uma barreira mais restritiva ao comércio do que a necessária para atingir os seus próprios objetivos.

Para. 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". Second, with respect to the dolphin protection objective, the Panel found that "allowing compliance with the AIDCP labelling requirements 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 and would involve no reduction in the level of protection in this respect." 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". 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". 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". 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."

Para. 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."

Para. 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, even under the restrictions contained in the AIDCP rules. Since under the proposed 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". 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."

Para. 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*."

c) "A não inclusão de sub-objetivos não prejudica a legitimidade do objetivo"

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US - Clove Cigarettes)*, Demandante: Indonésia, WT/DS406/R, para. 7.349

Abaixo trecho do Relatório acerca da não inclusão de sub-objetivos que não prejudiquem a legitimidade do objetivo.

Para. 7.349. "Finally, even if we were to accept Indonesia's assertions for the sake of argument – i.e., that the United States did not include menthol cigarettes in Section 907(a)(1)(A) "because Philip Morris opposed it", that the exclusion of menthol cigarettes from the ban was the result of a "political compromise", and the "real concern was getting a deal on the FSPTCA through the U.S. Congress while also avoiding the potential loss of jobs in the United States if menthol cigarettes were banned" (footnote omitted) – we fail to see how any of this would call into question the conclusion that the ban on clove cigarettes is aimed at reducing youth smoking, and that this is a legitimate objective. In our view, these assertions would seem more germane to the question of whether or not the justification advanced by the United States for excluding menthol cigarettes from the scope of the ban – i.e., allegedly to avoid the potential negative consequences associated with banning products (i.e., menthol cigarettes) to which tens of millions of adults are chemically and psychologically addicted due to the potential but unknown consequences for the health of the individual users or the overall population (footnote omitted) – is credible or not. In our view, these are distinct issues." (footnote omitted)

Relatório do Painel no caso *United States - Measures Concertning the Importation, Marketing and Sale of Tuna and Tuna Products (US - Tuna II)*, Demandante: México, WT/DS381/R, para. 7.442

O Painel entendeu que o objetivo de contribuir com a proteção de golfinhos do *US dolphin safe provisions* não deve ser considerado ilegítimo porque não cobre a proteção de outras espécies marítimas.

Para. 7.442. "As established above, the US dolphin-safe provisions aim at protecting dolphins. That this particular piece of legislation does not afford protection to other animals or marine species should not be sufficient reason to consider the goal of the measure to be illegitimate. As the Appellate Body has recognized, "certain complex public health or environmental problems may be tackled only when a comprehensive policy comprising a multiplicity of interacting measures". (Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151) The United States has indicated that its measures are part of a comprehensive policy to protect dolphins. (footnote omitted) Moreover, Mexico has never argued that the USdolphin-safe provisions are the only instrument the United States has put in place to protect marine life. It would be highly implausible to expect that a single regulatory instrument should serve all the purposes that may be legitimately pursued by the Members. Therefore, the Panel does not consider that the objective of contributing to the protection dolphins of the US dolphin-safe provisions should be considered illegitimate because it does not cover the protection of other marine species."

Relatório do Órgão de Apelação no caso *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (US - Tuna II), Demandante: México, WT/DS381/AB/R, paras. 315-316

O Órgão de Apelação entendeu que os membros possuem liberdade para estabelecer o nível que entendam como apropriado para o cumprimento do objetivo legítimo.

Para. 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". 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."

Para. 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."

d) "jurisprudência do Artigo XX(b) do GATT"

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes* (US - Clove Cigarettes), Demandante: Indonésia, WT/DS406/R, paras. 7.357-7.359 e 7.369

O Painel entendeu que alguns aspectos da jurisprudência do Artigo XX(b) devem ser levados em consideração para interpretar o Artigo 2.2 do Acordo TBT.

Para. 7.357. "The United States' argument that relying on the jurisprudence developed under Article XX(b) of the GATT 1994 in the context of Article 2.2 of the TBT Agreement would be a "radical approach" rests on the premise that Article 2.2 should be interpreted and applied in a manner that is

radically different from the manner in which Article XX(b) has been interpreted and applied. Having carefully considered the wording, context and objective of Article XX(b) and Article 2.2, we disagree."

Para. 7.358. "To begin with, the wording of the second sentence of Article 2.2 of the TBT Agreement is very similar to that found in Article XX(b) of the GATT 1994. Indeed, in a case such as this one where the "legitimate objective" at issue is the "protection of human health", the terms appear to be interchangeable. For example, in US –Gasoline the panel understood the expression "necessary to protect human ... life or health" in Article XX(b) called for an analysis of whether measures "were necessary to fulfil the policy objective" of protecting human life or health." (Panel Report, *US – Gasoline*, para. 6.20)

Para. 7.359. "In addition, the context of Article 2.2 of the TBT Agreement establishes a direct link to Article XX(b) of the GATT 1994. In this regard, we note that the sixth recital of the preamble to the TBT Agreement essentially reproduces the language contained in Article XX of the GATT 1994." (footnote omitted)

Para. 7.369. "We do not agree with the United States that "no aspect"670 of Article XX(b) jurisprudence is applicable to an Article 2.2 analysis. At the same time, we are not saying that Article XX(b) jurisprudence can be transposed in its entirety onto Article 2.2 of the TBT Agreement. It may well be that there are certain aspects of Article XX(b) jurisprudence that are not applicable in the context of Article 2.2 of the TBT Agreement. Rather, we are of the view that there are some aspects of Article XX(b) jurisprudence that may be taken into account in the context of interpreting Article 2.2 of the TBT Agreement."

Relatório do Painel no caso *United States - Measures Concertning the Importation, Marketing and Sale of Tuna and Tuna Products (US - Tuna II)*, Demandante: México, WT/DS381/R, paras. 7.458-7.460

Abaixo trechos que demonstram o entendimento do Painel acerca da jurisprudência do Artigo XX(b) do GATT de 1994.

Para. 7.458. "Similarly, under Article 2.2 of the TBT Agreement, the analysis involves an assessment of the degree of trade-restrictiveness of the measure at issue in relation to what is "necessary" for the fulfilment of the legitimate objective being pursued, and this can be measured against possible alternative measures that would achieve the same result with a lesser degree of trade-restrictiveness. At the same time, we note that there are differences in the wording of Article 2.2 of the TBT Agreement, as compared to Article XX of the GATT 1994 or Article XIV of the GATS, which reflect also the different positions of the provisions within their respective agreements. In particular, we note that Article 2.2 of the TBT Agreement sets out a positive obligation, and is not formulated as an exception."

Para. 7.459. "With reference to Mexico's observation that the term "necessary" has been interpreted in the context of Articles XX(b) and XX(d) of the GATT 1994 and Article XIV of the GATS and that such interpretation should guide us in our interpretation of Article 2.2 of the TBT Agreement, we note that Article 2.2 of the TBT Agreement refers to technical regulations that are more trade restrictive than necessary to fulfil a legitimate objective, whereas Article XX of the GATT 1994 refers to "measures necessary" to protect public morals, to protect human, animal or plant life or health, to secure compliance with laws or regulations."

Para. 7.460. "Thus, under Article 2.2 of the TBT Agreement, unlike in Article XX of the GATT 1994, the aspect of the measure to be justified as "necessary" is its trade restrictiveness rather than the necessity of the measure for the achievement of the objective. Given the fact that, under Article 2.2, the "necessity" to be assessed is that of the "trade-restrictiveness" of the measures rather than of the measures themselves, we understand the term "necessary" in the second sentence of Article 2.2 to mean essentially that the trade-restrictiveness must be "required" for the fulfilment of the objective. At the same time, we note that this question is distinct from that of the level of protection that the Member

seeks to achieve in relation to its objective. In this respect, we recall that the preamble of the TBT Agreement makes clear that a Member is entitled to take measures "at the level it consider appropriate", in pursuance of a legitimate objective under the Agreement. This implies, in our view, that an assessment of whether any trade-restrictiveness arising under the measures at issue is "necessary" within the meaning of Article 2.2 must be understood as an enquiry into whether such trade-restrictiveness is required to fulfil the legitimate objectives pursued by the Member at its chosen level of protection."

Relatório do Painel no caso *United States - Certain Country of Origin Labelling COOL Requirements* *(US - COOL)*, Demandante: Canadá, WT/DS384, 386/R, paras. 7.669-7.670

O Painel demonstra que a interpretação legal do Artigo XX do GATT de 1994 é relevante para o entendimento do Artigo 2.2 do Acordo TBT.

Para. 7.669. "We do not consider the United States' arguments as supporting its position that the legal interpretive approach under Article XX is not relevant to Article 2.2. We agree that Article 2.2 of the TBT Agreement and Article XX of the GATT 1994 are two independent provisions under two different WTO covered agreements. This does not mean, however, that the legal interpretive approach under one provision and the legal interpretive approach under another cannot inform each other. In our understanding, the United States highlights the differences between these provisions without explaining why such differences render the legal test under Article XX irrelevant for an analysis under Article 2.2."

Para. 7.670. "The following considerations further support the view that the legal interpretive approach under ArticleXX is relevant to Article2.2. First, the 2nd recital in the Preamble of the TBT Agreement prescribes the WTO Members' desire to "further the objectives of GATT 1994". This indicates a close connection between the TBT Agreement and the GATT 1994. Second, Article 2.2 of the TBT Agreement is textually similar to Article XX of the GATT 1994. The examples of legitimate objectives explicitly listed in Article 2.2 resemble the types of policy objectives prescribed under Article XX of the GATT 1994. (footnote omitted) Further, the wording of the 6th recital in the Preamble of the TBT Agreement is also similar to that of the chapeau of Article XX of the GATT 1994. We therefore disagree with the United States."

e) "teste de necessidade"

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes* *(US - Clove Cigarettes)*, Demandante: Indonésia, WT/DS406/R, paras. 7.379-7.380

O Painel entendeu que a medida questionada deve necessariamente gerar uma contribuição material ao seu objetivo. Ao mesmo tempo, não deve ser mais restritiva ao comércio do que necessário para cumprir o referido objetivo. Uma análise deve considerar diversos fatores como a contribuição feita pela medida para resguardar a lei ou regulação, o interesse comum ou valor protegido pela lei e os impactos da lei nas importações e exportações.

Para. 7.379. "In Korea – Various Measures on Beef, the Appellate Body explained that determining whether a measure is "necessary" within the meaning of Article XX(d) of the GATT 1994 "involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports." (Appellate Body Report, Korea - Various Measures on Beef, para. 164) In US - Gambling, the Appellate Body stated that the weighing and balancing process inherent in the necessity analysis involves an assessment of other factors, which will usually include "the contribution of the measure to the realization of the ends pursued by it" and "the restrictive impact of the measure on international commerce". (Appellate Body Report, US - Gambling, para. 306) In Brazil - Retreaded Tyres, the Appellate Body stated that "a contribution exists when there

is a genuine relationship of ends and means between the objective pursued and the measure at issue." (Appellate Body Report, Brazil - Retreaded Tyres, para. 145) We see nothing in the text, context or purpose of Article 2.2 of the TBT Agreement to suggest that a different standard should be applied in the context of examining whether a measure is "more trade-restrictive than necessary to fulfil a legitimate objective" for the purpose of that provision."

Para. 7.380. "There are certain similarities between the facts of this case and those of Brazil – Retreaded Tyres. In both cases, the measure at issue was an import ban. In both cases, the objective of the measure was to protect human life and health. In that case, the Appellate Body explained that "when a measure produces restrictive effects on international trade as severe as those resulting from an import ban, it appears to us that it would be difficult for a panel to find that measure necessary unless it is satisfied that the measure is apt to make a material contribution to the achievement of its objective." (Appellate Body Report, Brazil – Retreaded Tyres, para. 150) The Appellate Body distinguished a "material contribution" from a contribution that is "marginal or insignificant". (Appellate Body Report, Brazil – Retreaded Tyres, paras. 150 and 210) We will apply the same standard here, and examine whether banning clove cigarettes makes a material contribution to the objective of reducing youth smoking."

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US - Tuna II)*, Demandante: México, WT/DS381/R, paras. 7.454-7.456 e 7.465-7.467

No entendimento do Painel, se uma medida em vigor pode ser imposta de modo a restringir menos o comércio, caracteriza-se a violação ao Artigo 2.2 do Acordo TBT.

Para. 7.454. "The terms of Article 2.2 suggest that some restrictions on international trade may arise from the preparation, adoption or application of technical regulations that pursue legitimate objectives under the TBT Agreement. It further suggests that while a degree of "trade-restrictiveness" may be justified, where it is "necessary to fulfil a legitimate objective", a measure could not be justified under Article 2.2 if it is more trade restrictive than is necessary to achieve the objective at issue. What we must determine, therefore, is in what circumstances a measure may be considered to be "more trade-restrictive than necessary" under this provision. As observed above, a measure that would be "more trade-restrictive than necessary" within the meaning of the second sentence of Article 2.2 would create "unnecessary obstacles to trade" within the meaning of the first sentence."

Para. 7.455. "Turning first to the question of what constitutes "trade-restrictiveness" in this context, we note that Mexico argues that measures that are "trade restrictive" include those that impose any form of limitation of imports, discriminate against imports or deny competitive opportunities to imports (footnote omitted) and that the United States agrees with Mexico that a measure that imposes limits on imports or discriminates against them would meet the definition of a measure that is "trade-restrictive". (footnote omitted) "We also agree."

Para. 7.456. "We further note that the wording of the provision in terms of the measure "not" being "more" trade restrictive than necessary implies that trade-restrictiveness is only permissible to the extent that it is necessary to the achievement of the objective. A contrario, where it would be possible to achieve the same objective through a less trade restrictive measure, then the measure at issue would be in violation of Article 2.2, because it would then be more trade restrictive than necessary to achieve the said objective."

Para. 7.465. "In light of the above, we find that in order to determine whether a measure is more trade restrictive than necessary within the meaning of Article 2.2, we must assess the manner in which and the extent to which the measures at issue fulfil their objectives, taking into account Member's chosen level of protection, and compare this with a potential less trade restrictive alternative measure, in order to determine whether such alternative measure would similarly fulfil the objectives pursued by the technical regulation at the Member's chosen level of protection. To 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."

Para. 7.466. "We also note that, in making this determination, we are required to take into account "the risks that non-fulfilment would create". The final sentence of Article 2.2 further clarifies that "[i]n assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-used of products"."

Para. 7.467. "As we understand it, this part of the text enjoins us to consider, as part of our analysis, both the likelihood and the gravity of potential risks (and any associated adverse consequences) that might arise in the event that the legitimate objective being pursued would not be fulfilled. We further understand this to imply that an alternative means of achieving the objective that would entail greater "risks of non-fulfilment" would not be a valid alternative, even if it were less trade-restrictive. This is consistent, in our view, with the fact that each Member is entitled, as expressed in the preamble of the TBT Agreement and as discussed above, to define its own level of protection."

Relatório do Órgão de Apelação no caso *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US - Tuna II)*, Demandante: México, WT/DS381/AB/R, paras. 318-320

Abaixo trecho a respeito da interpretação do termo "necessary" no âmbito do Artigo 2.2.

Para. 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. 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."

Para. 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. As used in Article 2.2 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."

Para. 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. 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."

Relatório do Órgão de Apelação no caso *United States - Certain Country of Origin Labelling COOL Requirements* (US - COOL), Demandantes: Canadá, WT/DS384/AB/R; México, WT/DS386/AB/R, paras. 374-375

O Órgão de Apelação adotou o mesmo entendimento adotado no caso *US - Tuna II* (México), de que para avaliação da "necessidade" da medida devem ser consideradas às restrições ao comércio que ela causa, a contribuição que ela traz para atingir o seu objetivo e os riscos que o seu não cumprimento trariam.

Para. 374. "The notion of "necessity" is reflected in both the first and second sentences of Article 2.2, through the reference in the first sentence to "unnecessary obstacles to international trade", and in the second sentence to "not … more trade-restrictive than necessary". As the Appellate Body observed in US - Tuna II (Mexico), the assessment of "necessity", in the context of Article 2.2, involves a "relational analysis" of the following factors: 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. In a particular case, a panel's determination of what is considered "necessary" will be based on a consideration of all these factors."

Para. 375. "By its terms, Article 2.2 requires an assessment of the necessity of the trade restrictiveness of the measure at issue. In this regard, the Appellate Body in US - Tuna II (Mexico) defined "trade restrictive" to mean "having a limiting effect on trade". Moreover, it found that the reference in Article 2.2 to "unnecessary obstacles" implies that "some" trade restrictiveness is allowed and, further, that what is actually prohibited are those 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"."

f) "medidas alternativas"

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes* (US - Clove Cigarettes), Demandante: Indonésia, WT/DS406/R, paras. 7.423-7.424

O Painel alega que a mera listagem de diversas medidas alternativas que seriam menos restritivas ao comércio não é suficiente para comprovar a viabilidade e efetividade das medidas para atingirem os referidos propósitos.

Para. 7.423. "In our view, such a mere listing of two dozen possible alternative measures is insufficient to establish a prima facie case. It seems clear enough that each of these measures would be less trade-restrictive than the ban on clove cigarettes. The problem is that the mere listing of two dozen alternative measures without more does not show that such measures would make an equivalent contribution to the achievement of the objective at the level of protection sought by the United States. We further note that Indonesia does not specify whether it is any one of these measures, or some combination of these measures, or all of these measures, that would be the alternative measure(s)."

Para. 7.424. "In addition, each of the alternative measures suggested by Indonesia appears to involve a greater risk of non-fulfilment of the objective of reducing youth smoking, as compared with the outright ban currently in place. In analysing the existence of alternative measures, we are required by the terms of Article 2.2 to take into account "the risks that non-fulfilment would create". Thus, Article 2.2 suggests that if an alternative means of achieving the objective of reducing youth smoking would involve greater "risks of non-fulfilment", this may not be a legitimate alternative. This is consistent with the jurisprudence developed under Article XX(b) of the GATT 1994, pursuant to which the relevant question is, as explained above, whether there is one or more alternative measures that would make an

"equivalent" contribution to the achievement of the objective at the level sought. In our view, where an alternative measure would entail a greater risk of non-fulfilment of the objective, it would be difficult to find that it would make an "equivalent" contribution to the achievement of the objective, at the level of protection sought."

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US - Tuna II)*, Demandante: México, WT/DS381/R, paras. 7.468

O Painel entende que é ônus do demandante comprovar que a alternativa atingiria os requisitos da medida em questão.

Para. 7.468. "Finally, we note that the burden on Mexico to demonstrate that the measures are more trade restrictive than necessary includes the identification of a reasonably available alternative that is capable of achieving the objective pursued by the challenged measure at the same level as the challenged measure, taking into account the risks non-fulfilment would create. As is the case under Article XX of the GATT 1994 and under Article 5.6 of the SPS Agreement, it is, in our view, for the complainant to make a prima facie case that the alternative meets the requirements of the provision at issue. As observed by the panel in Australia - Apples, "[t]he Appellate Body explained in EC - Hormones that the complainant must establish a prima facie case by presenting "evidence and legal arguments" sufficient to demonstrate that the defendant has breached its obligations with respect to a specific provision. (Panel Report, Australia - Apples, para. 7.1104) In the context of Article 5.6 of the SPS Agreement, the Appellate Body confirmed in a subsequent dispute that "[p]ursuant to the rules on burden of proof ... it was for the [complainant] to establish a prima facie case that there is an alternative measure that meets all three elements under Article5.6 in order to establish a prima facie case of inconsistency with Article 5.6". (Panel Report, Australia - Apples, para. 7.1104) The same considerations similarly apply in the context of Article 2.2 of the TBT Agreement."

Relatório do Órgão de Apelação no caso *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US - Tuna II)*, Demandante: México, WT/DS381/AB/R, para. 330

O Órgão de Apelação entende que a medida alternativa proposta deve cumprir os objetivos da medida "na mesma extensão" que esta última o faz.

Para. 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, even under the restrictions contained in the AIDCP rules. Since under the proposed 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". 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."

Relatório do Órgão de Apelação no caso *United States - Certain Country of Origin Labelling COOL Requirements (US - COOL)*, Demandantes: Canadá, WT/DS384/AB/R; México, WT/DS386/AB/R, paras. 480-481 e 491

Apesar das proposições de certas medidas alternativas pelas Partes, o Órgão de Apelação não pode chegar a uma decisão conclusiva tendo em vista a ausência de análise pelo Painel de fatos do caso.

Para. 480. "As they did in their submissions to the Panel, Canada and Mexico point to four alternative measures, which, in their view, are reasonably available to the United States, are less trade restrictive, and fulfil the objective of providing consumers with information on origin at an equal or greater level than the COOL measure. These alternatives are: (i) a voluntary country of origin labelling requirement; (ii) a mandatory country of origin labelling requirement based on the criterion of substantial transformation; (iii) a voluntary country of origin labelling regime combined with a mandatory country of origin labelling requirement based on substantial transformation; and (iv) a trace back regime."

Para. 481. "We note that the Panel made no factual findings with regard to these four proposed labelling schemes because, having found that the COOL measure does not fulfil its objective, it did "not consider it necessary to proceed with the next step of the analysis, namely whether the COOL measure is 'more trade-restrictive than necessary' based on the availability of less trade restrictive alternative measures". Therefore, to the extent that our analysis of the proposed alternative measures entails consideration of factual elements, we will be able to complete the analysis only if there are sufficient undisputed facts on the record, or factual findings made by the Panel elsewhere in its analysis, that are relevant to our evaluation of: (i) whether these alternative measures are less trade restrictive than the COOL measure; (ii) whether they would make an equivalent contribution to the relevant objective, taking account of the risks non-fulfilment would create; and (iii) whether they are reasonably available to the United States. We note, at this juncture, that we are faced with a challenging exercise since, in its Article 2.2 analysis, the Panel made no findings with respect to any of the four proposed alternative measures, and made only limited findings with respect to the COOL measure itself, in particular with respect to its degree of contribution to the United States' objective."

Para. 491. "Overall, due to the absence of relevant factual findings by the Panel, and of sufficient undisputed facts on the record, we are unable to complete the legal analysis under Article 2.2 of the TBT Agreement and determine whether the COOL measure is more trade restrictive than necessary to fulfil its legitimate objective."

g) "flexibilidade no ônus da prova"

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US - Tuna II)*, WT/DS381/R, paras. 7.405-7.406

O Painel entende que deve ser considerado o entendimento de ambas as partes, bem como o texto da medida em análise, para guiar sua decisão, pois não deve se limitar à descrição da norma feita por um Membro.

Para. 7.405. "In light of these contentions, the Panel considers it necessary to seek to first clarify the objectives of the US dolphin-safe provisions. As the Appellate Body has recognized in the context of Article XIV of GATS, a panel's analysis is not bound by a Member's characterization of the objectives of its own measures. Such categorization must be made in an independent and objective fashion, based on the evidence in the record. (Appellate Body Report, US – Gambling, para. 304) The same considerations apply, in our view, in the context of Article 2.2 of the TBT Agreement."

Para. 7.406. "In this task, the Panel's analysis will be guided by the description of the objectives of the measures by both parties, as well as by the structure and design of the US dolphin-safe provisions. We note in this respect that the parties both consider that the design, structure and characteristics of the US dolphin-safe provisions themselves are relevant to a clarification of their objectives. (footnote omitted) We wish to make clear, however, that at this stage of the analysis our enquiry is limited to the question of what the objective or purpose of the measures is, and does not seek to address the separate question of what the measures actually do or do not do in pursuance of this objective."

h) "objetivo legítimo"

Relatório do Painel no caso *United States - Certain Country of Origin Labelling COOL Requirements (US - COOL)*, Demandantes: Canadá, WT/DS384/R; México, WT/DS386/R, paras. 7.628-7.632, 7.634 e 7.648-7.651

O Painel alega que fornecer informações sobre as origens dos produtos constitui um objetivo legítimo, devido às preferências dos consumidores.

Para. 7.628. "Having determined the objective pursued by the United States, we proceed to examine its legitimacy. We recall that the object of our review in this context is the identified objective (providing consumer information on origin) pursued through the technical regulation, not the technical regulation itself (the COOL measure)."

Para. 7.629. "As a party challenging the legitimacy of the identified objective, the complainants bear the burden to establish that the objective concerned is not legitimate within the meaning of Article 2.2."

Para. 7.630. "The word "legitimate" is defined as "2. a. Conformable to, sanctioned by or authorized by, law or principle; lawful; justifiable; proper. b. Normal, regular; conformable to a recognized standard type" Based on the ordinary meaning, therefore, we need to assess whether "providing consumer information on origin " is "conformable to law or principle", "justifiable and proper", or "conformable to a recognized standard type"."

Para. 7.631. "This understanding is supported by the panel's analysis in this respect in EC – Sardines. Touching upon the meaning of the term "legitimate" in the context of a legitimate objective as referred to in Articles 2.2 and 2.4, the panel in EC – Sardines suggested that the term "legitimate" refers to the genuine nature of the objective. It further noted the statement of the panel in Canada – Pharmaceutical Patents, in defining the term "legitimate interests" in the context of Article 30 of the TRIPS Agreement, that it must be defined "as a normative claim calling for protection of interests that are 'justifiable' in the sense that they are supported by relevant public policies or other social norms". (Panel Report on EC – Sardines, para. 7.121, referring to Panel Report on Canada – Pharmaceutical Patents, para. 7.69)

Para. 7.632. "The third sentence of Article 2.2 provides a non-exhaustive list of legitimate objectives under Article 2.2: national security requirements; the prevention of deceptive practices; protection of human health or safety; animal or plant life or health; or the environment. The use of the term "inter alia" in Article 2.2 of the TBT Agreement indicates that the objectives covered extend beyond the objectives specifically mentioned in Article 2.2. (Appellate Body Report, EC – Sardines, para. 286) The type of objectives explicitly listed in Article 2.2 nonetheless demonstrates that the legitimacy of a given objective must be found in the "genuine nature" of the objective, which is "justifiable" and "supported by relevant public policies or other social norms"."

Para. 7.634. "In addressing the complainants' position on this issue, we must bear in mind, as pointed out above, that Article 2.2 of the TBT Agreement provides a non-exhaustive, open list of legitimate objectives. This can be contrasted, for instance, with the specific categories of policy objectives stipulated in the subparagraphs of Article XX of the GATT 1994. In our view, the fact that Article 2.2 refers to an open list of objectives without any modifying language initially indicates that a wide range of objectives could potentially fall within the scope of legitimate objectives under Article 2.2. We do not find in the text of Article 2.2 or any other provision of the TBT Agreement an explicit requirement that a policy objective pursued by a technical regulation must be specifically linked in nature to those objectives explicitly listed in Article 2.2."

Para. 7.648. "Clearly, if consumers know the country of origin, they will be able to make informed choices with respect to origin of products, including meat. Some consumers may indeed have preferences for products produced by or originating in particular countries for a variety of reasons."

Para. 7.649. "We also acknowledge that Members have certain policy space in determining their objectives. There are therefore circumstances in which Members may decide to adopt particular regulations even in the absence of a specific demand from their citizens, and may do so without in fact shaping consumer expectations through regulatory intervention. We also note the panel's statement in Korea – Various Measures on Beef that "there can be good reasons – apart from any protectionist motives – why a WTO Member might want information to be provided as to the origin of products, and particularly meat products, at the retail level". (Panel Report, Korea – Various Measures on Beef, para. 655)

Para. 7.650. "We are persuaded, based on the evidence before us regarding US consumer preferences as well as the practice in a considerable proportion of WTO Members, that consumers generally are interested in having information on the origin of the products they purchase. We also observe that many WTO Members have responded to that interest by putting measures in place to require the provision of such information, albeit with different definitions of "origin". In this regard, we once again recall the words of the panel in EC – Sardines referring to the conclusion of the panel in Canada – Pharmaceutical Patents that a legitimate objective refers to "protection of interests that are 'justifiable' in the sense that they are supported by relevant public policies or other social norms". (Panel Report on EC – Sardines, para. 7.121, referring to Panel Report on Canada – Pharmaceutical Patents, para. 7.69) In our view, whether an objective is legitimate cannot be determined in a vacuum, but must be assessed in the context of the world in which we live. Social norms must be accorded due weight in considering whether a particular objective pursued by a government can be considered legitimate. It seems to us, based on the evidence before us, that providing consumers with information on the origin of the products they purchase is in keeping with the requirements of current social norms in a considerable part of the WTO Membership."

Para. 7.651. "In light of the foregoing, we conclude that providing consumer information on origin is a legitimate objective within the meaning of Article 2.2."

Relatório do Órgão de Apelação no caso *United States - Certain Country of Origin Labelling COOL Requirements* *(US - COOL),* Demandantes: Canadá, WT/DS384/AB/R; México, WT/DS386/AB/R, paras. 370, 372, 387 e 389-390

O Órgão de Apelação coloca seu entendimento sobre o termo "objetivo legítimo" e reforça a interpretação de que cabe ao Membro a definição do nível adequado de seu grau de alcance.

Para. 370. "We begin with the meaning of the different elements set out in the text of Article 2.2. First, a "legitimate objective" refers to an aim or target that is lawful, justifiable, or proper. Article 2.2 lists specific examples of such "legitimate objectives", namely: national security requirements; the prevention of deceptive practices; and the protection of human health or safety, animal or plant life or health, or the environment. The use of the words "inter alia" in Article 2.2 introducing that list, however, signifies that the list of legitimate objectives is not a closed one. In addition, the objectives expressly listed provide a reference point for other objectives that may be considered to be legitimate in the sense of Article 2.2. The sixth and seventh recitals of the preamble of the TBT Agreement refer to several objectives, which to a large extent overlap with the objectives listed in Article 2.2. As the Appellate Body has also noted, 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."

Para. 372. "With respect to the determination of the "legitimacy" of the objective, we note first that a panel's finding that the objective is among those listed in Article 2.2 will end the inquiry into its legitimacy. If, however, the objective does not fall among those specifically listed, a panel must make a determination of legitimacy. It may be guided by considerations that we have set out above, including whether the identified objective is reflected in other provisions of the covered agreements."

Para. 387. "First, we observe that the Panel's formulation of the objective pursued by the United States varied over the course of its analysis. For instance, at times the Panel identified the objective as being "to provide consumer information on origin"; at other times, the Panel referred to the objective as being "to provide as much clear and accurate origin information as possible to consumers". Through these differing formulations of the objective, the Panel introduced a level of uncertainty in its reasoning. It is of course self-evident that panels should seek to avoid using different language to denote the same concept. This is especially so in the context of an analysis under Article 2.2 of the TBT Agreement, given that the relevant objective is the benchmark against which a panel must assess the degree of contribution made by a challenged technical regulation, as well as by proposed alternative measures. For these reasons, the importance of a panel identifying with sufficient clarity and consistency the objective or objectives pursued by a Member through a technical regulation cannot be overemphasized."

Para. 389. "We note that the United States also points to this statement as setting out the Panel's articulation of "the level at which the United States considers it appropriate to fulfill the objective". In its appeal, the United States contends that it was appropriate for the Panel to include this step in its analysis , but that the Panel erred in the way in which it identified the level of fulfilment desired by the United States."

Para. 390. "However, as we have explained above, in preparing, adopting, and applying a measure in order to pursue a legitimate objective, a Member articulates, either implicitly or explicitly, the level at which it seeks to pursue that particular objective. Neither Article 2.2 in particular, nor the TBT Agreement in general, requires that, in its examination of the objective pursued, a panel must discern or identify, in the abstract, the level at which a responding Member wishes or aims to achieve that objective. Rather, what a panel is required to do, under Article 2.2, is to assess the degree to which a Member's technical regulation, as adopted, written, and applied, contributes to the legitimate objective pursued by that Member."

Relatório do Órgão de Apelação no caso *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US - Tuna II)*, Demandante: México, WT/DS381/AB/R, para. 313

O Órgão de Apelação descreve o significado do termo "objetivo legítimo" e o relaciona com as disposições do preâmbulo do Acordo.

Para. 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". The word "legitimate", in turn, is defined as "lawful; justifiable; proper". 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*."

4. Artigo 2.4

a) "aplicação temporal do Artigo 2.4"

Relatório do Órgão de Apelação no caso *European Communities - Trade Description of Sardines (EC - Sardines)*, WT/DS231/AB/R, paras. 205 e 207

O Órgão de Apelação, em consonância com o Painel, concluiu que o texto do Artigo 2.4 do Acordo TBT não se aplica apenas aos dois estágios de preparação e adoção de regulamentos técnicos, mas que o uso do tempo presente sugere uma obrigação continuada de medidas existentes, e não limitada a uma regulamentação elaborada e adoptada após o Acordo TBT ter entrado em vigor.

Para. 205. "We concur with the Panel's view that the text of Article 2.4 of the TBT Agreement does not support the European Communities' contention. We fail to see how the terms "where technical regulations are required", "exist", "imminent", "use", and "as a basis for" give any indication that Article 2.4 applies only to the two stages of preparatio and adoption of technical regulations. To the contrary, as the Panel noted, the use of the present tense suggests a continuing obligation for existing measures, and not one limited to regulations prepared and adopted after the TBT Agreement entered into force. The European Communities reads Article 2.4 as if it said "where technical regulations are in preparation or are to be adopted", which is clearly not the case. The obligation refers to technical regulations generally and without limitations."

Para. 207. "Like the sanitary measure in EC – Hormones, the EC Regulation is currently in force. The European Communities has conceded that the EC Regulation is an act or fact that has not "ceased to exist". Accordingly, following our reasoning in EC – Hormones, Article 2.4 of the TBT Agreement applies to existing measures unless that provision "reveals a contrary intention". As we have said, we see nothing in Article 2.4 which would suggest that the provision does not apply to existing measures."

b) "interpretação do Artigo 2.4"

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US - Tuna II)*, WT/DS381/R, para. 7.629

O Painel considera três elementos para concluir sobre a violação do Artigo 2.4.

Para. 7.629. "We therefore now consider the three elements identified above in order to determine whether Mexico has demonstrated that the US dolphin-safe labelling provisions are not based on a relevant international standard in violation of Article 2.4. Specifically, we will consider:

> – whether the "AIDCP standard" constitutes a relevant international standard;
> – whether the United States has used it as a basis for its dolphin-safe labelling provisions; and
> – whether it is an effective and appropriate means for the fulfilment of the legitimate objectives pursued by the United States."

c) "normas internacionais pertinentes" *(relevant international standards)*

Relatório do Órgão de Apelação no caso *European Communities - Trade Description of Sardines (EC - Sardines)*, WT/DS231/AB/R, paras. 222-223, 225 e 229

O Órgão de Apelação concluiu que o texto da nota explicativa suporta a conclusão de que o consenso não é exigido para os padrões adotados pela comunidade internacional de normatização.

Para. 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. This provision therefore confirms that even if not adopted by consensus, an international standard can constitute a relevant international standard.
>
> 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"."

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. 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."

Para. 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 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."

Para. 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." (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."

Para. 229. "In analyzing the merits of this argument, the Panel first noted that the ordinary meaning of the term "relevant" is "bearing upon or relating to the matter in hand; pertinent". The Panel reasoned that, to be a "relevant international standard", Codex Stan 94 would have to bear upon, relate to, or be pertinent to the EC Regulation. (…)"

(i) Norma internacional

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US - Tuna II)*, WT/DS381/R, paras. 7.663-7.664, 7.672, 7.679-7.680 e 7.695

O TBT não define o termo "norma internacional", por esse motivo o Painel aplica a definição constante do ISO/IEC Guide 2, que indica três elementos.

Para. 7.663. "The term "international standard" is not defined in Annex 1 of the TBT Agreement, but is defined in the ISO/IEC Guide 2. In accordance with the terms of Annex 1, in the absence of a specific definition of this term in Annex 1, the term "international standard" should be understood to have the same meaning in the TBT Agreement as in the ISO/IEC Guide 2, which defines it as a "standard that is adopted by an international standardizing/standards organization and made available to the public"."

Para. 7.664. "An "international standard" is thus composed of three elements: (i) a standard; (ii) adopted by an international standardizing/standards organization; and (iii) made available to the public. We must therefore consider whether the provisions of the AIDCP tuna tracking and verification resolution (which contain a definition of dolphin-safe) and of the AIDCP dolphin-safe certification resolution (which provides for the AIDCP dolphin-safe label) meet each of these components and thus constitute an "international standard"."

Para. 7.672. "Accordingly, pursuant to the definition of the ISO/IEC Guide 2, we must consider whether the AIDCP "dolphin-safe" provisions of the AIDCP constitute a "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"."

Para. 7.679. "We must therefore now consider whether the AIDCP dolphin-safe definition has been approved by an "international standardizing/standards organization". We note that the ISO/IEC Guide 2 defines an "international standardizing organization" as a "standardizing organization whose membership is open to the relevant national body from every country". A "standardizing body", in turn, is defined as a "body that has recognized activities in standardization". The term "organization" is defined as a "body that is based on the membership of other bodies or individuals and has an established constitution and its own administration". (emphasis added) The Guide also defines the term "body" as a "legal or administrative entity that has specific tasks and composition". The TBT Agreement does not define these various terms, but does contain definitions of "international body or system", "regional body or system" and "central government body"." (footnote omitted)

Para. 7.680. "In light of these definitions, we must therefore determine whether the AIDCP dolphin-safe definition and labelling provisions were adopted by 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."

Para. 7.695. "These transparency procedures aim at informing market operators about the AIDCP and its objective and the procedures for the dolphin-safe certificate and the dolphin-safe label which, by the same token, makes it possible to obtain the certificate and the label. Thus, these procedures are "made available to the public". We are therefore satisfied that the IADCP dolphin-safe definition and certification are made available to the public."

Relatório do Órgão de Apelação no caso *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* *(US - Tuna II)*, Demandante: México, WT/DS381/AB/R, paras. 350-353

O Órgão de Apelação utiliza a definição presente no ISO/IEC Guide 2.

Para. 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.
>
> 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."

Para. 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.

Para. 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."

Para. 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 (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." 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"."

(ii) Pertinente

Relatório do Painel no caso *United States - Certain Country of Origin Labelling COOL Requirements* *(US - COOL),* WT/DS381/R, para. 7.729

O Painel considera a medida questionada como pertinente, sem maiores explicações.

Para. 7.729. "We are mindful that the parties disagreed on whether CODEX-STAN 1-1985 is a relevant international standard within the meaning of Article 2.4 of the TBT Agreement. In this context, wealso recall that the SPS Agreement recognizes the relevance of the Codex Alimentarius Commission by acknowledging that for food safety, international standards, guidelines and recommendations are the

ones established by the Codex Alimentarius Commission. (footnote omitted) We also recognize that CODEX plays a crucial role in food safety and quality. For our analysis of Mexico's claim under Article 2.4 of the TBT Agreement, however, we find it sufficient to assess whether CODEX-STAN 1-1985 is an effective and appropriate means to fulfil the identified objective pursued by the United States. "To enhance simplicity and efficiency" in our decision-making in the present case (Appellate Body Report, China – Publications and Audiovisual Products, para. 213), we carry out this analysis on the assumption that CODEX-STAN 1-1985 is a relevant international standard within the meaning of Article 2.4." (footnote omitted)

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US - Tuna II)*, WT/DS381/R, paras. 7.700-7.701

O Painel faz uma exposição dos motivos para considerar a medida questionada pertinente, analisando o produto, a área de influência e o processamento.

Para. 7.700. "As noted by both parties, in EC – Sardines, the Appellate Body agreed with the panel's statement that the ordinary meaning of the term "relevant" is "bearing upon or relating to the matter in hand; pertinent". (Panel report, EC – Sardines, para. 7.68; Appellate Body Report on EC – Sardines, para. 230) According to the panel's reasoning, to be a "relevant international standard", the standard at issue in the dispute – Codex Stan 94 – would have to "bear upon, relate to, or be pertinent to the EC Regulation". (Panel report, EC – Sardines, para. 7.69)

Para. 7.701. "In the present case, we need therefore to determine whether the AIDCP dolphin-safe definition and certification bear upon, relate to, or are pertinent to the US dolphin-safe labelling provisions. As noted by Mexico "the measures apply to the same product, i.e. tuna, which are caught in the same area, and are then processed into canned tuna and bear a dolphin-safe label". (footnote omitted) Indeed, the US dolphin-safe labelling provisions and the AIDCP resolutions both deal with the same products: tuna and tuna products. In addition, the AIDCP dolphin-safe certification resolution establishes the "AIDCP Dolphin Safe Tuna Certificate" and the "AIDCP Dolphin Safe Tuna Label", respectively defined as "Document issued by the competent national authority, evidence of the dolphin-safe status of tuna and tuna products, in accordance with the definition of the AIDCP System for Tracking and Verification of Tuna" and "Graphic representation which distinguishes dolphin-safe tuna and tuna products, as defined in the System for Tracking and Verifying Tuna, which can be used on the packaging of tuna certified under this resolution". The US dolphin-safe labelling provisions and the later AIDCP resolution therefore regulate the same subject matter, insofar as they both deal with the definition of criteria for identifying tuna as "dolphin-safe" and means for identifying dolphin-safe tuna, in the form of labelling requirements."

d) "como base para"

Relatório do Órgão de Apelação no caso *European Communities - Trade Description of Sardines (EC - Sardines)*, WT/DS231/AB/R, paras. 245 e 248

O Órgão de Apelação concluiu que não tinha a necessidade de definir a natureza da relação que deve existir para um padrão internacional servir "como base para" um regulamento técnico. Nessa linha, concluiu que precisava apenas examinar a medida para determinar se ela cumpria essa obrigação.

Para. 245. "From these various definitions, we would highlight the similar terms "principal constituent", "fundamental principle", "main constituent", and "determining principle" - all of which lend credence to the conclusion that there must be a very strong and very close relationship between two things in order to be able to say that one is "the basis for" the other."

Para. 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."

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US - Tuna II)*, WT/DS381/R, paras. 7.714-7.716

O Órgão de Apelação entendeu que algo não pode servir de base caso seja contraditório com o que pretende fundamentar, por esse motivo, sob a égide do Artigo 2.4, se uma regulação técnica for incompatível com uma norma internacional, então esta pode ser usada corretamente como alicerce da primeira.

Para. 7.714. "Finally, as Mexico points out, the Appellate Body also stated that:

> 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." (Appellate Body Report, EC – Sardines, para. 248)

Para. 7.715. "In the case at hand, the departure from the AIDCP standard was formally stated by the Court rulings, and in particular the Hogarth ruling which describes it as an explicit refusal to adopt the standard:

> The program was formalized into a legally-binding agreement known as the Panama Declaration, pursuant to which the UnitedStates' delegation agreed to seek a weakening of the dolphin-safe labeling standard and allow such a label to be affixed to tuna caught with purseseine nets as long as no dolphins were observed to be killed or seriously injured during the set. (...)"

When the delegation asked Congress to change the standard, however, Congress refused to relax its strict requirements without affirmative evidence that the tuna fishery was not significantly contributing to the slowness of the recovery rate of already depleted dolphin stocks. (footnote omitted)

Para. 7.716. "In light of this evidence, we conclude that the United States failed to base the US dolphin-safe labelling provisions on the relevant international standard of the AIDCP."

e) "ônus da prova"

Relatório do Órgão de Apelação no caso *European Communities - Trade Description of Sardines (EC - Sardines)*, WT/DS231/AB/R, paras. 275

O Órgão de Apelação, fazendo referência ao caso *EC - Hormones*, concluiu que o demandante deve estabelecer um caso de inconsistência com norma do Acordo.

Para. 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. In EC – Hormones, we found that a "general rule-exception" relationship between Articles 3.1 and 3.3 of the SPS Agreement does not exist, with the consequence that the complainant had to establish a case of inconsistency with both Articles 3.1 and 3.3. We reached this conclusion as a consequence of our finding there that "Article 3.1 of the SPS Agreement simply excludes from its scope of application the kinds of situations covered by

Article 3.3 of that 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."

f) "meio inadequado ou ineficaz"

Relatório do Órgão de Apelação no caso *European Communities - Trade Description of Sardines (EC - Sardines)*, WT/DS231/AB/R, paras. 289

O Órgão de Apelação partilhou da conclusão do Painel de que os termos "ineficaz" e "inadequado" têm significado diferente; e que é conceitualmente possível que uma medida seja eficaz, mas inadequada ou ineficaz, mas adequada.

Para. 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. 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."

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US - Tuna II)*, WT/DS381/R, paras. 7.722-7.724

O Painel se refere à jurisprudência do Órgão de Apelação para explicar que o termo "meio inapropriado ou ineficaz" está relacionado às duas questões: i) eficácia da medida (em relação ao objetivo proposto) e ii) o quão apropriada é a medida (medida específica para cumprir com o seu propósito).

Para. 7.722. "Accordingly, in the present case, it is for Mexico to demonstrate that the AIDCP dolphin-safe standard is effective and appropriate to fulfil the legitimate objectives pursued by the United States through its dolphin-safe labelling provisions."

Para. 7.723. "With respect to the meaning of the term "ineffective or inappropriate means", we note that the Appellate Body in EC - Sardines agreed with 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. The Panel had interpreted the term "ineffective" as referring to something which is not "having the function of accomplishing", "having as a result", or "brought to bear", whilst it had interpreted the term "inappropriate" as referring to something which is not "specially suitable", "proper" or "fitting". (Appellate Body Report, EC - Sardines, para. 285 citing the Panel Report, EC - Sardines para. 7.116) In sum, the Panel had noted that: "... 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. (...) The question of effectiveness bears upon de results of the means employed, whereas the question of appropriateness relates more to the nature of the means employed." (original

emphasis) (Appellate Body Report, EC - Sardines, para.285 citing the Panel Report, EC - Sardines para. 7.116)

Para. 7.724. "In light of these determinations, we now consider whether Mexico has discharged its burden of showing that the AIDCP standard is appropriate and effective to fulfil the US dolphin-safe labelling provisions' objectives. We note that this enquiry differs from that conducted earlier under Article 2.2. In that context, as discussed earlier, Mexico had suggested that a label complying with the AIDCP standard could be allowed to coexist with the existing US standard. (footnote omitted) Under Article 2.4 of the TBT Agreement, the Panel's point of enquiry is whether this international standard in itself would fulfil the legitimate objectives of the United States."

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US - Tuna II)*, WT/DS381/R, paras. 7.728 e 7.730-7.735

O Painel faz uma análise concreta dos dois critérios, concluindo que a medida tratada é tanto ineficaz quanto inapropriada.

Para. 7.728. "In EC - Sardines, the AppellateBody established that under Article 2.4 of the TBT Agreement the complaining party bears the burden of demonstrating that the relevant international standard at issue is appropriate and effective to fulfil the legitimate objectives pursued by the responding party through its regulation. (Appellate Body Report, EC - Sardines, para. 282) Thus, we will examine whether Mexico has established that CODEX-STAN 1-1985 is an effective or appropriate means for the fulfilment of the legitimate objectives pursued by the United States through the COOL measure."

Para. 7.730. "The panel in EC - Sardines established that "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". (Panel Report, EC - Sardines, para. 7.116) In that dispute, the Appellate Body found that, in that case, a consideration of the appropriateness of the standard and a consideration of the effectiveness of the standard were interrelated due to the nature of the objectives of the regulation under examination." (Appellate Body Report, EC - Sardines, para. 289)

Para. 7.731. "We recall our findings above that the objective pursued by the United States through the COOL measure is providing consumer information on origin. (footnote omitted) We also recall that the exact information on origin that the UnitedStates wants to provide to consumers through the COOL measure is the countries where the animal from which the meat is derived was born, raised and slaughtered." (footnote omitted)

Para. 7.732. "Turning to the matter of effectiveness and appropriateness, CODEX-STAN 1-1985 would be effective if it had the capacity to accomplish the objective, and it would be appropriate if it were suitable for the fulfilment of the objective."

Para. 7.733. "We consider that in this case a consideration of the effectiveness and a consideration of the appropriateness of CODEX-STAN 1-1985 are interrelated, due to the nature of the objective of the COOL measure."

Para. 7.734. "In our view CODEX-STAN 1-1985 does not have the function or capacity of accomplishing the objective of providing information to consumers about the countries in which an animal was born, raised and slaughtered. The reason is that the standard confers origin exclusively to the country where the processing of food took place. In other words, it is based on the principle of substantial transformation. This means that no more than one country can claim origin under CODEX-STAN 1-1985; even when an animal is born and raised in a third country and then slaughtered in the United States, the origin would exclusively be the United States. Thus, the exact information that the United States wants to provide to consumers cannot be conveyed through CODEX-STAN 1-1985. For

the same reasons, we find that CODEX-STAN 1-1985 is an inappropriate means for the fulfilment of this objective, as it is not specially suitable for providing this type of information to the consumer."

Para. 7.735. "Based on the above, we find that CODEX-STAN 1-1985 is ineffective and inappropriate for the fulfilment of the specific objective as defined by the United States."

5. Artigo 2.5

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US - Clove Cigarettes)*, WT/DS406/R, para. 7.444 e 7447-7450

Nesta controvérsia, tendo em vista que não havia qualquer jurisprudência quanto à análise jurídica do Artigo 2.5 do Acordo TBT, o Painel traçou suas próprias impressões quanto ao teste legal deste dispositivo.

Para. 7.444. "The question before the Panel is therefore whether the United States has failed to explain the justification for Section 907(a)(1)(A) upon Indonesia's request, in terms of Articles 2.2, 2.3 and 2.4 of the TBT Agreement, as required by Article 2.5 of the TBT Agreement. According to Indonesia, the only issue in dispute before the Panel in this respect is whether the United States provided an explanation in a timely manner as required pursuant to Article 2.5 of the TBT Agreement." (footnote omitted)

Para. 7.447. "We note that Article 2.5 contains two sentences: a first sentence regarding the explanation that Members are to provide, at the request of another Member, about the justification for their technical regulations; and a second sentence, which establishes a rebuttable presumption of compliance with the first sentence of Article 2.2 for those technical 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. Indonesia's claim under Article 2.5 of the TBT Agreement is in respect only of the first sentence."

Para. 7.448. "Article 2.5, first sentence, of the TBT Agreement thus obliges any Member preparing, adopting or applying a technical regulation that may have a significant effect on trade of other Members to explain, upon the request of another Member, the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4 of Article 2 of the TBT Agreement."

Para. 7.449. "We observe that Article 2.5 of the TBT Agreement, first sentence, includes four elements that must be present: (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."

Para. 7.450. "Rather than following the order of appearance of those elements in the first sentence of Article 2.5 of the TBT Agreement, in our view, the threshold question to which we should respond is whether Indonesia actually requested the United States to explain the justification for Section 907(a)(1)(A) in terms of the provisions of paragraphs 2 to 4 pursuant to the first sentence of Article 2.5 of the TBT Agreement. Indeed, in the absence of such a request, the obligation to explain the justification for Section 907(a)(1)(A) would not be triggered."

6. Artigo 2.8

Relatório do Painel no Caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US - Clove Cigarettes)*, WT/DS406/R, para. 7.484

O Painel explica que o grau de especificidade da regulação técnica não é relevante para analisar a compatibilidade da medida com o Artigo 2.8.

Para. 7.484. "We therefore conclude that Article 2.8 of the TBT Agreement does not oblige Members to provide "a certain level of specificity" (footnote omitted) in their technical regulations. It thus follows that the "level of specificity" reflected in Section 907(a)(1)(A) is not relevant to the question of whether this measure is consistent with Article 2.8. Accordingly, we do not need to consider whether the FSPTCA provides a definition of "characterizing flavour" for purposes of the ban, and/or whether the FDA has provided further specification on what constitutes a "characterizing flavour". (footnote omitted) Insofar as Indonesia's claim under Article 2.8 rests on the argument that Section 907(a)(1)(A) "lacks the specificity required" (footnote omitted), then the Panel concludes that Indonesia's claim and argument are misplaced."

Relatório do Órgão de Apelação no caso *European Communities - Measures Affecting Asbestos and Products Containing Asbestos* (*EC - Abestos*), WT/DS135/AB/R, paras. 82-83

O Painel deixa de examinar as alegações do Canadá por não terem sido exploradas suficientemente.

Para. 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."

Para. 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."

7. Artigo 2.9

a) "produto objeto do regulamento técnico"

Relatório do Órgão de Apelação no caso *European Communities - Measures Affecting Asbestos and Products Containing Asbestos CE - Amianto* (*EC - Abestos*), WT/DS135/AB/R, para. 70

O Painel explica que toda regulação técnica deve possuir um produto identificado ou identificável, caso contrário não seria possível identificar o produto ou grupo de produtos.

Para. 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." [grifo nosso]

8. Artigo 2.12

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes* (*US - Clove Cigarettes)*, WT/DS406/R, paras. 7.568, 7.576 e 7.593-7.594

O Painel DS 406: *US - Clove Cigarettes* analisou o Artigo 2.12 do TBT com base na Decisão Ministerial de Doha.

Para. 7.568 "Concerning the interpretation of "reasonable interval", Indonesia has drawn the Panel's attention to a decision of the TBT Committee taken at its meeting of 15 March 2002, which takes note of paragraph 5.2 of the Doha Ministerial Decision. This paragraph provides as follows:

> Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase 'reasonable interval' shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued."

Para. 7.576. "Although the parties disagree on the categorization of paragraph 5.2 of the Doha Ministerial Decision as an authoritative interpretation under Article IX:2 of the WTO Agreement, this Panel deems that it must be guided by it in its interpretation of the phrase "reasonable interval", as it was agreed by all WTO Members meeting in the form of Ministerial Conference, the highest ranking body of the WTO. Furthermore, the Panel is of the view that paragraph 5.2 of the Doha Ministerial Decision could be considered as a subsequent agreement of the parties within the meaning of Article 31(3)(a) of the VCLT952, on the interpretation of "reasonable interval" within Article 2.12 of the TBT Agreement."

Para. 7.593. "Thus, we are not persuaded that delaying the ban by six months, rather than the three-month period provided for in Section 907(a)(1)(A) would have been ineffective in fulfilling the objective pursued by the United States. The United States has not explained the Panel why it deemed that allowing a 90 day/three month interval between the publication and entry into force of Section 907(a)(1)(A) was not ineffective in fulfilling the objective pursued by Section 907(a)(1)(A), while a six-month interval would be. The United States has also not explained why six months was ineffective when the government of the United States has not deemed necessary to notify Section 907(a)(1)(A) as an urgent measure pursuant to Article 2.10 of the TBT Agreement."

Para. 7.594. "We are not saying that the burden of proof in a claim under Article 2.12 of the TBT Agreement is on the respondent. We are saying that Indonesia has persuaded the Panel that, in the light of Article 2.12 of the TBT Agreement and paragraph 5.2 of the Doha Ministerial Decision, an interval of less than six months was not reasonable in the circumstances of this case and that the United States has not rebutted that presumption."

III. Comentários

Apesar das inúmeras disputas na OMC em que o Artigo 2 do Acordo TBT foi citado, os Painéis ou o Órgão de Apelação, até o presente momento, não trataram deste Artigo como uma regra geral. Conforme nota-se, poucas disputas foram analisadas com substância por Painéis, e um número ainda menor foi objeto de revisão pelo Órgão de Apelação.

Ademais, nos poucos casos em que o Artigo 2 do Acordo de TBT foi interpretado pelo Órgão de Apelação, o dispositivo acionado não foi o Artigo, como uma regra geral, mas a obrigação traduzida em um Parágrafo específico.

O Artigo 2.1 do Acordo TBT traz as obrigações da nação mais favorecida e do tratamento nacional. Este dispositivo foi analisado poucas vezes e, dentre estas, pelo Órgão de Apelação nos casos *US - Clove Cigarettes, US - Tuna II* e *US - COOL*.

O primeiro ponto de destaque é o fato de que os Painéis que enfrentaram alegações referentes ao Artigo 2.1 não empregaram o mesmo padrão de análise. No caso *US - Clove Cigarettes*, o Painel entendeu que a análise de "likeness" deveria levar em consideração o objetivo da medida e que a interpretação do termo "like" deveria ser diferente daquela desenvolvida no âmbito do Artigo III:4 do GATT. O Órgão de Apelação reformou este entendimento, por considerar que para a análise de "likeness", neste caso, é mais relevante que a análise do relacionamento competitivo entre os produtos, tal qual os seus usos finais e as preferências do consumidor.

Por outro lado, o Painel, nos casos *US - Tuna II* e *US - COOL*, concluiu que o Artigo 2.1 busca preservar as oportunidades de competividade entre produtos nacionais e importados e retrata a mesma obrigação do Artigo III:4 do GATT. Com base nisso, o Painel desses casos apenas importou a mesma análise e interpretação jurídica do princípio do tratamento nacional do Artigo III:4 do GATT para o Artigo 2.1 do Acordo TBT. Esta visão, considerando as condições de competição entre os produtos objeto da análise de "likeness", foi corroborada pelo Órgão de Apelação nos referidos casos.

O segundo ponto de destaque diz respeito à divergência na análise do tratamento menos favorável. Em *US - Clove Cigarettes* e *US - Tuna II*, o Painel parece ter adotado a mesma linha de entendimento do Órgão de Apelação em *Dominican Republic - Import and Sale of Cigarettes*. Isto é, não resta comprovado um tratamento menos favorável se este resulta de fatores ou circunstâncias não relacionadas à origem do produto. O Órgão de Apelação em *US - Tuna II* corrigiu o entendimento do Painel, ao pronunciar que deveriam ter sido consideradas as mudanças nas condições de competição entre os produtos, traduzidas em uma discriminação. Em *US - Clove Cigarettes*, o Órgão de Apelação manteve o entendimento do Painel, mas ressaltou a importância de verificar-se se a medida traduz-se em uma discriminação arbitrária ou injustificável frente às condições de concorrência, ou se ela é uma distinção que busca atingir objetivos legítimos da medida.

Esta interpretação, adotada pelo Painel em *US - COOL*, foi inspirada no entendimento do Órgão de Apelação no caso *Korea - Beef*. De acordo com o Painel do caso *US - COOL*, um tratamento menos favorável será comprovado se a medida afetar negativamente as condições de competitividade do produto importado. Disso decorre que, ainda que a medida não outorgue determinado tratamento em função da origem, se o impacto for maior ou afetar negativamente a competitividade do produto importado, restará clara a violação ao Artigo 2.1 do Acordo TBT, por traduzir-se em uma discriminação *de facto*. O Órgão de Apelação, neste mesmo caso, confirmou este entendimento de que todas as circunstâncias factuais que possam alterar as condições de competição devam ser levadas em conta, para então analisar se há uma discriminação.

Por fim, merece destaque o exercício da economia judicial. Nos três casos em que o Artigo 2.1 foi objeto de alegações, o Artigo III:4 do GATT também foi acionado, seja com caráter subsidiário ou complementar. No caso *US - Clove Cigarettes* e no caso *US - COOL*, o Painel encontrou violação ao Artigo 2.1. Partindo do pressuposto de que este dispositivo era mais específico que o Artigo III:4 do GATT, o Painel, em ambos os casos, exerceu economia judicial quanto ao pleito do Artigo III:4. Estas ações não foram reanalisadas pelo Órgão de Apelação.

No entanto, o Painel do caso *US - Tuna II*, apesar de não encontrar violação ao Artigo 2.1, se absteve de analisar os pleitos em relação aos Artigos I e III:4 do GATT, com base no argumento de que as obrigações eram semelhantes. Não obstante isso, o Órgão de Apelação reverteu tal determinação, por entender que o escopo e conteúdo do Artigo 2.1 do TBT é diferente, em relação aos Artigos I e III:4 do GATT. Nesse sentido, afirmou que o conceito de economia processual poderá sempre ser usado, desde que isto não leve a uma resolução parcial da matéria em questão.

O Artigo 2.2 foi analisado em disputas recentes e o Órgão de Apelação revisou os entendimentos dos Painéis nos casos *US - Tuna II* e *US - COOL*. As decisões de Painéis que trataram deste dispostivo não apresentam divergências explícitas e em grande parte se complementam. Em parte, foram corrigidas pelo Órgão de Apelação, conforme abaixo.

O teste de compatilidade com o Artigo 2.2 teve entendimento compatível do Painel nos casos *US - Clove Cigarettes* e *US - Tuna II*. De acordo com o estabelecido nessas ocasiões, a medida deve perseguir um objetivo legítimo e a ela não pode ser mais restritiva que o necessário para atingir o seu obejtivo. Apesar de não questionar a metodologia aqui descrita, o Órgão de Apelação reverteu o entendimento do Painel em *US - Tuna II*, por entender que não ficou provado que a medida consistia em uma barreira mais restritiva ao comércio do que o necessário, tendo em vista que a medida alternativa proposta pelo México não cumpria os objetivos de melhor forma.

No entanto, o Painel em *US - COOL* se afastou um pouco do teste padrão. De acordo com ele, deve ser analisado: (i) se a medida é restritiva ao comércio; (ii) qual o seu objetivo e se esse objetivo é legítimo; (iii) se a medida atinge o seu objetivo; e (iv) se ela é mais restritiva que o necessário. O Órgão de Apelação, ao analisar este caso, não questionou a metodologia de análise deste Artigo feita pelo Painel, mas reverteu o entendimento do Painel, pois entendeu que a medida dos EUA atingia seu objetivo, no nível designado pela Parte.

Ainda, em todas as disputas nas quais o Artigo 2.2 foi objeto de análise, houve concordância na alocação do ônus da prova, tanto em relação à alegação de violação quanto na identificação dos objetivos legítimos. Esta interpretação foi corroborada inclusive pelas decisões do Órgão de Apelação nos casos *US - Tuna II* e *US - COOL*. Ademais, em todos os casos o Painel observou a importância da jurisprudência do Artigo XX(b) do GATT e a levou em consideração para a análise do Artigo 2.2 do Acordo TBT.

No que concerne ao teste de necessidade, nota-se que também houve uniformidade em sua aplicação, a qual foi baseada, quase que integralmente, no teste de necessidade do Artigo XX(b) do GATT. Por sua vez, o Órgão de Apelação, em *US - TUNA II*, aplicou o teste de necessidade como uma análise relacional entre a restritividade ao comércio da medida, o grau de contribuição que esta traz ao cumprimento de um objetivo legítimo, e os riscos que o seu não cumprimento criariam. Este entendimento foi utilizado pelo Órgão de Apelação novamente em *US - COOL*.

Conforme se nota das recentes decisões de Painel, não houve distanciamento dos entendimentos estabelecidos pelo Órgão de Apelação no caso *EC - Sardines*.

Em *EC - Sardines*, o Painel e o Órgão de Apelação ilustraram a importância de um regulamento técnico ser baseado em um padrão internacional, conforme disposto no Artigo 2.4. Seguindo a jurisprudência estabelecida no âmbito do Acordo SPS para a expressão "*based on*", o Painel concluiu que essa expressão não é equivalente a "*conform to*".

No entanto, afirmou que dela decorre a obrigação de "*employ or apply*" o padrão internacional como princípio fundamental para a implementação do regulamento técnico. No mesmo caso, o Órgão de Apelação determinou que na ausência de uma contradição entre o regulamento técnico e o padrão internacional, o regulamento técnico pode ser considerado baseado em um padrão internacional. Referido entendimento foi seguido pelo Painel no caso *US - Tuna II*, e posteriormente confirmado pela respectiva decisão do Órgão de Apelação.

No que diz respeito à pertinência da norma internacional, o Painel em *US - Tuna II* também tomou como referência a conclusão do Órgão de Apelação em *EC - Sardines* de que "*relevant*" deve ser interpretado como "*bear upon, relate to, or be pertinent to*". Ademais, em relação à consideração da norma como meio apropriado ou eficaz para atingir o objetivo almejado, o Painel dos casos *US - COOL* e *US - Tuna II*, tal qual o Órgão de Apelação para este último, também seguiu a jurisprudência do caso *EC - Sardines*.

Em ambas as disputas, o Painel alocou o ônus da prova ao Demandante e determinou que a análise se resume a dois aspectos: se a norma internacional é adequada para atingir o objetivo (meio apropriado), e se ela tem a função de alcançar o obejtivo (meio eficaz). O Órgão de Apelação confirmou esta interpretação, e ela também não tem sido questionada nas decisões dos Painéis.

O Artigo 2.5 foi analisado pela primeira vez na disputa *US - Clove Cigarettes*. O Painel concluiu que referido dispositivo, em sua primeira sentença, estabelece quatro requisitos. Ainda, afirmou que o pedido de explicações por parte do Membro afetado funciona como um requisito preliminar para que uma violação ao Artigo 2.5 seja estabelecida.

Ressalta-se que não foi feito questionamento ao Órgão de Apelação, por nenhuma das Partes, relativo à matéria.

No caso *US - Clove Cigarettes* (DS406), o Painel entendeu que a interpretação da Indonésia em relação ao Artigo 2.8 estava errada, o Artigo não obriga os Membros a fornecer "certo nível de especificação" em seus regulamentos técnicos, tampouco os Membros são obrigados a sempre especificá-los em termos de desempenho. O Painel deixa claro que os regulamentos serão especificados em termos de desempenho sempre que possível. Portanto, os EUA não descumpriram os termos do Artigo ao especificarem o regulamento com uma característica descritiva de um produto, uma vez que não seria possível especificar em termos de desempenho.

Apesar dos casos indicados acima não conterem interpretações diretas e específicas em relação aos aspectos materiais do Artigo 2.9, alguns comentários são pertinentes em relação aos aspectos procedimentais.

Nos casos DS291, 292 e 293, destaca-se que o Painel entendeu não ser aplicável o Acordo TBT, uma vez que as medidas das CE em relação aos produtos geneticamente modificados (GMO ou *biotech*) se enquadravam como SPS *Measures*. Portanto, em razão do Artigo 1.5 do Acordo TBT, não seria aplicável o Acordo TBT.

Contudo, no âmbito procedimental, os Painéis dos casos acima analisaram um ponto interessante em relação à necessidade de analisar os subitens do Artigo 2.9 do Acordo TBT ao pleitear a sua violação como um todo. No geral, os Painéis entenderam que a forma como os demandantes (Canadá, EUA e Argentina) questionaram o Artigo 2.9 estava correta, não violando o Artigo 6.2 do DSU. Tal ocorreu, pois os Painéis em *EC - Biotech* destacaram a importância de se atentar para os subitens do Artigo ao questionar a sua violação por parte do demandado. Não é preciso que se analise especificamente a violação de cada subitem, pelo fato das obrigações do Artigo serem "muito próximas" e "interligadas". **(13)**

Quanto ao DS406, embora o Painel tenha sido composto, não há Relatório do Painel nem do Órgão de Apelação disponível sobre o caso. No "*Request for Consultation"* **(14)** por parte da Indonésia, o Artigo 2 do TBT é mencionado de maneira geral, indicando violação por parte dos EUA na imposição de suas medidas contra cigarros de cravo indianos (pelo tratamento diferenciado em relação ao produto nacional, ser mais restritivo ao comércio do que o necessário e pela ausência de informações técnicas e científicas que embasem esse tratamento), conforme abaixo:

No Relatório do Órgão de Apelação, há importante interpretação sobre os produtos objeto de um regulamento técnico, conforme delimita o Artigo 2.9.2. Ao contrário do que havia sido decidido pelo Painel, o Órgão de Apelação apontou a desnecessidade de um regulamento técnico identificar o nome exato do produto a que se destina, sendo válido se o regulamento contiver características que tornam o produto identificável. Tal ocorre, pois não há disposição específica no acordo que exija que o produto seja nomeado ou expressamente identificado no regulamento técnico.

O Artigo não foi analisado ou interpretado de maneira específica pelo DSB. Contudo, o dispositivo faz referência ao procedimento regular de notificação do Artigo 2.9, motivo pelo qual os comentários sobre o referido dispositivo contribuem de maneira subsidiária para a aplicação do Artigo 2.10 do Acordo TBT.

Dada a inexistência de uma evolução interpretativa por parte do DSB sobre o Artigo 2.11, por ora recomenda-se ajustes na tradução.

A referida Decisão Ministerial define o que seria "*reasonable interval*", mas não estipula parâmetros específicos para as exceções a esse prazo. Ao contrário, a decisão limita-se a dizer que o prazo poderá ser menor, quando os objetivos do regulamento técnico do Membro importador se tornarem ineficazes. Por esse motivo, é necessário que o Membro comprove o motivo pelo qual a medida que carece de urgência imediata, impreterivelmente necessita de aplicação em prazo menor do que seis meses.

Caso não possa comprovar tal necessidade, será configurada a violação ao Artigo 2.12 do TBT. Em se tratando de uma aplicação emergencial relacionada à saúde, ao meio-ambiente, à segurança nacional e à vida, o presente parágrafo não se aplica, pois o parágrafo 9 do mesmo Artigo é específico para tais situações. O Painel (DS406) analisou se a medida aplicada pelos EUA, ao entrar em vigor apenas três meses após sua publicação, violou o requerimento de um intervalo razoável do Artigo 2.12. Essa foi a primeira vez que um Painel ou Órgão de Apelação interpretou esse Artigo.

Além disso, notou-se que o início do texto do Artigo exclui sua aplicação a casos de urgência, conforme o Artigo 2.10. Logo, todas as emergências de segurança, saúde, proteção ambiental e segurança nacional não são incluídas no rol de sua aplicação. O objetivo do Artigo 2.12 do TBT é permitir que os produtores dos Membros exportadores, especialmente em PEDs, tenham tempo para adaptar as suas respectivas produções ou métodos de produção aos requerimentos do Membro importador.

A Indonésia alegou que a decisão do Comitê do TBT, reunido em 15 de março de 2002, estabeleceu que o termo "intervalo razoável" do Artigo 2.12 normalmente se refere a um período de não menos do que seis meses, com a exceção dos casos onde esse prazo impediria o cumprimento efetivo dos objetivos propostos. O Painel entendeu que a Conferência Ministerial (e o Conselho Geral) têm a autoridade exclusiva para adotar interpretações relativas aos Acordos em análise. Essa decisão foi adotada por consenso pelo Conselho Ministerial.

Mesmo não havendo um requerimento formal para sustentar que uma Decisão Ministerial é uma interpretação de autoridade sob o Artigo IX:2 do Acordo da OMC, a interpretação da Conferência Ministerial se baseou nas discussões feitas no Conselho Geral e em órgãos subsidiários da OMC. Partindo do pressuposto de que todos os Membros da OMC que participaram da Conferência Ministerial concordaram com as interpretações feitas, o Painel entendeu que, à luz do Artigo 2.12 e do parágrafo 5.2 da Decisão Ministerial de Doha, um intervalo de menos de seis meses não seria razoável nas circunstâncias do presente caso, e os EUA não refutaram essa presunção.

FOOTNOTES:

Footnote 1: Relatório do Painel, para. 7.542.
Footnote 2: Relatório do Painel, para. 7.595.
Footnote 3: Relatório do Painel, paras 7.429-432.
Footnote 4: Relatório do Painel, paras 7.461-463.
Footnote 5: Relatório do Painel, paras 7.496-497.
Footnote 6: Relatório do Painel, para. 7.549.
Footnote 7: Relatório do Painel, para. 7.549.
Footnote 8: Relatório do Painel, paras 7.716-720.
Footnote 9: Relatório do Painel, paras 7.886-887.
Footnote 10: Relatório do Painel, paras 7.734-736.
Footnote 11: Relatório do Painel, para. 7.803.
Footnote 12: Relatório do Painel, paras 7.798-800.
Footnote 13: Para maiores informações, vide Panel Reports – EC – Measures affecting the approval and marketing of biotech products (WT/DS291, 292, 293/R) – WorldTradeLaw.net Dispute Settlement Commentary (DSC), paras. 13 e 14.
Footnote 14: G/L/917 G/SPS/GEN/1015 G/TBT/D/38 WT/DS406/

- **Artigo 3**

Beatriz Machado Granziera
Victor Bovarotti Lopes

IA. Texto do Artigo em Inglês

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.

IB. Texto do Artigo em Português

Artigo 3
Elaboração, Adoção e Aplicação de Regulamentos Técnicos por instituições Públicas Locais e Instituições não Governamentais

No que se refere a suas instituições públicas locais e às instituições não governamentais existentes em seu território:

3.1 Os Membros tomarão as medidas razoáveis a seu alcance para assegurar o cumprimento por tais Instituições das disposições do Artigo 2, com exceção da obrigação de notificar tal como contida nos parágrafos 9.2 e 10.1 do Artigo.

3.2 Os Membros assegurarão que os regulamentos técnicos de governos locais de nível imediatamente inferior ao nível do governo central dos Membros sejam notificados, de acordo com as disposições dos parágrafos 9.2 e 10.1 do Artigo 2, notando que não será necessário notificar regulamentos técnicos cujo conteúdo técnico seja substancialmente o mesmo de regulamentos técnicos de instituições do governo central do Membro em questão previamente notificados.

3.3 Os Membros poderão solicitar que os contatos com outros Membros, inclusive as notificações, fornecimento de informações, comentários e discussões a que se referem os parágrafos 9 e 10 do Artigo 2 se façam por meio do governo central.

3.4 Os Membros não tomarão medidas que obriguem ou encorajem instituições públicas locais ou instituições não governamentais existentes em seu território a agir de forma incompatível com as disposições do Artigo 2.

3.5 Os Membros são inteiramente responsáveis sob este Acordo pela observância de todas as disposições do Artigo 2. Os Membros formularão e implementarão medidas positivas e mecanismos de apoio à observância das disposições do Artigo 2 por instituições que não sejam do governo central.

(Decreto nº 1.355, de 30 de dezembro de 1994)

IC. Comentários sobre a Tradução

Em primeiro lugar, "Instituições Públicas Locais" e "Governo Central" poderiam ser substituídos por "Órgãos Públicos" e "União", respectivamente, considerando que o texto deve se adequar ao contexto brasileiro. Em várias passagens, foram sugeridas vírgulas e termos para tornar a leitura do texto mais clara, conforme abaixo:

3.1 Os Membros tomarão as medidas razoáveis [que estiverem] a seu alcance para assegurar o cumprimento, por tais Instituições, das disposições do Artigo 2, com exceção da obrigação de notificar tal como contida nos parágrafos 9.2 e 10.1 do Artigo

(...)

3.5 Os Membros são inteiramente responsáveis, sob este Acordo, pela observância de todas as disposições do Artigo 2. Os Membros formularão e implementarão medidas positivas [efetivas] e mecanismos de apoio à observância das disposições do Artigo 2 por instituições que não sejam do governo central.

No Artigo 3.2, "observando" é uma melhor tradução para "*noting*" do que "notando". Ainda no Artigo 3.2, "notificar regulamentos técnicos" deveria ser substituído por "a notificação de regulamentos técnicos". No Artigo 3.5, "efetivas" é uma melhor tradução para "*positive*" do que "positivas".

II. Interpretação e Aplicação do Artigo 3

Este Artigo não foi objeto de análise pelo DSB da OMC.

III. Comentários

Nada a observar, uma vez que este Artigo não foi objeto de análise pelo DSB da OMC.

- **Artigo 4**

IA. Texto do Artigo em Inglês

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.

IB. Texto do Artigo em Português

Artigo 4
Elaboração, Adoção e Aplicação de Normas

4.1 Os Membros assegurarão que suas instituições de normalização do governo central aceitem e cumpram o Código de Boa Conduta para a Elaboração, Adoção e Aplicação de Normas contido no Anexo 3 a este Acordo (doravante denominado 'Código de Boa Conduta'). Eles tomarão as medidas razoáveis a seu alcance para assegurar que as instituições de normalização públicas locais ou não governamentais existentes em seu território, bem como as instituições de normalização regionais das quais eles ou uma ou mais instituições existentes em seu território sejam Membros, aceitem e cumpram este Código de Boa Conduta. Adicionalmente os Membros não tomarão medidas que tenham o efeito direto ou indireto de obrigar ou encorajar tais instituições de normalização a agir de forma incompatível com o Código de Boa Conduta. As obrigações dos Membros a respeito do cumprimento das disposições do Código de Boa Conduta pelas instituições de normalização se aplicarão independentemente de uma instituição de normalização ter aceito ou não o Código de Boa Conduta.

4.2 As instituições de normalização que tenham aceito e estejam cumprindo o Código de Boa Conduta serão consideradas cumpridoras dos princípios deste Acordo pelos Membros.

(Decreto nº 1.355, de 30 de dezembro de 1994)

II. Interpretação e Aplicação do Artigo 4

Este Artigo não foi objeto de análise pelo DSB da OMC.

III. Comentários

Nada a observar, uma vez que este Artigo não foi objeto de análise pelo DSB da OMC.

- **Artigo 5**

Beatriz Machado Granziera
Érica Cristina Iwano Lourenço
Julia Young Soo Kim
Victor Bovarotti Lopes

IA. Texto do Artigo em Inglês

Article 5
Conformity with Technical Regulations and Standards

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 pplicable 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.

IB. <u>Texto do Artigo em Português</u>

Artigo 5
Procedimentos para Avaliação de Conformidade por instituições do Governo Central

5.1 Os Membros assegurarão que, nos casos em que sela exigida uma declaração positiva de conformidade com regulamentos técnicos ou normas, as instituições de seu governo central aplicarão as seguintes disposições a produtos originários do território de outros Membros.

5.1.1 os procedimentos de avaliação de conformidade serão elaborados, adotados e aplicados de modo a conceder acesso a fornecedores de produtos similares originários dos territórios de outros Membros sob condições não menos favoráveis do que as concedidas a fornecedores de produtos similares de origem nacional ou originários de qualquer outro país numa situação comparável; acesso implica o direito do fornecedor a uma avaliação de conformidade sob as regras do procedimento, incluindo, quando previsto por este procedimento a possibilidade de efetuar as atividades de avaliação de conformidade no local das instalações e de receber a marca do sistema.

5.1.2 os procedimentos de avaliação de conformidade não serão elaborados adotados ou aplicados com a finalidade ou o efeito de criar obstáculos desnecessários ao comércio internacional. Isto significa, *inter alia*, que os procedimentos de

avaliação de conformidade não deverão ser mais rigorosos ou ser aplicados mais rigorosamente do que o necessário para dar ao Membro importador confiança suficiente de que os produtos estão em conformidade com os regulamentos técnicos ou normas aplicáveis, levando em conta os riscos que a não conformidade criaria.

5.2 Na implementação das disposições do parágrafo 1, os Membros assegurarão que:

5.2.1 os procedimentos de avaliação de conformidade sejam realizados e concluídos tão rapidamente quanto possível e numa ordem não menos favorável para produtos originários dos territórios de outros Membros do que para produtos nacionais similares;

5.2.2 o período normal de processamento de cada procedimento de avaliação de conformidade seja publicado ou que o período de processamento previsto seja comunicado ao solicitante a pedido deste; que ao receber uma solicitação, a instituição competente examine prontamente se a documentação está completa e informe o solicitante de todas as deficiências de forma precisa e completa; que a instituição competente transmita, assim que possível, os resultados da avaliação de orma precisa e completa, a fim de que se possam tomar medidas corretivas caso necessário; que, mesmo quando haja deficiências, a instituição competente prossiga até onde for possível com o procedimento se o solicitante assim requerer; e que o solicitante seja informado, a seu pedido, do andamento do procedimento, explicando-se-lhe qualquer atraso;

5.2.3 as informações requisitadas limitem-se ao necessário para avaliar a conformidade e determinar as taxas;

5.2.4 a confidencialidade da informação sobre os produtos originários dos territórios de outros Membros que resulte ou sela fornecida em função de tais procedimentos de avaliação de conformidade seja respeitada da mesma forma que para produtos nacionais e de tal forma que os interesses comerciais legítimos selam protegidos;

5.2.5 quaisquer taxas cobradas para avaliar a conformidade de produtos originários de territórios de outros Membros sejam eqüitativas em relação a quaisquer taxas cobráveis para avaliar a conformidade de produtos similares de origem nacional ou originários de qualquer outro país, levando em conta comunicações, transportes e outros custos resultantes de diferenças entre a localização das instalações do solicitante e da instituição de avaliação de conformidade;

5.2.6 a localização das instalações utilizadas em procedimentos de avaliação de conformidade e a coleta de amostres não causem inconvenientes desnecessários aos solicitantes ou seus agentes;

5.2.7 sempre que as especificações de um produto sejam modificadas após a determinação de sua conformidade ao regulamento técnico ou norma aplicável, os procedimentos de avaliação de conformidade para o produto modificado sejam limitados ao necessário para determinar se existe confiança suficiente de que o produto ainda satisfaz os regulamentos técnicos ou normas em questão.

5.2.8 exista um procedimento para examinar as reclamações relativas à operação de um procedimento de avaliação de conformidade e tomar medidas corretivas quando a reclamação seja justificada.

5.3 Nada nos parágrafos 1 e 2 impossibilitará os Membros de realizar verificações por amostragem razoáveis- justificável em seus territórios.

5.4 Nos casos em que seja exigida uma declaração positiva de que os produtos estão em conformidade com regulamentos técnicos ou normas, e existam guias ou recomendações pertinentes emitidas por instituições de normalização internacionais, ou sua formulação definitiva for iminente, os Membros assegurarão que as instituições do governo central utilizarão estas guias ou recomendações ou seus elementos pertinentes como base de seus procedimentos de avaliação de conformidade, exceto quando, conforme devidamente explicado, caso solicitado, tais guias ou recomendações ou seus elementos pertinentes sejam inadequados para os Membros em questão por razões como, *inter alia*, imperativos de segurança nacional, a prevenção de práticas enganosas, a proteção da saúde ou segurança humana, da saúde ou vida animal ou vegetal ou do meio ambiente, fatores climáticos ou outros fatores geográficos fundamentais, problemas fundamentais tecnológicos ou de Infra-estrutura.

5.5 Com o objetivo de harmonizar o mais amplamente possível os procedimentos de avaliação de conformidade, os Membros participarão integralmente, dentro do limite de seus recursos, da preparação, pelas instituições de normalização internacionais apropriadas, de guias ou recomendações sobre procedimentos de avaliação de conformidade.

5.6 Sempre que não existir um guia ou recomendação pertinente emitidos por instituições de normalização internacionais ou o conteúdo técnico de um projeto de procedimento de avaliação de conformidade não estiver em concordância com o conteúdo técnico dos guias ou recomendações pertinentes emitidos por instituições de normalização internacionais, e se o procedimento de avaliação de conformidade puder ter um efeito significativo sobre o comércio de outros Membros, os Membros:

5.6.1 publicarão uma nota numa publicação com antecedência suficiente para que todas as partes interessadas existentes em outros Membros possam tomar conhecimento de que planejam introduzir um determinado procedimento de avaliação de conformidade;

5.6.2 notificarão aos outros Membros, por meio do Secretariado, os produtos a serem cobertos pelo procedimento de avaliação de conformidade planejado, junto com uma breve indicação de seu objetivo e arrazoado. Tais notificações serão feitas com a antecedência suficiente quando emendas ainda possam ser introduzidas e comentários levados em consideração;

5.6.3 quando se lhes solicite, fornecerão a outros Membros pormenores ou cópias do projeto e procedimento de avaliação de conformidade e, sempre que possível, identificarão as partes que difiram em substância dos guias ou recomendações pertinentes emitidos por instituições de normalização internacionais;

5.6.4 que concederão, sem discriminação, um prazo razoável para que outros Membros açam comentários por escrito, discutirão estes comentários, caso solicitado e levarão em consideração estes comentários escritos e o resultado destas discussões.

5.7 Sem prejuízo das disposições do *caput* do parágrafo 6, quando surgirem ou houver ameaça de que surjam problemas urgentes de segurança, saúde, proteção do meio ambiente ou segurança nacional para um Membro, este Membro poderá omitir os passos enumerados no parágrafo 6 que julgue necessário, desde que o Membro, quando da adoção do procedimento:

5.7.1 notifique imediatamente os outros Membros por meio do Secretariado sobre o procedimento em questão e os produtos cobertos, com uma breve indicação do objetivo e arrazoado do procedimento, inclusive a natureza dos problemas urgentes;

5.7.2 quando se lhes solicite, forneça a outros Membros cópias do procedimento.

5.7.3 sem discriminação, permita que outros Membros façam comentários por escrito, discuta estes comentários caso solicitado e leve em consideração estes comentários escritos e o resultado destas discussões.

5.8 Os Membros assegurarão que todos os procedimentos de avaliação de conformidade que tenham sido adotados sejam prontamente publicados ou colocados a disposição de outra forma, de modo a permitir que em outros Membros as partes interessadas tomem conhecimento do mesmos.

5.9 Exceto nas circunstâncias urgentes a que se faz referência no parágrafo 7, os Membros deixarão um intervalo razoável entre a publicação dos requisitos relativos aos procedimentos de avaliação de conformidade e sua entrada em vigor, de forma que os produtores dos Membros exportadores particularmente os dos países em desenvolvimento disponham de tempo para adaptar seus produtos ou métodos de produção às exigências do Membro importador.

IC. Comentários sobre a Tradução

Recomendamos o uso do termo "órgãos" ao invés de "instituições" para traduzir o termo "bodies".

Além disso, acreditamos que no Artigo 5.1, o uso do tempo verbal "apliquem" seja mais adequado do que "aplicarão", e nos Artigos 5.1.1 e 5.1.2, o uso de "são" ao invés de "serão".

Ademais, no Artigo 5.1.1, recomendamos o uso do plural "(dos) fornecedores", conforme a redação em inglês.

Por fim, em relação ao Artigo 5.1.2, acreditamos que "adequada" seja uma tradução mais fiel do que "suficiente".

Sugere-se a substituição dos termos: "Instituições Públicas Locais" e "Governo Central", por "Órgãos Públicos" e "União" ou "Governo Federal", respectivamente, considerando-se a necessidade de adequação ao contexto brasileiro, e "instituições do Governo Central" poderia ser substituído por "instituições federais".

Ademais, considerando-se o significado da palavra "guia" em português, sugere-se a sua substituição por "diretrizes", a fim de enfatizar o significado de conjunto de regras a serem obedecidas. Em várias passagens foram sugeridas vírgulas e a inclusão de alguns termos, para tornar a leitura do texto mais clara, conforme abaixo:

5.5 Com o objetivo de harmonizar o mais amplamente possível os procedimentos de avaliação de conformidade, os Membros participarão integralmente, dentro do limite de seus recursos, da preparação [elaboração], pelas instituições de normalização internacionais apropriadas, de guias ou recomendações sobre procedimentos de avaliação de conformidade.

Em relação ao Artigo 5.6, recomendamos o uso do termo "relevante" ao invés do termo "pertinente". Além disso, acreditamos que "organismos internacionais de uniformização" seja uma tradução mais adequada do que "instituições de normalização internacionais". Ainda, recomendamos o uso do termo "relevantes" ao invés do termo "pertinentes".

5.7.1 notifique imediatamente os outros Membros, por meio do Secretariado, sobre o procedimento em questão e os produtos cobertos, com uma breve indicação do objetivo e arrazoado do procedimento, inclusive a natureza dos problemas urgentes;

5.7.2 quando se lhes solicite [solicitado], forneça a outros Membros cópias do procedimento.

5.7.3 sem discriminação, permita que outros Membros façam comentários [observações] por escrito, discuta estes comentários caso solicitado e leve em consideração estes comentários escritos e [bem como] o resultado destas discussões.

Sugerimos a seguinte redação para a parte final do Artigo 5.8: "(...) de modo a permitir que as partes interessadas em outros Membros tomem conhecimento do mesmos."

5.9 Exceto nas circunstâncias urgentes a que se faz referência no parágrafo 7, os Membros deixarão um intervalo [de tempo] razoável entre a [data de] publicação dos requisitos relativos aos procedimentos de avaliação de conformidade e sua entrada em vigor, de forma que os produtores dos Membros exportadores, particularmente os dos países em desenvolvimento, [Membros] disponham de tempo para adaptar seus produtos ou métodos de produção às exigências do Membro importador.

Além disso, o termo "instituições de normalização internacionais" deve ser substituído por "instituições de normatização/padronização internacionais", já que a palavra "normalização" refere-se ao ato ou efeito de normalizar(-se), o que não faz sentido no contexto do TBT. Quanto ao Artigo 5.3, o termo "*spot checks*" poderia ter sido traduzido por "inspeção" ao invés de "verificações por amostragem". Já no Artigo 5.4, "fundamentais" poderia ser substituído por "essenciais".

Por sua vez, no Artigo 5.7.1., "abrangidos" é uma melhor tradução para "*covered*" do que "cobertos". Ainda no Artigo 5.7.1., "arrazoado" poderia ser substituído por "a razão" ou "o motivo". No Artigo 5.7.2. "quando se lhes solicite" poderia ser substituído por "quando solicitado". No Artigo 5.7.3, a palavra "comentários", poderia ser substituída por "observações". No Artigo 5.9, depois de "particularmente os dos países em desenvolvimento", a palavra "Membros" deve ser retirada do texto.

Por fim, Ainda no Artigo 5.9, deve-se deixar expresso que o "intervalo" a que esse Artigo se refere, é um intervalo temporal. Sugestão: "os Membros deixarão um intervalo [de tempo] razoável entre a [data de] publicação dos requisitos."

No Artigo 5.2, recomendamos o uso do termo "órgão" ao invés de "instituição". Além disso, recomendamos, no Artigo 5.2.1, que se utilize a tradução "da forma mais expedita possível" ao invés de "tão rapidamente quanto possível". Em relação ao Artigo 5.2.2, o termo "padrão" seria uma tradução mais adequada do que "normal". Ademais, acreditamos que "mesmo havendo" seria mais cabível do que "mesmo quando haja".

Quanto ao Artigo 5.2.4, parece que houve um erro de digitação, de forma que "sela" seria "seja" e "selam", "sejam". Referente ao Artigo 5.2.6, recomendamos a tradução "seleção de amostras" ao invés de "coleta de amostres". Já com relação ao Artigo 5.2.7, a redação em inglês está no singular quando trata do "procedimento", todavia, a redação em português fala de "procedimentos", no plural.

II. Interpretação e Aplicação do Artigo 5

1. Geral

O Painel comenta sobre a aplicação do Acordo, em vista do Artigo 1.5 do TBT.

Relatório do Painel no caso *European Communities - Measures Concerning Meat and Meat Products (EC - Hormones)*, WT/DS26/R, paras. 8.29 e ss

Para. 8.29. "Canada invokes arguments relating to three different agreements: the SPS Agreement, the TBT Agreement and GATT. The European Communities, in turn, invokes the same three agreements in its defense. We next examine which of these agreements apply to the present dispute."

"(…) In respect of the applicability of the TBT Agreement to this dispute, we note that Article 1.5 of the TBT Agreement reads as follows:

> 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.

Since the measures in dispute are sanitary measures, we find that the TBT Agreement is not applicable to this dispute."

Em outra oportunidade, o Painel analisa a aplicabilidade do TBT, em vista das medidas em questão serem consideradas medidas sanitárias.

Relatório do Painel no caso *European Communities - Measures Affecting the Approval and Marketing of Biotech Products* (EC - Approval and Marketing of Biotech Products), WT/DS291/292/293/R, paras. 7.2518-7.2521 e 7.2528

Para. 7.2518. "The Panel now turns to address Canada's and Argentina's claims of inconsistency under the TBT Agreement. We recall that the United States did not present claims under the TBT Agreement."

Para. 7.2519. "Canada considers that the product-specific measures it is challenging are SPS measures and that, as such, they are not subject to the requirements of the TBT Agreement. Canada argues, however, that if the Panel decides that the product-specific measures at issue are not SPS measures, then Canada submits, in the alternative, that these measures are subject to the requirements of the TBT Agreement. More particularly, Canada's alternative claim is that the relevant measures are inconsistent with Articles 2.1, 2.2, 5.1.2 and 5.2.1, first part, of the TBT Agreement."

Para. 7.2520. "Furthermore, Canada states that to the extent that the Panel determines that parts of the measures at issue are covered by the TBT Agreement in addition to the SPS Agreement, Canada's TBT claims are to be considered cumulative rather than alternative, vis-à-vis its SPS claims."

Para. 7.2528. "In the light of the above, the Panel reaches the following conclusions:

(i) DS292 (Canada)

With reference to DS292, and having regard to the arguments and evidence presented by Canada and the European Communities, the Panel concludes that it is not necessary to make findings on whether the product-specific measures which are being challenged by Canada are inconsistent with Articles 2.1, 2.2, 5.1.2 and 5.2.1, first part, of the TBT Agreement. Accordingly, the Panel offers no findings under Articles 2.1, 2.2, 5.1.2 or 5.2.1, first part, of the TBT Agreement."

Para. 7.2521. "Argentina considers that the Panel should examine the product-specific measures Argentina is challenging under the SPS Agreement. However, if the Panel concludes that it should not analize Argentina's claim under the SPS Agreement, Argentina submits, in the alternative, that the product-specific measures at issue are subject to the requirements of the TBT Agreement. More particularly, in Argentina's view the relevant measures are inconsistent with Articles 2.1, 2.2, 5.1.1, 5.1.2, 5.2.1, 5.2.2 and 12 of the TBT Agreement.

(...)

(ii) DS293 (Argentina)

With reference to DS293, and having regard to the arguments and evidence presented by Argentina and the European Communities, the Panel concludes that it is not necessary to make findings on whether the relevant ten product-specific measures challenged by Argentina are inconsistent with Articles 2.1, 2.2, 5.1.1, 5.1.2, 5.2.1, 5.2.2 and 12 of the TBT Agreement. Accordingly, the Panel offers no findings under Articles 2.1, 2.2, 5.1.1, 5.1.2, 5.2.1, 5.2.2 or 12 of the TBT Agreement."

2. Artigo 5.2

Relatório do Painel no caso *European Communities - Measures Affecting the Approval and Marketing of Biotech Products* (EC - Approval and Marketing of Biotech Products), WT/DS291/292/293/R, paras. 7.2524

O Acordo TBT não foi analisado, pois as reclamações em relação a esse acordo eram alternativas ao Acordo SPS.

Para. 7.2524. "(...) Since Canada's alternative claims are relevant only in the event that we decide that the relevant product-specific measures are not subject to the SPS Agreement, and since we have found that these measures are subject to the SPS Agreement (notably Annex C(1)(a) and Article 8), we see no need to address Canada's alternative claims under Articles 2.1, 2.2, 5.1.2 and 5.2.1, first part, of the TBT Agreement further."

3. Artigo 5.6

O Painel entendeu que o Artigo 5.6 do Acordo TBT requer que os Membros concedam um prazo razoável para outros Membros comentarem sobre a respectiva regulação, conforme também é exigido pelos Artigos 2.9 do Acordo TBT e Anexo B(5) do Acordo SPS.

Relatório do Painel no caso *European Communities - Measures Affecting the Approval and Marketing of Biotech Products* (EC - Approval and Marketing of Biotech Products), WT/DS291/292/293/R, para. 73

Para. 73. "In our view, like the procedural obligations in Article 5 of the *Anti-Dumping Agreement*, the "notice and comment" obligations contained in Annex B(5) of the *SPS Agreement* and Articles 2.9 and 5.6 of the *TBT Agreement* are "closely related" and "interlinked". For example, sub-paragraph (d) of Annex B(5) of *SPS Agreement* requires Members to allow a reasonable time for other Members to make comments in writing on a proposed regulation. If this proposed regulation has not been published at an early stage, as required in sub-paragraph (a) of Annex B(5) and brought to the attention of other Members through the notification required in subparagraph (b) of Annex B(5), and copies provided upon request as established in subparagraph (c) of Annex B(5), it is difficult to imagine how an interested Member would gain sufficient knowledge of the content fo the proposed regulation to be able to avail itself of the opportunity to submit comments as foreseen in sub-paragraph (d) of Annex B(5). Therefore, we consider that the fact that Argentina's panel request identifies the relevant article and paragraph numbers sheds sufficient light on "the nature of the obligation at issue"66 to meet the minimum requirements of Article 6.2"."

4. Artigo 5.8

Relatório do Painel no caso *European Communities - Measures Affecting the Approval and Marketing of Biotech Products* (EC - Approval and Marketing of Biotech Products), WT/DS291/292/293/R, paras. 7.2524

O Acordo TBT não foi analisado, pois as reclamações em relação a esse acordo eram alternativas ao Acordo SPS.

Para. 7.2524. "(...) Since Canada's alternative claims are relevant only in the event that we decide that the relevant product-specific measures are not subject to the SPS Agreement, and since we have found that these measures are subject to the SPS Agreement (notably Annex C(1)(a) and Article 8), we see no need to address Canada's alternative claims under Articles 2.1, 2.2, 5.1.2 and 5.2.1, first part, of the TBT Agreement further."

III. Comentários

O Artigo 5 foi invocado em quatro disputas, quais sejam DS48, DS291, DS292 e DS293. Ocorre que, em nenhuma delas, o Órgão de Apelação se aprofundou na análise de seus dispositivos, não sendo possível verificar uma evolução interpretativa acerca do Artigo 5 do TBT. Apesar disso, é possível traçar comentários acerca da aplicabilidade desse Artigo, segundo a interpretação do Órgão de Apelação, como será feito a seguir.

Em *EC - Hormones (Canadá*) (DS48), o Canadá apresenta argumentos relacionados a três Acordos da OMC, quais sejam o SPS, TBT e GATT. O Órgão de Apelação, nessa ocasião, examinou quais desses acordos seriam aplicáveis ao caso concreto discutido. Ao analisar o contexto do caso, o Órgão de Apelação conclui que todos os argumentos apresentados pela parte, referiam-se a medidas sanitárias. Em sua conclusão, apenas confirma o Artigo 1.5 do TBT, pelo qual esse Acordo não se aplicaria a esse tipo de medidas.

Já em *EC - Approval and Marketing of Biotech Products* (DS291, DS292 e DS293), o TBT foi invocado alternativamente, caso o SPS não fosse acolhido pelo Órgão de Apelação. Entretanto, em análise, o Órgão de Apelação acolheu as alegações dos demandantes em relação ao SPS e considerou que não seria relevante analisar as reclamações alternativas em relação ao Artigo 5 do TBT.

As únicas menções feitas pelo Painel tratam exclusivamente da aplicabilidade do Artigo 5.2. No caso *EC - Biotech* (DS 291, 292 e 293), o Painel entendeu que o Acordo TBT não seria aplicável, por considerar que as medidas da UE (em relação aos produtos geneticamente modificados) seriam medidas sanitárias e fitossanitárias. Assim, o Acordo TBT não seria aplicado, de acordo com o estabelecido no Artigo 1.5. Não há, contudo, evolução interpretativa do Órgão de Apelação sobre o Artigo.

A análise procedimental realizada no caso *EC - Biotech* (DS 291, 292 e 293) em relação ao Artigo 5.6 do TBT merece destaque. O Painel entendeu não ser necessário à Parte indicar a violação específica de cada um dos parágrafos do Artigo 5.6 para que seja realizado uma análise por parte da DSB. Dada a inter-relação e a semelhança entre as disposições, a indicação da violação ao Artigo como um todo parece ser suficiente, de acordo com o entendimento do Painel.

Por fim, vale fazer referência ao trabalho do Comitê do TBT em relação ao Artigo 5.6, no que tange aos princípios a serem observados no trabalho da notificação e outras recomendações, conforme abaixo:

> The TBT Committee adopted a decision in respect of the principles to be observed, when international standards, guidelines and recommendations (as mentioned under Articles 2, 5 and Annex 3 of the TBT Agreement) are developed, so as to ensure transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and to take account of the concerns of developing countries. **(15)**
> With reference to the notification of draft conformity assessment procedures, see the recommendations and decisions adopted by the TBT Committee, as described in paragraphs 26–36 above. See in particular the recommendation concerning the application of Articles 2.9 and 5.6 (preambular part). **(16)**

No caso *EC - Biotech* (DS 291, 292 e 293), o Painel entendeu que o Acordo TBT não seria aplicável, por considerar que as medidas da UE (em relação aos produtos geneticamente modificados) seriam medidas sanitárias e fitossanitárias. Assim, o Acordo TBT não poderia ser aplicado, de acordo com o estabelecido no Artigo 1.5.

FOOTNOTES:

Footnote 15: G/TBT/1/Rev.8, paras. 26–29.
Footnote 16: G/TBT/1/Rev.8, para. 15.

- **Artigo 6**

Lucas Queiroz Pires

IA. Texto do Artigo em Inglês

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 others 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.

IB. Texto do Artigo em Português

Artigo 6
Reconhecimento de Avaliação de Conformidade por Instituições do Governo Central

No que se refere às instituições de seu governo central:

6.1 Sem prejuízo das disposições dos parágrafos 3 e 4, os Membros assegurarão, sempre que possível, que sejam aceitos os resultados dos procedimentos de avaliação de conformidade de outros Membros, mesmo que estes procedimentos difiram dos seus, desde que estejam convencidos de que aqueles oferecem uma garantia de conformidade com os regulamentos técnicos ou normas aplicáveis equivalente a seus próprios procedimentos. Reconhece-se que consultas prévias podem ser necessárias para se chegar a um entendimento mutuamente satisfatório em relação a, em particular:

6.1.1 competência técnica adequada e persistente das instituições de avaliação de conformidade relevantes existentes no Membro exportador, de modo que possa existir confiança na confiabilidade continuada dos resultados a este respeito, o cumprimento comprovado, por exemplo, por meio do credenciamento de guias ou recomendações pertinentes emitidas por instituições de normalização internacionais, serão levadas em consideração como uma indicação de competência técnica adequada;

6.1.2 limitação da aceitação dos resultados da avaliação de conformidade àqueles produzidos por instituições designadas no Membro exportador.

6.2 Os Membros assegurarão que seus procedimentos de avaliação de conformidade permitam, tanto quanto possível, a implementação das disposições do parágrafo 1.

6.3 Encorajam-se os Membros a que, a pedido de outros Membros, mostrem-se dispostos a entrar em negociações para a conclusão de acordos de reconhecimento mútuo dos resultados dos procedimentos de avaliação de conformidade de cada um. Os Membros poderão requerer que tais acordos preencham os critérios do parágrafo 1 e gerem satisfação mútua no que diz respeito a seu potencial para facilitação do comércio nos produtos em questão.

6.4 Encorajam-se os Membros a permitir a participação de instituições de avaliação de conformidade localizadas no território de outros Membros em seus procedimentos de avaliação de conformidade em condições não menos favoráveis do que as concedidas às instituições localizadas em seu território ou no território de qualquer outro país.

(Decreto nº 1.355, de 30 de dezembro de 1994)

IC. Comentários sobre a Tradução

Primeiro, sugere-se mudança do termo "governo central" por "União". Quanto ao Item 6.1.1, recomenda-se as seguintes alterações: (i) "confiança na confiabilidade continuada" é redundância, sugere-se "confiança continuada" apenas; (ii) Pelo texto em inglês, uma redação melhorada seria: "(...) de modo que possa existir confiança continuada nas avaliações dos resultados; nesse sentido, comprova-se o cumprimento na confiança nos indicadores e recomendações relevantes emitidos por instituições internacionais de normalização devem ser levados em consideração como uma indicação de competência técnica adequada"; (iii) Artigo 6.3: "estejam dispostos". Por fim, considera-se mais adequado incluir a expressão "deverão assegurar" no lugar de "assegurarão" para refletir a expressão *"shall ensure"*, de forma a enfatizar a obrigação dos Membros.

II. Interpretação e Aplicação do Artigo 6

Não há qualquer Relatório disponível sobre a interpretação do Artigo 6.

DS3: *Korea - Measures Concerning the Testing and Inspection of Agricultural Products*

Trata-se de disputa envolvendo testes e critérios de inspeção de produtos agrícolas dentro da Coreia. Os EUA alegam violação aos Artigos 5 e 6 do TBT, dentre outros do SPS e do Acordo sobre Agricultura. Não há Relatório do Painel nem do Órgão de Apelação disponível sobre o caso.

III. Comentários

Dada a inexistência de uma evolução interpretativa por parte do DSB sobre o Artigo 6 do TBT, por ora recomenda-se ajustes na tradução, conforme acima.

- **Artigo 7**

Lucas Queiroz Pires

IA. Texto do Artigo em Inglês

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.

IB. Texto do Artigo em Português

Artigo 7
Procedimentos de Avaliação de Conformidade por Instituições Públicas Locais

No que se refere a suas instituições públicas locais existentes em seus territórios:

7.1 Os Membros tomarão as medidas razoáveis a seu alcance para assegurar o cumprimento por tais instituições das disposições dos Artigos 5 e 6, com exceção da obrigação de notificar tal como contida nos parágrafos 6.2 e 7.1 do Artigo 5.

7.2 Os Membros assegurarão que os procedimentos de avaliação de conformidade de governos locais de nível imediatamente inferior ao nível do governo central dos Membros sejam notificados de acordo com as disposições dos parágrafos 6.2 e 7.1 do Artigo 5, notando que não será necessário notificar procedimentos de avaliação de conformidade cujo conteúdo técnico seja substancialmente o mesmo de procedimentos de avaliação de conformidade de instituições do governo central do Membro em questão previamente notificados.

7.3 Os Membros poderão solicitar que os contatos com outros Membros, inclusive as notificações, fornecimento de Informações, comentários e discussões a que se referem os parágrafos 6 e 7 do Artigo 5 se façam por meio do governo central.

7.4 Os Membros não tomarão medidas que obriguem ou encorajem instituições públicas locais existentes em seu território a agir de forma incompatível com as disposições dos Artigos 5 e 6.

7.5 Os Membros são inteiramente responsáveis sob este Acordo pela observância de todas as disposições dos Artigos 5 e 6. Os Membros formularão e implementarão medidas positivas e mecanismos de apelo à observância das disposições dos Artigos 5 e 6 por instituições que não sejam do governo central.

(Decreto nº 1.355, de 30 de dezembro de 1994)

IC. Comentários sobre a Tradução

Consideramos que o termo "Instituições Públicas" não seja a melhor tradução para "Local Government Bodies". Sugere-se "Órgãos governamentais". Também, considera-se mais adequado incluir as expressões "deverão tomar", "deverão assegurar", "não deverão tomar" e "deverão formular e implementar" no lugar de "tomarão", "assegurarão", "não tomarão", "formularão e implementarão", respectivamente, para refletir as expressões "*shall take", "shall ensure",* "*shall not take", "shall formulate and implement"* de forma a enfatizar a obrigação dos países-membros".

No caso, Informações" não precisa de "I" maiúsculo. Além disso, "referem" é melhor do que "releram". Por fim, "em apoio à" ou "de acordo com" seria melhor do que "de apelo à".

II. Interpretação e Aplicação do Artigo 7

Este Artigo não foi objeto de análise pelo DSB da OMC.

III. Comentários

Dada a inexistência de uma evolução interpretativa por parte do DSB sobre o Artigo 7 do TBT, por ora recomenda-se ajustes na tradução, conforme acima.

➢ Artigo 8

Lucas Queiroz Pires

IA. Texto do Artigo em Inglês

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.

IB. Texto do Artigo em Português

Artigo 8
Procedimentos de Avaliação de Conformidade por Instituições Não Governamentais

8.l Os Membros tomarão as medidas razoáveis a seu alcance para assegurar o cumprimento das disposições dos Artigos 5 e 6 por instituições não governamentais existentes em seu território que operam procedimentos de avaliação de conformidade, com exceção da obrigação de notificar os projetos de procedimentos de avaliação de conformidade. Adicionalmente os Membros não tomarão medidas que tenham o efeito direto ou indireto de obrigar ou encorajar tais instituições a agir de forma incompatível com as disposições dos Artigos 5 e 6.

8.2 Os Membros assegurarão que suas instituições de governo central só contem com procedimentos de avaliação de conformidade operados por instituições não governamentais se estas instituições cumprem com as disposições dos Artigos 5 e 6, com exceção da obrigação de notificar projetos de procedimentos de avaliação de conformidade.

(Decreto nº 1.355, de 30 de dezembro de 1994)

IC. Comentários sobre a Tradução

Conforme exposto acima, a expressão "Instituições" poderia ser substituída por "Órgãos" ou "Organizações". Entende-se, assim, mais adequado incluir as expressões "deverão tomar", "não deverão tomar" e "deverão assegurar" no lugar de "tomarão", "não tomarão" e "assegurarão", respectivamente, para refletir as expressões *"shall ensure"*, "*shall take" e "shall not take"* de forma a enfatizar a obrigação dos Membros. Ao invés de "operam", recomenda-se "realizam". O termo "Projetos de procedimentos" está incorreto. Sugere-se "Propostas de procedimentos". No parágrafo 8.1, recomenda-se incluir vírgula onde no trecho "Adicionalmente, os Membros...". Por fim, destaca-se um erro de linguagem. O mais correto seria "cumprirem", não "cumprem".

II. Interpretação e Aplicação do Artigo 8

Este Artigo não foi objeto de análise pelo DSB da OMC.

III. Comentários

Dada a inexistência de uma evolução interpretativa por parte do DSB sobre o Artigo 8 do TBT, por ora recomenda-se ajustes na tradução, conforme acima.

➢ Artigo 9

Lucas Queiroz Pires

IA. Texto do Artigo em Inglês

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.

IB. Texto do Artigo em Português

Artigo 9
Sistemas Internacionais e Regionais

9.1 Quando for exigida uma declaração positiva de conformidade com um regulamento técnico ou norma, os Membros, sempre que possível, formularão e adotarão sistemas internacionais para avaliação de conformidade e se tornarão Membros ou participarão dos mesmos.

9.2 Os Membros tomarão as medidas razoáveis a seu alcance para assegurar que os sistemas internacionais e regionais dos quais as instituições pertinentes existentes em seu território sejam Membros ou participantes, cumpram as disposições dos Artigos 5 e 6. Adicionalmente os Membros não tomarão quaisquer medidas que tenham o efeito direto ou indireto de obrigar ou encorajar tais instituições a agir de forma incompatível com as disposições dos Artigos 5 e 6.

9.3 Os Membros assegurarão que as instituições de seu governo central contem com os sistemas internacionais ou regionais de avaliação de conformidade apenas na medida em que estes sistemas cumpram as disposições dos artigos 5 e 6, segundo sela procedente.

(Decreto nº 1.355, de 30 de dezembro de 1994)

IC. Comentários sobre a Tradução

Ressalta-se necessidade de incluir o termo em destaque no trecho “Os Membros tomarão as medidas razoáveis a seu alcance para assegurar que os sistemas internacionais e regionais [*de avaliação de conformidade*, dos quais as....” no Artigo 9.2.

Considera-se mais adequado incluir as expressões “deverão tomar” e “deverão assegurar” no lugar de “tomarão” e “deverão”, respectivamente, para refletir as expressões “*shall take” e “shall ensure”* de forma a enfatizar a obrigação dos Membros. Por fim, ao invés de “segundo sela procedente”, melhor seria “conforme o caso”.

Por fim, sugere-se a inserção de uma vírgula no trecho: “Adicionalmente, os Membros”.

II. Interpretação e Aplicação do Artigo 9

Este Artigo não foi objeto de análise pelo DSB da OMC.

III. Comentários

Dada a inexistência de uma evolução interpretativa por parte do DSB sobre o Artigo 9 do TBT, por ora recomenda-se ajustes na tradução, conforme acima.

- **Artigo 10**

IA. <u>Texto do Artigo em Inglês</u>

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 enforca 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 embers, 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 **(17)** 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.

IB. <u>Texto do Artigo em Português</u>

Artigo 10
Informação sobre Regulamentos Técnicos, Normas e Procedimentos de Avaliação de Conformidade

10.1 Cada Membro assegurará que exista um centro de informação que seja capaz de responder a todas as consultas razoáveis de outros Membros e de partes em outros Membros que estejam interessadas, bem como fornecer os documentos pertinentes, referentes:

10.1.1 a qualquer regulamento técnico adotado ou proposto em seu território por instituições do governo central ou instituições públicas locais, por instituições não governamentais que tenham poder legal de fazer cumprir um regulamento técnico, ou por instituições regionais de normalização de que tais instituições sejam Membros ou participantes;

10.1.2 a qualquer norma adotada ou proposta em seu território por instituições do governo central, instituições públicas locais, ou por instituições regionais de normalização das quais estas instituições sejam Membros ou participantes;

10.1.3 a qualquer procedimento de avaliação de conformidade, ou projeto de procedimento de avaliação de conformidade, que sejam operados em seuterritório por instituições do governo central ou instituições públicas locais, por instituições não governamentais que tenham poder legal de fazer cumprir um regulamento técnico, ou por instituições regionais de normalização de que tais instituições sejam Membros ou participantes;

10.1.4 à condição de Membro e à participação do Membro, ou das instituições pertinentes do governo central ou públicas locais existentes em seu território em sistemas de avaliação de conformidade e instituições de normalização internacionais ou regionais, bem como em arranjos bilaterais ou multilaterais no âmbito deste Acordo; ele deverá também ser capaz de fornecer as informações que seria razoável esperar sobre as disposições de tais sistemas e arranjos;

10.1.5 à localização das notas publicadas de conformidade a este Acordo, ou à indicação de onde tal informação pode ser obtida; e

10.1.6 à localização dos centros de informação mencionados no parágrafo 3.

10.2 Se, entretanto, por razões legais ou administrativas, forem estabelecidos mais de um centro de informação por um Membro, este Membro deverá fornecer aos outros Membros informação completa e sem ambiguidade sobre o escopo e responsabilidade de cada um destes centros de informação. Adicionalmente, tal Membro assegurará que quaisquer consultas dirigidas a um centro de informação incorreto seja prontamente transmitidas ao centro de informação correto.

10.3 Cada Membro tomará as medidas razoáveis a seu alcance para assegurar que existam um ou mais centros de informação capazes de responder todas as consultas razoáveis de outros Membros e partes em outros Membros que estejam interessadas, bem como fornecer os documentos pertinentes, ou informação sobre onde podem ser obtidos, referentes:

10.3.1 a quaisquer normas adotadas PI em projeto em seu território por instituições de normalização não governamentais, ou por instituições de normalização regionais dos quais tais instituições sejam Membros ou participantes; e

10.3.2 a quaisquer procedimentos de avaliação de conformidade, ou projeto de procedimentos de avaliação de conformidade, que sejam operados em seu território por instituições não

governamentais, ou por instituições regionais das quais tais instituições sejam Membros ou participantes;

10.3.3 à condição de Membro e à participação de instituições não governamentais pertinentes existentes em seu território em sistemas de avaliação de conformidade e instituições de normalização internacionais ou regionais, bem como em arranjos bilaterais ou multilaterais no âmbito deste Acordo; eles deverão também ser capazes de fornecer as informações que seria razoável esperar sobre as disposições de tais sistemas e arranjos;

10.4 Os Membros tomarão as medidas razoáveis a seu alcance para assegurar que, quando forem solicitadas cópias de documentos por outros Membros ou por partes interessadas existentes em outros Membros, conforme as disposições deste Acordo, elas sejam fornecidas por um preço equitativo (se não forem gratuitas) que deverá, à parte o custo real do envio, ser o mesmo para nacionais[1] do Membro em questão ou de qualquer outro Membro.

10.5 Os países desenvolvidos Membros, a pedido de outros Membros, fornecerão, em inglês, francês ou espanhol, traduções dos documentos cobertos por uma notificação determinada ou, no caso de documentos volumosos, de resumos destes documentos.

10.6 O Secretariado, ao receber notificações de conformidade com as disposições deste Acordo, circulará cópias das notificações a todos os Membros e instituições de avaliação de conformidade e de normalização internacionais, e levará à atenção dos países em desenvolvimento Membros quaisquer notificações relativas a produtos de seu particular interesse.

10.7 Sempre que um Membro tiver alcançado um acordo com qualquer outro país ou países, em matérias relacionadas a regulamentos técnicos, normas ou procedimentos de avaliação de conformidade, que possa ter um efeito significativo sobre o comércio, pelo menos um Membro que seja parte do acordo deverá notificar os outros Membros por meio do Secretariado sobre os produtos a serem cobertos pelo acordo e incluir uma breve descrição do mesmo. Encorajam-se os Membros em questão a entrar, a pedido, em consultas com outros Membros a fim de concluir acordos similares ou permitir sua participação em tais acordos.

10.8 Nada neste Acordo será interpretado no sentido de obrigar:

10.8.1 à publicação de textos em línguas outras que não a do Membro;

10.8.2 ao fornecimento de pormenores ou cópias de projetos em línguas outras que não a do Membro, exceto conforme estipulado no parágrafo 5; ou

10.8.3 ao fornecimento pelos Membros de qualquer informação cuja revelação considerem contrária a seus imperativos essenciais de segurança.

10.9 As notificações ao Secretariado serão feitas em inglês, francês ou espanhol.

10.10 Os Membros designarão uma única autoridade do governo central como responsável pela implementação no nível nacional das disposições relativas a procedimentos de notificação sob este Acordo, à exceção dos incluídos no Anexo 3.

10.11 Se, entretanto, por razões legais ou administrativas, a responsabilidade pelos procedimentos de notificação estiver dividida entre dois ou mais autoridades do governo central, o Membro em

[1] "Nacionais", no caso de um território aduaneiro separado Membro da OMC, tomará o significado de pessoas, físicas ou jurídicas, domiciliadas ou que tenham um estabelecimento industrial ou comercial real e efetivo naquele território aduaneiro.

questão deverá fornecer aos outros Membros informação completa e sem ambiguidade sobre o escopo da responsabilidade destas autoridades.

Footnote 17: "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.

(Decreto nº 1.355, de 30 de dezembro de 1994)

IC. Comentários sobre a Tradução

Nada a comentar.

II. Interpretação e Aplicação do Artigo 10

Este Artigo não foi objeto de análise pelo DSB da OMC.

III. Comentários

Nada a comentar, uma vez que este Artigo não foi objeto de análise pelo DSB da OMC.

- **Artigo 11**

IA. Texto do Artigo em Inglês

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.

IB. <u>Texto do Artigo em Português</u>

Artigo 11
Assistência Técnica a Outros Membros

11.1 Caso solicitados, os Membros assessorarão outros Membros, em especial países em desenvolvimento Membros, na preparação de regulamentos técnicos.

11.2 Caso solicitados, os Membros assessorarão outros Membros, em especial países em desenvolvimento Membros, e a eles prestarão assistência técnica em termos e condições mutuamente acordados em relação à criação de instituições de normalização nacionais e sua participação em instituições de normalização internacionais, bem como encorajarão suas instituições de normalização nacionais a fazer o mesmo.

11.3 Caso solicitados, os Membros tomarão as medidas razoáveis a seu alcance para que as instituições regulamentadoras existentes no seu território assessorem outros Membros, em especial países em desenvolvimento Membros, e a eles prestarão assistência técnica em termos e condições mutuamente acordados no que se refere:

11.3.1 criação de instituições regulamentadoras, ou de instituições para avaliação de conformidade com regulamentos técnicos; e

11.3.2 aos métodos que melhor permitam cumprir seus regulamentso técnicos.

11.4 Caso solicitados, os Membros tomarão as medidas razoáveis a seu alcance para que seja prestado assessoramento a outros Membros, em especial países em desenvolvimento Membros, e a eles prestarão assistência técnica em termos e condições mutuamente acordados no que se refere à criação de instituições para avaliação de conformidade com normas adotadas no território do Membro solicitante.

11.5 Caso solicitados, os Membros assessorarão outros Membros, em especial países em desenvolvimento Membros, e a eles prestarão assistência técnica em termos e condições mutuamente acordados no que se refere às medidas que seus produtores tenham que adotar se desejarem ter acesso a sistemas de avaliação de conformidade operados por instituições governamentais ou não governamentais existentes no territóriodo Membro solicitado.

11.6 Caso solicitados, os Membros que são Membros ou participantes de sistemas de avaliação de conformidade internacionais ou regionais assessorarão outros Membros, em especial países em desenvolvimento Membros, e a eles prestarão assistência técnica em termos e condições mutuamente acordados no que se refere à criação das instituições e do quadro jurídico que permitam cumprir as obrigações decorrentes da condição de membro ou de participante de tais sistemas.

11.7 Caso solicitados, os Membros encorajarão as instituições existentes em seu território que sejam membros ou participantes de sistemas internacionais ou regionais de avaliação de conformidade a assessorar outros Membros, em especial países em desenvolvimento Membros, e deveriam examinar suas solicitações de assistência técnica no que se refere à criação das instituições que permitiriam às instituições pertinentes existentes em seus territórios cumprir as obrigações decorrentes da condição de membro ou participante.

11.8 Ao prestar assessoramento e assistência técnica a outros Membros nos termos dos parágrafos 1 a 7, os Membros darão prioridade às necessidades dos países de menor desenvolvimento relativo Membros.

(Decreto nº 1.355, de 30 de dezembro de 1994)

IC. Comentários sobre a Tradução

Nada a comentar.

II. Interpretação e Aplicação do Artigo 11

Este Artigo não foi objeto de análise pelo DSB da OMC.

III. Comentários

Nada a comentar, uma vez que este Artigo não foi objeto de análise pelo DSB da OMC.

- **Artigo 12**

Bruno Said Haidar
Cinthia Battilani Giantomassi Medeiros
Lucas Queiroz Pires

IA. Texto do Artigo em Inglês

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 Agreements 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.

IB. <u>Texto do Artigo em Português</u>

Artigo 12
Tratamento Especial e Diferenciado para Países Membros em Desenvolvimento

12.1 Os Membros dispensarão tratamento diferenciado e mais favorável a países em desenvolvimento Membros deste Acordo, tanto por meio das disposições seguintes quanto pelas disposições pertinentes dos demais Artigos deste Acordo.

12.2 Os Membros darão particular atenção às disposições deste Acordo que se referem aos direitos e obrigações de países em desenvolvimento Membros e levarão em conta as necessidades especiais de desenvolvimento financeiras e comerciais dos países em desenvolvimento Membros na implementação deste Acordo, tanto no nível nacional quanto na operação dos arranjos institucionais deste Acordo.

12.3 Os Membros levarão em conta as necessidades especiais de desenvolvimento financeiras e comerciais dos países em desenvolvimento Membros na elaboração e aplicação de regulamentos técnicos, normas e procedimentos de avaliação de conformidade com vistas a assegurar que tais regulamentos técnicos, normas e procedimentos de avaliação de conformidade não criem obstáculos desnecessários às exportações da países em desenvolvimento Membros.

12.4 Os Membros reconhecem que embora possam existir normas, guias e recomendações internacionais, os países em desenvolvimento, face às suas condições sócio-econômicas e tecnológicas particulares, podem adotar certos regulamentos técnicos, normas e procedimentos de avaliação de conformidade destinados a preservar a tecnologia autóctone e dos métodos e processos da produção compatíveis com suas necessidades de desenvolvimento. Os Membros, portanto, reconhecem que não se deve esperar que os países em desenvolvimento Membros utilizem como base de seus regulamentos técnicos e normas, inclusive métodos de

ensaio, normas internacionais que não sejam adequadas às suas necessidades de desenvolvimento financeiras e comerciais.

12.5 Os Membros tomarão as medidas razoáveis a seu alcance para assegurar que as instituições de normalização internacionais e os sistemas internacionais de avaliação de conformidade sejam organizados e operados de modo a facilitar a participação ativa e representativa das instituições pertinentes em todos os Membros, levando em conta os problemas especiais dos países em desenvolvimento Membros.

12.6 Os Membros tomarão as medidas razoáveis a seu alcance para assegurar que as instituições internacionais de normalização, a pedido de países em desenvolvimento Membros examine a possibilidade e, se possível, elabore normas internacionais referentes a produtos de especial interesse para países em desenvolvimento Membros.

12.7 Os Membros prestarão, de acordo com as disposições do Artigo 11, assistência técnicaaos países em desenvolvimento Membros para assegurar que a elaboração e aplicação de regulamentos técnicos, normas e procedimentos de avaliação de conformidade não criem obstáculos desnecessários à expansão e diversificação das exportações dos países em desenvolvimento Membros. Ao determinar os termos e condições da assistência técnica, será levado em conta o estágio de desenvolvimento do país solicitante e, em particular, dos países de menor desenvolvimento relativo Membros.

12.8 Reconhece-se que países em desenvolvimento Membros podem enfrentar problemas especiais, inclusive institucionais e de infra-estrutura, no campo da elaboração e aplicação de regulamentos técnicos, normas e procedimentos de avaliação de conformidade. Reconhece-se, ademais, que as necessidades de desenvolvimento e comerciais dos países em desenvolvimento Membros, bem como seu estágio de desenvolvimento tecnológico, podem prejudicar sua capacidade de cumprir integralmente suas obrigações sob este Acordo. Os Membros, por conseguinte, levarão estes fatos integralmente em consideração. Em conseqüência, com o objetivo de assegurar que os países em desenvolvimento Membros sejam capazes de cumprir com este Acordo, faculta-se ao Comitê de Barreiras Técnicas ao Comércio, previsto no Artigo 13 (denominado neste Acordo o "Comitê") que conceda, sob solicitação, exceções específicas limitadas no tempo, totais ou parciais, ao cumprimento das obrigações decorrentes deste Acordo. Ao examinar estas solicitações, o Comitê deve levar em conta os problemas especiais no campo da elaboração e aplicação de regulamentos técnicos, normas e procedimentos de avaliação de conformidade e as necessidades especiais de desenvolvimento e comerciais do país em desenvolvimento Membro, bem como seu estágio de desenvolvimento tecnológico, que podem prejudicar sua capacidade de cumprir integralmente as obrigações decorrentes deste Acordo. O Comitê levará em consideração, em particular, os problemas especiais dos países de menor desenvolvimento relativo.

12.9 Durante as consultas, os países desenvolvidos Membros terão em mente as dificuldades especiais que enfrentam os países em desenvolvimento Membros na formulação e implementação de normas, regulamentos técnicos e procedimentos de avaliação de conformidade e, desejando assistir os países em desenvolvimento Membros em seus esforços nesta direção, os países desenvolvidos Membros levarão em conta as necessidades especiais daqueles em relação a financiamento, comércio e desenvolvimento.

12.10 O Comitê examinará periodicamente o tratamento especial e diferenciado, tal como previsto neste Acordo, concedido aos países em desenvolvimento Membros nos níveis nacional e internacional.

(Decreto nº 1.355, de 30 de dezembro de 1994)

IC. Comentários sobre a Tradução

Considera-se mais adequado incluir as expressões "deverão conferir", "deverão prestar", "deverão levar", "deverão tomar" no lugar de "dispensarão", "darão", "levarão", "tomarão" e "prestarão" para refletir as expressões *"shall provide"*, "*shall give"*, "*shall take*" de forma a enfatizar a obrigação dos Membros.

No parágrafo 12.3, denota-se um erro de concordância, de forma que "dos países" seria o correto. Também, no parágrafo 12.6, "padronização" seria uma melhor alternativa à "normalização". Além disso, destaca-se outros erros de concordância no mesmo parágrafo, uma vez que deveria ser "examinem" e "elaborem".

II. Interpretação e Aplicação do Artigo 12

Os seguintes Relatórios demonstram o entendimento do Painel e do Órgão de Apelação sobre o tratamento requerido pelo Artigo 12.

Relatório do Painel no Caso *European Communities - Trade Description of Sardines* (EC - *Sardines)*, WT/DS231/R, para. 1.3

Para. 1.3. "In a communication dated 7 June 2001 Peru requested the establishment of a panel to examine the EC Regulation, with the standard terms of reference set out in Article 7 of the DSU. Peru made its request in accordance with Article XXIII of the GATT 1994, Articles 4 and 6 of the DSU and Article 14 of the TBT Agreement. In its communication, Peru stated that it considered the EC Regulation to constitute an unnecessary obstacle to international trade which is inconsistent with Articles 2 and 12 of the TBT Agreement, Article XI:1 of the GATT 1994 and the principle of non-discrimination under Articles I and III of the GATT 1994."

Relatório do Painel no Caso *European Communities - Trade Description of Sardines* (EC - *Sardines)*, WT/DS231/R, para. 7.143

Para. 7.143. "Regarding the term "matter", the Appellate Body in Guatemala - Cement I stated that the matter consists of the specific measure and the claims relating to it, both of which must be identified in the request for the establishment of a panel. In its Request for the Establishment of a Panel, Peru invoked the EC Regulation as the specific measure at issue and claimed that the EC Regulation is inconsistent with Articles 2 and 12 of the TBT Agreement and Articles I, III and XI:1 of the GATT 1994. In the so-called reformulated request for findings, Peru asked the Panel to find that the EC Regulation prohibiting the use of the term "sardines" combined with the name of a country of origin, name of a geographic area, name of the species or the common name of Sardinops sagax used in the language of the member State of the European Communities in which the product is sold is inconsistent with Article 2.4 of the TBT Agreement. Peru specifically referred to the EC Regulation and Article 2.4 of the TBT Agreement, both of which are set out in Peru's Request for the Establishment of a Panel. Therefore, we do not consider that Peru, even if it broadened the scope of its request beyond what it originally requested in its first written submission, made any claims that exceeded the terms of reference." **(18)**

O Órgão de Apelação, no caso *EC - Sardines*, por sua vez, menciona a utilização subsidiária do Artigo 12.4, por tê-lo como exemplo de dispositivo que pretende regular a aplicação de regulamentos técnicos, através da utilização de termos explícitos.

Relatório do Órgão de Apelação no *European Communities - Trade Description of Sardines* (EC - *Sardines)*, WT/DS231/AB/R, para. 33

Para. 33. "The European Communities further alleges that Article 2.5 of the TBT Agreement provides contextual support for a conclusion that is the complete opposite of that reached by the Panel. According to the European Communities, Article 2.5 shows that when provisions of the TBT Agreement are intended to cover the application of technical regulations, they say so explicitly. Similar contextual support is found in Article 12.4, which uses the word "adopt", and in paragraph F of the Code of Good Practice for the Preparation, Adoption and Application of Standards, included as Annex 3 to the TBT Agreement, which uses the word "develops". The European Communities also rejects the Panel's conclusion that Article 2.6 of the TBT Agreement would be redundant if Article 2.4 did not apply to existing measures. The objective of Article 2.6 is the harmonization of technical regulations. Thus, for the European Communities, it is obvious that WTO Members who have technical regulations on a subject should be encouraged to participate in the preparation of an international standard."

Relatório do Órgão de Apelação no Caso *European Communities - Trade Description of Sardines (EC - Sardines)*, WT/DS231/AB/R, para. 210

Para. 210. "Having considered the European Communities' arguments based on the text of Article 2.4, we turn to examine the arguments of the European Communities that are based on the context of that provision. The European Communities argues that Article 2.5 of the TBT Agreement demonstrates that, when a provision is intended to cover the application of technical regulations, the provision says so explicitly. The European Communities finds similar contextual support in Article 12.4 of the TBT Agreement, which uses the word "adopt", and in paragraph F of the Code of Good Practice for the Preparation, Adoption and Application of Standards, included as Annex 3 to the TBT Agreement, which uses the word "develops"."

Na análise do Artigo 12.3, o Painel chegou às seguintes conclusões:

Relatório do Painel no caso *United States - Certain Country of Origin Labelling Requirements (US - COOL)*, WT/DS384/R, para. 7.763

Para. 7.763. "In finding that Article 12.3 of the TBT Agreement lays down only one lega obligation that is limited to the operative part of that sentence, we are not suggesting that the final clause of the sentence starting with "with a view to" should be read out of Article 12.3 or rendered ineffective."

Relatório do Painel no caso *United States - Certain Country of Origin Labelling Requirements (US - COOL)*, WT/DS384/R, para. 7.764

Para. 7.764. "An assessment of a claim under Article 12.3 entails a review of whether the respondent's relevant action or inaction with regard to the operative part of Article 12.3 fulfils, or is carried out with, the objective of ensuring that technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members."

Mais adiante, ao analisar conjuntamente o Artigo 12.1 e o Artigo 12.3, teve o seguinte entendimento:

Relatório do Painel no caso *United States - Certain Country of Origin Labelling Requirements (US - COOL)*, WT/DS384/R, para. 7.771

Para. 7.771. "Articles 12.3 and 12.1 are not termed as exceptions from other obligations in the TBT Agreement. These Articles contain obligations additional to the rest of the Articles in the TBT Agreement. And even if Articles 12.3 and 12.1 of the TBT Agreement could be described as exceptions from other obligations, this in itself would not be sufficient to shift the initial burden of proof to the respondent."

Na discussão sobre o ônus da prova dos referidos artigos, o Painel optou por seguir a tradição:

Relatório do Painel no caso *United States - Certain Country of Origin Labelling Requirements* *(US - COOL)*, WT/DS384/R, para. 7.773

Para. 7.773. "Accordingly, we see no reason to depart from the established normal distribution of burden of proof in assessing Mexico's Article 12.1 and 12.3 claims. It is not the respondent, the United States, that needs to establish that it has "take[n] account of [Mexico's] special development, financial and trade needs" "in the preparation and application of [the COOL measure]". In saying this, however, we are not calling into question that Article 12 imposes substantive obligations on the United States as a Member, and as a respondent in the current dispute."

Relatório do Painel no caso *United States - Certain Country of Origin Labelling Requirements* *(US - COOL)*, WT/DS384/R, para. 7.763

Para. 7.774. "In line with the established normal distribution of the burden of proof, it is Mexico, the complainant bringing a claim under Article 12.3, that bears the initial burden to make a prima facie case that the United States did not "take account of [Mexico's] special development, financial and trade needs" "in the preparation and application of [the COOL measure]". Once Mexico has succeeded in making a prima facie case, the burden is on the United States, the respondent, to refute this."

Após tratar dos aspectos preliminares do Artigo 12.3, foi feita uma abordagem sobre o sentido dado ao termo "levar em consideração":

Relatório do Painel no caso *United States - Certain Country of Origin Labelling Requirements* *(US - COOL)*, WT/DS384/R, para. 7.766

Para. 7.776. "The dictionary defines "to take account of", as well as the similar term "to take into account" as: "to take into consideration as an existing element, to notice". This suggests that "to take account of" and "to take into account" mean to consider, but not necessarily to act in line with the specific need, view or position under consideration."

Relatório do Painel no caso *United States - Certain Country of Origin Labelling Requirements* *(US - COOL)*, WT/DS384/R, para. 7.781

Para. 7.781. "Based on the approach to Article 10.1 of the SPS Agreement by the panel in EC – Approval and Marketing of Biotech Products and the interpretation of the term "take into account" by the panel in *US – Continued Suspension*, we find that Article 12.3 of the TBT Agreement does not amount to a requirement for WTO Members to conform their actions to the special needs of developing countries but merely to give consideration to such needs along with other factors before reaching a decision."

Relatório do Painel no caso *United States - Certain Country of Origin Labelling Requirements* *(US - COOL)*, WT/DS384/R, para. 7.799

Para. 7.799. "In light of the above considerations and the various documents showing how the United States considered Mexico's special development, financial and trade needs in an active and meaningful way, we conclude that Mexico has not demonstrated that the United States failed to "take account of [Mexico's] special development, financial and trade needs" "in the preparation and application of [the COOL measure]"."

Por fim, não foi considerada necessária a análise do Artigo 12.1 do TBT:

Relatório do Painel no caso *United States - Certain Country of Origin Labelling Requirements* *(US COOL)*, WT/DS384/R, para. 7.802

Para. 7.802. "As explained above, Mexico claims that the United States violated this provision by having breached Article 12.3 of the TBT Agreement."

Relatório do Painel no caso *United States - Certain Country of Origin Labelling Requirements* (US – *COOL)*, WT/DS384/R, para. 7.803

Para. 7.803. "Given that Mexico has failed to establish the violation of Article 12.3 of the TBT Agreement, we need not pursue Mexico's claim under Article 12.1 of the TBT Agreement; we conclude that Mexico has also failed to demonstrate the violation of Article 12.1."

Relatório do Painel no Caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes* (US - Clove Cigarettes), WT/DS406/R, para. 7.614

Para. 7.614. "The Panel observes that certain elements of Indonesia's Panel Request and subsequent submissions suggest that, in Indonesia's view, the relevant question under Article 12.3 of the TBT Agreement is whether a challenged measure "created an unnecessary obstacle to exports from developing country Members"."

Relatório do Painel no Caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes* (US - Clove Cigarettes), WT/DS406/R, para. 7.620

Para. 7.620. "We understand the wording of Article 12.3 of the TBT Agreement to require that three elements must be demonstrated in order to establish a violation of the obligation set forth in that provision. In particular, the Panel considers that Indonesia must demonstrate that:

> (a) Indonesia is a "developing country";
> (b) Indonesia has "special development, financial and trade needs" that are affected by Section 907(a)(1)(A); and (c) the United States failed to "take account of" Indonesia's special financial, development and trade needs."

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes* (US - Clove Cigarettes), WT/DS406/R, para. 7.628

Para. 7.628. "In this regard, the Panel notes that Indonesia explained "the importance of clove cigarettes to its economy and its people"."

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes* (US - Clove Cigarettes), WT/DS406/R, para. 7.646

Para. 7.646. "In addition, to "take account of" the special financial, development and trade needs of a developing country does not necessarily mean that the Member preparing or applying a technical regulation must agree with or accept the developing country's position and desired outcome. In our opinion, the fact that the United States ultimately decided not to exclude clove cigarettes from the scope of the ban in Section 907(a)(1)(A) does not mean that the United States did not take account of Indonesia's special financial, development and trade needs."

Relatório do Painel no caso *United States - Measures Affecting the Production and Sale of Clove Cigarettes* (US - Clove Cigarettes), WT/DS406/R, para. 7.647

Para. 7.647. "Finally, in its communications, Indonesia made clear that its desired outcome was for the United States to exclude clove cigarettes from the scope of Section 907(a)(1)(A). However, we have found that banning clove cigarettes makes a material contribution to the legitimate objective of reducing youth smoking in the United States. Considering that the measure is a ban on cigarettes with characterizing flavours for reasons of public health, the Panel fails to see how it could be possible, under WTO rules, to exclude from the ban cigarettes with characterizing flavours from developing countries. Indeed, a requirement to exclude a product that is harmful to human health from a ban, solely on the

grounds that the product is produced and exported by a developing country, would limit Members' ability to regulate for public health purposes."

III. Comentários

De maneira geral, evidencia-se que o Artigo 12 do TBT é utilizado pelos Membros demandantes, no sentido de complementar as violações por parte do demandado, uma vez que aqueles que o utilizam se enquadram como países em desenvolvimento (PEDs). Trata-se de um recurso ao tratamento diferenciado em razão da condição econômica do Membro, descrito no Artigo 12 do Acordo TBT.

Denota-se que o Artigo 12 é invocado, de maneira geral, para complementar o argumento de uma violação por parte do demandado contra um Membro demandante, o qual se enquadra como um PED.

Conforme análise do Órgão Apelação, no caso *EC - Sardines*, houve utilização subsidiária do Artigo 12.4, tendo sido adotado como exemplo de dispositivo que pretende regular a aplicação de regulamentos técnicos por meio de termos explícitos, como no caso: "Membros que venham a adotar certos regulamentos técnicos".

No caso DS233, não houve Relatório do Painel nem do Órgão de Apelação. Contudo, no pedido de consultas, a Índia indica o Artigo 12 sob a justificativa da Argentina não ter realizado um tratamento diferenciado para a Índia, como PED, ao implementar as suas medidas, conforme abaixo:

> Besides, in implementing these laws/decrees, Argentina has not taken into consideration the status of India as a developing country Member and has not provided special and differential treatment as required under Article 12 of the Agreement on TBT. **(19)**

No caso *EC - Biotech*, destaca-se que o Painel entendeu não ser aplicável o TBT, uma vez que as medidas da UE em relação aos produtos geneticamente modificados (GMO ou biotech) se enquadravam como medidas sanitárias e fitosanitárias. Portanto, em razão do Artigo 1.5 do TBT, este acordo não seria aplicável (maiores informações, vide Artigo 2.9). Todavia, no âmbito procedimental, o Painel analisou a aplicação do Artigo 12 do TBT, de forma a atentar para a sua obrigação única "de fornecer tratamento diferenciado e mais favorecido aos países em desenvolvimento por meio de diversos critérios a serem preenchidos". Por esses motivos, julgou necessário que a UE preparasse sua defesa em cima desse dispositivo levantado pela Argentina. **(20)**

Já no caso DS406, embora o Painel tenha sido composto, não há relatório do Painel nem do Órgão de Apelação disponível. No Pedido de Consulta por parte da Indonésia, consta:

> Article 12 of the TBT Agreement obligates the United States to take into account the special development and trade needs of developing country Members, such as Indonesia and to ensure that technical regulations to not create unnecessary barriers to exports from developing countries. **(21)**

Apesar dos seus 10 parágrafos, o Artigo 12 detém uma relevância por conferir esse tratamento diferenciado, de maneira geral, impondo uma obrigação de se atentar para a condição social do país ao se impor barreiras técnicas contra o mesmo. No relatório do Painel no caso *EC - Biotech*, esse entendimento do aspecto geral do Artigo 12 do TBT é verificado. Isso se dá, pois o Painel entendeu ser suficiente o escopo geral do Artigo 12 para que as CE elaborassem uma resposta, conforme análise acima.

Considerando que o Artigo 2.2 dispõe de requerimentos semelhantes, o Painel optou por não ler o Artigo 12.3 como uma proibição de uma imposição de obstáculos desnecessários para a exportação de um Membro em desenvolvimento. O sentido desse Artigo não prescreve que um resultado específico seja atingido, mas simplesmente exige que se leve em consideração as necessidades especiais dos países

em desenvolvimento. Por esse motivo, uma medida inconsistente (ou consistente) com um dos Artigos não necessariamente é com o outro.

O Painel entendeu que o Artigo 12.3 estabelece três elementos a serem demonstrados para configurar a sua violação. O primeiro é a presença de um país em desenvolvimento. O segundo é a existência de necessidades especiais financeiras, comerciais e de desenvolvimento. O terceiro elemento é a falta de observância a esses requisitos por parte do país que impõe a medida.

A classificação da Indonésia como país em desenvolvimento no Banco Mundial foi suficiente para satisfazer o primeiro requisito. Quanto ao segundo requisito, a Indonésia explicou a importância dos cigarros de cravo em sua economia em termos de valor, geração de emprego e participação no PIB, além do histórico de 40 anos de comércio com os EUA. O Painel considerou essas explicações suficientes para satisfazer o segundo requisito.

Na análise do último requisito, o Painel observou a troca de correspondências entre os governos das Partes sobre o assunto. Atentou para o fato dos pedidos da Indonésia terem sido levados em consideração pelos oficiais do governo norte-americano. O Painel ressaltou que o sentido de "levar em consideração" significa considerar algo em conjunto com outras variáveis, e não considerar algo exclusivamente.

Além disso, a proibição de cigarros de cravo contribui materialmente para o objetivo legítimo de reduzir o consumo de substâncias dessa natureza pelos jovens nos EUA. Por esses motivos, concluiu-se que uma medida que estabelece uma proibição a cigarros com sabores por razões de saúde pública não deve excluir nações em desenvolvimento de sua aplicação, com base nas regras da OMC, pois isso limitaria a capacidade dos Membros de regulamentar matérias de saúde pública.

Em outra ocasião (DS384/ DS386), o Painel entendeu que o Artigo 12.3 do TBT estabelece somente uma obrigação legal, limitada à parte operacional da sentença. A análise de uma demanda sob esse Artigo requer uma abordagem sobre se a ação ou inação de um Membro cumpre o objetivo de assegurar que regulações, parâmetros e procedimentos técnicos não criem obstáculos desnecessários para as exportações de Membros em desenvolvimentos. Considerou-se duas questões relativas a essa parte: a distribuição do ônus da prova e o sentido do termo "levar em conta".

No que se refere à primeira questão, o Painel entendeu que os Artigos 12.3 e 12.1 não configuram uma exceção ao TBT, mas simplesmente estabelecem obrigações adicionais. A regra geral nos procedimentos de solução de controvérsias requer que a Parte demandante estabeleça um caso *prima facie* de inconsistência com um dispositivo do TBT. Assim, o Painel entendeu que não cabe ao demandado provar que o demandante tem necessidades especiais financeiras, comerciais e de desenvolvimento. O que não quer dizer que o Artigo 12 não imponha obrigações substanciais ao demandado. Logo, no caso em pauta, o ônus da prova inicial seria do México e, uma vez demonstradas as necessidades especiais financeiras, comerciais e de desenvolvimento, a ônus passaria a ser dos EUA.

O sentido do termo "levar em conta" significa considerar ou levar em consideração. Os Membros têm a obrigação de considerar as necessidades dos PEDs na imposição de barreiras ao comércio. O Painel entendeu que o Artigo 12.3 do TBT não exige que os Membros da OMC compatibilizem as suas medidas às necessidades dos PEDs, mas meramente levem em consideração essas necessidades, somadas aos outros fatores, antes de tomar uma decisão. Dentre os casos casos referenciados, encontram-se: *EC - Approval and Marketing of Biotech Products, US - Continued Suspension* e *EC - Approval and Marketing of Biotech Products*.

Considerando-se que os EUA demonstraram que em pelo menos quatro oportunidades levaram em consideração as necessidades do México, o qual não refutou tais alegações, o Painel entendeu que não houve violação ao Artigo 12.3 do TBT.

FOOTNOTES:

Footnote 18: In any event, we note that the findings requested by Peru as set out in the first and second written submissions are not substantively different. Peru's second written submission refers to the prohibition to market the products prepared from *Sardinops sagax* under the name "sardines" combined with an indication of the name of the country of origin, the geographic area, the species and the common name whereas the first written submission, while similar in all respect, refers to "the prohibition … to market the products … under the common name of the species *Sardinops sagax* customarily used in the language of the member State of the European Communities in which the product is sold (such as 'Peruvian sardine' in English, or 'Südamerikanische Sardine' in German)". Although the latter does not contain the explicit reference to the term "sardines" combined with the common name, we note that examples cited by Peru uses the term "sardines" with the putative common name. Moreover, Peru argued throughout the proceedings that the term "sardines" has to be used in combination with the four alternatives set out in Codex Stan 94.

Footnote 19: WT/DS233/1 G/L/451 G/TBT/D/24.

Footnote 20: Panel Reports - *EC - Measures affecting the approval and marketing of biotech products*, WT/DS291, 292, 293/R – WorldTradeLaw.net Dispute Settlement Commentary (DSC), p. 14.

Footnote 21: WT/DS406/1 G/L/917 G/SPS/GEN/1015 G/TBT/D/38.

- **Artigo 13**

IA. Texto do Artigo em Inglês

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.

IB. Texto do Artigo em Português

Artigo 13
O Comitê de Barreiras Técnicas ao Comércio

13.1 Fica criado um Comitê de Barreiras Técnicas ao Comércio que será composto de representantes de cada um dos Membros. O Comitê elegerá seu Presidente e reunir-se-á conforme necessário, mas não menos que uma vez ao ano, para dar aos Membros a oportunidade de consultar-se sobre qualquer questão relativa ao funcionamento do presente Acordo ou à promoção de seus objetivos, bem como desempenhará as funções que lhe forem atribuídas em virtude deste Acordo ou pelos Membros.

13.2 O Comitê estabelecerá grupos de trabalho ou outros organismos que sejam apropriados para desempenhar as funções que lhes sejam atribuídas pelo Comitê conforme as disposições pertinentes deste Acordo.

13.3 Fica entendido que devem ser evitadas duplicações desnecessárias entre o trabalho realizado em virtude deste Acordo e o dos governos em outros organismos técnicos. O Comitê examinará esse problema com vistas a minimizar tal duplicação.

(Decreto nº 1.355, de 30 de dezembro de 1994)

IC. Comentários sobre a Tradução

Nada a comentar.

II. Interpretação e Aplicação do Artigo 13

Este Artigo não foi objeto de análise pelo DSB da OMC.

- **Artigo 14**

IA. Texto do Artigo em Inglês

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.

IB. Texto do Artigo em Português

Artigo 14
Consultas e Solução de Controvérsias

14.1 As consultas e a solução de controvérsias a respeito de qualquer questão que afete o funcionamento deste Acordo terá lugar sob os auspícios do Órgão de Solução de Controvérsias e seguirá, *mutatis mutandis*, as disposições dos Artigos XXII e XXIII do GATT 1994, tal como elaboradas e aplicadas pelo Entendimento sobre Solução de Controvérsias.

14.2 Sob solicitação de uma das partes em uma controvérsia, ou sob sua própria iniciativa, um grupo especial poderá estabelecer um grupo de especialistas técnicos para assisti-lo em questões de natureza técnica, que requeiram exame minucioso por peritos.

14.3 Os grupos de especialistas técnicos serão regidos pelos procedimentos do Anexo 2.

14.4 As disposições de solução de controvérsias enunciadas acima poderão ser invocadas nos casos em que um Membro considere que um outro Membro não obteve resultados satisfatórios sob os Artigos 3, 4, 7, 8 e 9 e seus interesses comerciais forem significativamente afetados. A este respeito, tais resultados deverão ser equivalentes aos que se preveria se a instituição em questão fosse um Membro.

(Decreto nº 1.355, de 30 de dezembro de 1994)

IC. Comentários sobre a Tradução

Nada a comentar.

II. Interpretação e Aplicação do Artigo 14

Este Artigo não foi objeto de análise pelo DSB da OMC.

- **Artigo 15**

IA. <u>Texto do Artigo em Inglês</u>

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.

IB. <u>Texto do Artigo em Português</u>

Artigo 15
Disposições Finais

Reservas

15.1 Não poderão ser feitas reservas em relação a quaisquer disposições do presente Acordo sem o consentimento dos demais Membros.

Exame

15.2 Cada Membro informará ao Comitê, prontamente após a data na qual o Acordo Constitutivo da OMC entre em vigor para si, as medidas existentes ou tomadas para assegurar a implementação e administração deste Acordo. Quaisquer mudanças subsequentes de tais medidas serão também notificadas ao Comitê.

15.3 O Comitê examinará anualmente a implementação e funcionamento deste Acordo tendo em conta seus objetivos.

15.4 Antes do encerramento do terceiro ano da entrada em vigor do Acordo Constitutivo da OMC e ao final de cada período trienal subsequente, o Comitê examinará o funcionamento deste Acordo, incluídas as disposições relativas a transparência, com vistas a recomendar um ajustamento dos direitos e obrigações deste Acordo onde seja necessário para assegurar vantagens econômicas mútuas e equilíbrio de direitos e obrigações, sem prejuízo das disposições do Artigo 12. Tendo em conta, *inter alia*, a experiência ganha na implementação do Acordo, o Comitê deverá, quando apropriado, apresentar propostas para emenda do texto deste Acordo ao Conselho para o Comércio de Bens.

Anexos

15.5 Os anexos a este Acordo constituem uma parte integral do mesmo.

(Decreto nº 1.355, de 30 de dezembro de 1994)

IC. Comentários sobre a Tradução

Nada a comentar.

II. Interpretação e Aplicação das Disposições Finais

As disposições finais não foram objeto de análise pelo DSB da OMC.

- **ANEXO I**

Fernando Benjamin Bueno
Érica Cristina Iwano Lourenço

IA. Texto em Inglês

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.

IB. <u>Texto do Anexo em Português</u>

Anexo I
Termos e suas Definições para os Propósitos deste Acordo

Quando utilizados neste Acordo, os termos apresentados na sexta edição do Guia ISO/IEC 2 1991 - Termos Gerais e suas Definições Referentes à Normalização e Atividades Correlatas terão o mesmo significado que aquele constante nas definições do mencionado Guia, levando em conta que serviços estão excluídos da cobertura deste Acordo.

Para os propósitos deste Acordo, entretanto, as seguintes definições se aplicarão:

1 Regulamento Técnico

Documento que enuncia as características de um produto ou os processos e métodos de produção a ele relacionados, incluídas as disposições administrativas aplicáveis, cujo comprimento é obrigatório. Poderá também tratar parcial ou exclusivamente de terminologia, símbolos, requisitos de embalagem, marcação ou rotulagem aplicáveis a um produto, processo ou método de produção.

Nota explicativa

A definição existente no Guia ISO/IEC 2 não é completa em si mesma, mas baseada no chamado sistema de ‘blocos de construção’.

2 Norma

Documento aprovado por uma instituição reconhecida que fornece, para uso comum e repetido, regras, diretrizes ou características para produtos ou processos e métodos de produção conexos, cujo cumprimento não é obrigatório. Poderá também tratar parcial ou exclusivamente de terminologia, símbolos, requisitos de embalagem, marcação ou rotulagem aplicáveis a um produto, processo ou método de produção.

Nota explicativa

Os termos definidos no Guia ISO/IEC 2 cobrem produtos, processo e serviços. Este Acordo trata apenas de regulamentos técnicos, normas e procedimentos de avaliação de conformidade relacionados a produtos ou processos e métodos de produção. As normas, tal como definidas pelo Guia ISO/IEC 2, podem ser obrigatórias ou voluntárias. Para os propósitos deste Acordo, as normas são definidas como documentos voluntários e os regulamentos técnicos como obrigatórios. As normas preparadas pela comunidade internacional de normalização são baseadas no consenso. Este Acordo cobre também documentos que não são baseados no consenso.

3 Procedimentos de Avaliação de Conformidade

Qualquer procedimento utilizado direta ou indiretamente para determinar que as prescrições pertinentes de regulamentos técnicos ou normas são cumpridos.

Nota explicativa

Os procedimentos de avaliação de conformidade incluem, *inter alia*, procedimentos para amostragem, teste e inspeção, avaliação, verificação e garantia de conformidade, registro, credenciamento e homologação, bem como suas combinações.

4 Instituição ou Sistema Internacional

Instituição ou sistema aberto à participação das Instituições pertinentes de pelo menos todos os Membros.

5 Instituição ou Sistema Regional

Instituição ou sistema aberto à participação das instituições pertinentes de apenas alguns dos Membros.

6 Instituição do Governo Central

O Governo Central, seus ministérios e departamentos ou qualquer outra instituição sujeita ao controle do governo central, no que diz respeito à atividade em questão.

Nota explicativa

No caso das Comunidades Europeias, aplicam-se as disposições que regulam as Instituições do governo central. Entretanto, poderão estabelecer-se no interior das Comunidades Europeias, instituições ou sistemas regionais de avaliação de conformidade e, em tais casos, estariam sujeitas às disposições deste Acordo sobre instituições ou sistemas de avaliação de conformidade regionais.

7 Instituição pública local

Poderes públicos distintos do Governo Central (por exemplo, estados, províncias, Lander, cantões, municípios, etc), seus ministérios ou departamentos ou qualquer outra instituição sujeita ao controle de tal poder público a respeito da atividade em questão.

8 Instituição não Governamental

Instituição que não seja do governo central, nem instituição pública local, inclusive uma instituição não governamental legalmente habilitada para fazer cumprir um regulamento técnico.

(Decreto nº 1.355, de 30 de dezembro de 1994)

IC. Comentários sobre a Tradução

No item 1.1, a palavra "comprimento" deve ser substituída por "cumprimento". No item 1.1, a expressão "Poderá também tratar parcial ou exclusivamente" pode ser substituída por "Poderá também incluir ou tratar exclusivamente". Já no item 1.2, a expressão "Poderá também tratar parcial ou exclusivamente" pode ser substituída por "Poderá também incluir ou tratar exclusivamente". No item 1.3, a expressão "prescrições pertinentes" pode ser substituída por "requisitos relevantes" ou "requisitos importantes". No item 1.3, a palavra "pertinentes" pode ser substituída por "relevantes" ou "importantes".

II. Interpretação e Aplicação do Anexo I

Os seguintes Relatórios demonstram o entendimento do Painel e do Órgão de Apelação sobre o tratamento requerido pelo Anexo I.

Relatório do Painel no *European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (*EC - Trademarks and Geographical Indications*), WT/DS290/R, paras. 7.448-7.449

Anexo 1.1 - Definição de Regulamento Técnico

Para. 7.448. "The parties disagree as to whether the second indent of Article 12(2) of the Regulation lays down a product characteristic. The Panel notes that it expressly sets out a requirement that concerns what must be indicated on "the label" of a product. That is a labelling requirement. The second sentence of the definition of "technical regulation" in Annex 1.1 of the TBT Agreement expressly refers to "labelling requirements" as an example of a technical regulation."

Para. 7.449. "The Panel notes that this example in the definition in Annex 1.1 is qualified by the words "as they apply to a product, process or production method". The text does not limit the scope of the example by stating what the labels must indicate in order for them to constitute a technical regulation. Rather, they explain to what the labelling requirements "apply". This simply means that a requirement concerning a product label is a labelling requirement that applies to a product. The context shows that the subject of the second sentence, "[i]t" refers back to the noun "[d]ocument" as qualified by the relative clause beginning "which lays down" and ending with the word "mandatory". Were this not so, the element that "compliance is mandatory", for example, would not apply to the items described in the second sentence, which would be contrary to the object and purpose of the obligations concerning technical regulations. As a result, a document that "deal[s] exclusively with ... labelling requirements as they apply to a product" can be an example of a "[d]ocument that lays down product characteristics". The issue is not whether the content of the label refers to a product characteristic: the label on a product is a product characteristic. Therefore, the second indent of Article 12(2) of the Regulation deals exclusively with a labelling requirement "as it applies to a product"."

Relatório do Órgão de Apelação no caso *European Communities - Measures Affecting Asbestos and Products Containing Asbestos* (*EC - Asbestos*), WT/DS135/AB/R, paras. 67-70 e 72

Anexo 1.1 - Definição de Regulamento Técnico

Para. 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"."

Para. 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"."

Para. 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."

Para. 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."

Para. 72. "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."

Relatório do Órgão de Apelação no caso *European Communities - Measures Concerning Meat and Meat Products (Hormones), (EC - Sardines),* WT/DS231/AB/R, paras. 175-176, 180, 183 e 190-191

O Órgão de Apelação entendeu que o Regulamento das CE é inconsistente com o Artigo 2.4 do Acordo TBT. Merece destaque o trecho abaixo do Relatório do Órgão de Apelação:

Anexo 1.1 - Definição de Regulamento Técnico

Para. 175. "As we explained in *EC - Asbestos* [paragraph 59], whether a measure is a "technical regulation" is a threshold issue because the outcome of this issue determines whether the TBT Agreement is applicable. If the measure before us is not a "technical regulation", then it does not fall within the scope of the TBT Agreement. (…)"

Para. 176. "We interpreted this definition in *EC - Asbestos* [paragraphs 66-70]. In doing so, we set out three criteria that a document must meet to fall within the definition of "technical regulation" in the TBT Agreement. First, the document must apply to an identifiable product or group of products. The identifiable product or group of products need not, however, be expressly identified in the document. Second, the document must lay down one or more characteristics of the product. These product characteristics may be intrinsic, or they may be related to the product. They may be prescribed or imposed in either a positive or a negative form. Third, compliance with the product characteristics must be mandatory. (…)."

Para. 180. "… Thus, a product does not necessarily have to be mentioned explicitly in a document for that product to be an identifiable product. Identifiable does not mean expressly identified."

Para. 183. "(…) We observe that the EC Regulation does not expressly identify Sardinops sagax. However, this does not necessarily mean that Sardinops sagax is not an identifiable product. As we stated in *EC - Asbestos* [paragraph 70], a product need not be expressly identified in the document for it to be identifiable."

Para. 190. "We do not find it necessary, in this case, to decide whether the definition of "technical regulation" in the TBT Agreement makes a distinction between "naming" and labelling. … We are of the view that this requirement - to be prepared exclusively from fish of the species Sardina pilchardus - is a product characteristic "intrinsic to" preserved sardines that is laid down by the EC Regulation. (…)"

Para. 191. "In any event, as we said in *EC - Asbestos* [paragraph 67], a "means of identification" is a product characteristic. A name clearly identifies a product; indeed, the European Communities concedes that a name is a "means of identification" (…)."

Relatório do Órgão de Apelação no caso *European Communities - Measures Concerning Meat and Meat Products (Hormones) (EC- Sardines),* WT/DS231/AB/R, paras. 222 e 223

Seguem abaixo trechos do Relatório:

Anexo 1.2 - *Standards*

Para. 222. "(…) 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. 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."

Para. 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 immediately preceding sentence, which deals with standards adopted by international bodies (…)."

Relatório do Painel no Caso *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* *(US - Clove Cigarettes)* WT/DS406/R, paras. 7.24, 7.27, 7.32 e 7.39

Seguem abaixo trechos do Relatório:

Para. 7.24. "We note that the definition of the term "technical regulation" in Annex 1.1 of the TBT Agreement has already been examined by the Appellate Body: first in *EC - Asbestos*, and then again in *EC - Sardines*. In those cases, the Appellate Body set out three criteria that a document must meet to fall within the definition of "technical regulation" in Annex 1.1":

> (...) First, the document must apply to an identifiable product or group of products. The identifiable product or group of products need not, however, be expressly identified in the document. Second, the document must lay down one or more characteristics of the product. These product characteristics may be intrinsic, or they may be related to the product. They may be prescribed or imposed in either a positive or a negative form. Third, compliance with the product characteristics must be mandatory. As we stressed in *EC – Asbestos*, these three criteria are derived from the wording of the definition in Annex 1.1. (...).

Para. 7.27. "We observe that the measure at issue in this case, Section 907(a)(1)(A), explicitly identifiesthe products it covers: cigarettes and any of their component parts. In our view, the products covered by Section 907(a)(1)(A) are not merely "identifiable", as was apparently the case in *EC – Asbestos*. Rather, they are "expressly identified". (...)"

Para. 7.32. "In our view, the fact that Section 907(a)(1)(A) lays down product characteristics in the negative form ("a cigarette ... shall not contain") does not alter the conclusion that Section 907(a)(1)(A) lays down product characteristics."

Para. 7.39. "We are of the view that Section 907(a)(1)(A) lays down product characteristics with which compliance is "mandatory" (...)."

Relatório do Painel no caso *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* *(US - Tuna II)*, WT/DS381/R, paras. 7.131 e 1.178

Seguem abaixo trechos do Relatório:

Para. 7.131. "In our view, to the extent that they prescribe, in a binding and legally enforceable instrument, the manner in which a dolphin-safe label can be obtained in the United States, and disallow any other use of a dolphin-safe designation, the US tuna labelling measures "regulate" dolphin-safe labeling requirements "in a binding or compulsory fashion". It is not compulsory to meet these requirements and to bear the label, in order to sell tuna on the US market. The US measures therefore do not impose any requirement to label, in a "positive" manner. However, they do prescribe and impose the conditions under which a product may be labelled dolphin-safe. In particular, the measures prescribe "in a negative form", to use the Appellate Body's terms, that no tuna product may be labeled dolphin-safe or otherwise refer to dolphins, porpoises or marine mammals if it does not meet the conditions set out in the measures, and thus impose a prohibition on the offering for sale in the United States of tuna products bearing a label referring to dolphins and not meeting the requirementsthat they set out."

Para. 7.178. "In explaining the adverse effects of the measures, Mexico argued that they have direct effects on tuna products, because major retailers in the United States refuse to buy tuna products that

cannot be labelled dolphin safe, and indirect effects on tuna caught by the Mexican fleet, because major producers of tuna in the United States also refuse to purchase Mexican or other tuna caught in the ETP because tuna product containing such tuna could not be included in tuna products labeled dolphin safe. I agree with the United States, however, that these are decisions made by private actors that do not necessarily involve the participation of the State. Such private actions alone should not be able to turn an otherwise voluntary norm into a technical regulation."

III. Comentários

O Órgão de Apelação exemplifica o que estaria dentro do conceito de "características do produto" e entende que as características podem ser intrínsecas ou extrínsecas ao produto.

Nos casos *US - Clove Cigarettes* e *US - Tuna II*, o Painel entendeu que para um documento ser considerado um regulamento técnico, é preciso preencher três critérios: ser aplicável a um produto ou a um grupo de produto identificável; mencionar uma ou mais características do produto; e, obrigatoriamente cumprir as características dos produtos.