Conclusion

Impacts associated with shale gas development and policy decisions in the U.S. and Europe about whether to allow for such development remain important and controversial issues. Effective risk communication is a crucial element of ongoing policy discourse. In this brief report, we highlighted relevant perspectives on risk communication in the context of shale gas development, focusing on opportunities and barriers to public participation in the decision-making process. We drew on ongoing research to help identify emerging communication challenges, offer solutions, and identify future research needs. We recognize the intense passion with which pro-development and anti-development advocates work to have their voices heard in what is becoming a national and international energy policy debate. As such, we do not naively expect all sides come to consensus on whether it should or should not be allowed. What we do hope for, and apply our research toward, is facilitating greater awareness of short-term and long-term impacts and tradeoffs as well as more nuanced communication efforts that better engage two way communication and a diversity of evidentiary claims.

Trade, Investment and Risk

This section highlights the interface between international trade and investment law and municipal and international risk regulation. It is meant to cover cases and other legal developments in WTO law (SPS, TBT and TRIPS Agreements and the general exceptions in both GATT 1994 and GATS), bilateral investment treaty arbitration and other free trade agreements such as NAFTA. Pertinent developments in international standardization bodies recognized by the SPS and TBT Agreement are also covered. Risk regulation refers broadly to regulation of health, environmental, financial or security risks.
Of recurrent interest in this area are questions of whether precautionary policies can be justified, the extent to which policy can and should influence risk regulation and the standard of review with which international judicial and quasi-judicial bodies assess scientific evidence.

Re-tuning Tuna? Appellate Body Report in *US – Tuna II*

*Lukasz Gruszczynski**

Under the TBT Agreement, a labelling requirement can be qualified as a technical regulation, and not as a standard, even if it does not constitute a precondition for placing a product for sale on the relevant market. Examination of "no less favourable treatment" under Article 2.1 requires determining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported like products, and whether such detrimental impact stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported like products. The evaluation of whether a measure is more trade-restrictive than necessary under Article 2.2 involves a process of balancing different factors, such as the contribution of the measure to the pursued objective, its trade restrictiveness, and risks arising from non-fulfilment. In order for a particular rule to qualify as an international standard for the purpose of Article 2.4, it is necessary to determine whether it has been adopted by a body which has recognized activities in the field of standardization and whose membership is open to the relevant bodies of at least all WTO Members. As far as the last element is concerned, the process for joining such a body by interested WTO Members should be automatic and any required consent from participating Members should be only a pure formality.

I. Introduction

The Agreement on Technical Barriers to Trade ("TBT Agreement") has remained an unappreciated piece of WTO law for a long time. Although WTO Members have actively participated in the activities of the TBT Committee and frequently referred to the agreement in their requests for consultations,[1] concerns arising

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1 According to the WTO webpage, the TBT Agreement was cited in 43 requests for consultations <http://wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A22#selected_agreement> (last accessed on 16 July 2012).

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from the TBT rarely reached the final stage of the dispute settlement process.[2] This changed in 2012, when three new reports were issued by the Appellate Body,[3] including the report in *US – Tuna II*.[4] It is an important case not only because it touches upon the sensitive issue of environmental protection, but also because it sheds the light on the normative content of specific TBT obligations.

II. Facts

The dispute arose in the context of a US law establishing the conditions for use of a "dolphin-safe" label on tuna products. The trade controversy was not new, having roots dating back to the 1980's, and related to the disagreement between the US and Mexico on the use of specific fishery techniques for harvesting tuna. Two GATT panels found, in 1991 and 1994 respectively, that the US bans on importation of tuna from Mexico (and other countries where Mexican tuna was exported), imposed in order to protect dolphins that were accidentally killed or injured when fishing for tuna, were incompatible with the GATT requirements. Although those reports were never adopted, the US eventually changed its policy and introduced a new regulatory framework that allowed for the importation of tuna from Mexico. Simultaneously, the US also concluded, with Mexico and other countries of the region, a number of international agreements aimed at the protection of dolphins. The most important was the 1999 Agreement on the International Dolphin Conservation Program ("AIDCP") signed within the framework of the Inter-American Tropical Tuna Commission. Nevertheless, after two decades the problem of tuna came back to the WTO, albeit in a different form.

The contested measures included: (i) the Dolphin Protection Consumer Information Act (US Code, Title 16, Section 1385, referred to as the "DPCIA"), (ii) implementation regulations (Dolphin-safe labelling standards and Dolphin-safe requirements for tuna harvested in the Eastern Tropical Pacific (ETP) by large pursue seine vessels), both of which are contained in the Code of Federal Regulations, Title 50, Section 216.91) and (iii) the judgment of the US appeals court in the case *Earth Island Institute v. Hogarth*. These measures, taken as a whole, establish the conditions for using the "dolphin-safe" label on tuna products sold in the US (and will be hereinafter referred to collectively as the "US measure"). The US measure comprises various substantive and documentary requirements that have to be met before a tuna product can be labelled as "dolphin-safe". These requirements differ depending on certain variables identified by the DPCIA, such as the location of harvesting (i.e. inside or outside the ETP region), use of specific fishing gear (e.g. pursue seine nets), fishing techniques (i.e. setting on dolphins), or types of interaction between tuna and dolphins (i.e. existence or lack of association between these two species). Since the ETP is an area where tuna frequently associate with dolphins, and Mexican fishing vessels there have traditionally used pursue seine nets to encircle tuna, the requirements set by the US law are quite stringent as compared to other locations.[5] Contrary to the AIDCP, which also establish a labelling scheme, the focus of the US measure is on specific fishing techniques (i.e. setting on dolphins in order to catch tuna and using pursue seine nets) rather than on the level of dolphin mortality and injury. In principle, tuna from the ETP region harvested with pursue seine nets (if setting on dolphins) is not eligible for the "dolphin-safe" label. The DPCIA, however, establishes a potential exemption from this provision based on a determination by the US Secretary of Commerce by which the Secretary can confirm that the use of pursue seine nets does not have a significant adverse effect on the depletion of dolphin stocks. Such a determination was indeed issued in 2002, but it was subsequently challenged before a US federal court by the Earth Island Institute, a non-governmental

2 Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359; relatively extensive analysis of the TBT provisions also appeared in Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243 and Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, DSR 2006:III-VIII, 847.

3 The two cases are: Appellate Body Report, *United States – Measures Affecting the Productions and Sale of Clove Cigarettes*, WT/DS406/AB/R, issued 4 April 2012, not yet adopted; and Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, WT/DS386/AB/R, issued 29 June 2012, not yet adopted.

4 Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, issued 16 May 2012, not yet adopted.

5 Note that smaller vessels fishing in the ETP region are relieved of these obligations. In other words, they can use the "dolphin-safe" label without complying with the detailed requirements of the DPCIA.

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organization. As a consequence of this legal action the Secretary's determination was vacated by the court. This in turn meant that tuna products from the ETP region, where the majority of Mexican tuna come from, have been subjected to more demanding labelling requirements. At the same time it should be noted that the parties to the dispute did not contest the fact that the sale of tuna products without the "dolphin-safe" label has always been possible in the US.

Mexico requested consultations with the US on 24 October 2008. Since the consultation failed to produce a satisfactory outcome, Mexico asked for the establishment of a panel, which was subsequently formed on 20 April 2009. Several countries, including China and the European Union, joined the proceeding as third parties. Mexico argued that the measure was incompatible with Articles I:1 and III:4 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and Articles 2.1, 2.2, and 2.4 of the TBT Agreement. The relevant TBT provisions stipulate that:

– "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" (Article 2.1).
– "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:* ... the prevention of deceptive practices; protection of ... animal or plant life or health, or the environment" (Article 2.2).
– "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" (Article 2.4).

The Panel issued its final report on 15 September 2011. It found the US measure to be a technical regulation falling within the scope of the TBT Agreement.[6] In particular, the panel considered the measure to be of mandatory character, despite the fact that the label was not required as a formal precondition to enter the US market.[7] Following that finding, the panel held that the measure was not inconsistent with Article 2.1 because Mexico failed to establish that its tuna products received less favourable treatment as compared to products originating in other countries (including the US).[8] The panel, however, found that the measure was more restrictive than necessary to fulfil the various legitimate objectives pursued by the US. Two such objectives were identified by the panel: (i) protection of consumers by ensuring that they are not misled as to the quality of tuna products (i.e. that tuna was not caught in a manner that adversely affects dolphins) and (ii) protection of dolphins by discouraging certain fishing techniques that harm dolphins.[9] According to the panel, the US measure only partially ensured fulfilment of the first objective (because tuna products labelled as "dolphin-safe" might in any case have involved the injury or killing of dolphins). The panel also believed that there were other alternative measures that were less trade restrictive and could achieve the level of protection sought by the US (i.e. allowing the coexistence of the AIDCP and US dolphin-safe labels). Consequently, the US measure violated Article 2.2.[10] As far as Article 2.4 was concerned, the panel held that the US measure did not violate this provision. Although, it identified AIDCP as the relevant international standard in the context of the TBT Agreement, it also held that Mexico had failed to establish that this standard was an effective or appropriate means to achieve the US objectives. In particular, it found that "the AIDCP label would not address some of the

6 Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, issued 15 September 2011, para. 7.145.

7 Note that there was one dissenting panellist who believed that US scheme should be classified as a standard and not a technical regulation. He did not, however, question the applicability of the TBT Agreement as such. For a more detailed analysis of this aspect of the dispute, see Alessandra Arcuri, "Back to the Future: US-Tuna II and the New Environment-Trade Debate", 2(3) *European Journal of Risk Regulation* (2012), pp. 177–189.

8 Panel Report, *US – Tuna II*, paras. 7.374–7.378.

9 *Ibidem*, paras. 7. 408–427.

10 *Ibidem*, para. 7.578.

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adverse effects on dolphins that the United States has identified as part of its objectives."[11] The panel also exercised judicial economy and declined to make findings under the GATT 1994.

Both parties to the dispute appealed the panel's report. The appellate submissions were lodged on 7 February 2012. Once again a number of countries, including the European Union, filed third party submissions. The US argued that the panel erred in qualifying the measure as a technical regulation; in finding that the measure was more trade restrictive than necessary to fulfil the legitimate objectives sought to be achieved; and in recognizing AIDCP as the relevant international standard. Mexico contested the panel's finding as to the consistency of the measure with Article 2.1 (i.e. the Panel's finding that the measure did not accord less favourable treatment to like Mexican products), and the refusal to consider the AIDCP as the effective and appropriate means to fulfil the US objectives. The Appellate Body circulated its report to WTO Members on 16 May 2012.

III. The Appellate Body's Report

The Appellate Body upheld the panel's finding that the US measure could be qualified as a technical regulation. It explained that labelling requirements in principle might fall within either of two categories envisaged by the TBT Agreement (i.e. technical regulations and standards).[12] What distinguishes a technical regulation from a standard is its mandatory character, i.e. making compliance compulsory. In assessing that element, one needs to consider various features identified by the Appellate Body. These include questions such as "whether the measure consists of a law … enacted by a WTO Member, whether it prescribes or prohibits particular conduct, whether it sets out specific requirements that constitute the sole means of addressing a particular matter and the nature of the matters addressed by the measure."[13] The character of the enforcement mechanism is also relevant.[14] On that basis, the Appellate Body concluded that the US measure was indeed a technical regulation. The measure was found to be composed of governmental legislative and regulatory acts which set out specific and exclusive requirements for labelling tuna as "dolphin-safe" (prohibiting any other labels that would be based on other conditions), and which was enforced via a specific enforcement mechanism (i.e. outside of the standard rules on the prevention of deceptive practices). At the same time, the Appellate Body disagreed with the US that a specific measure can be regarded as mandatory only if it establishes a precondition for placing a product for sale on the market.[15]

The Appellate Body's analysis of Article 2.1 concentrated on the third element of the test contained in the provision, i.e. whether treatment accorded to imported products is less favourable that accorded to like domestic products. Following the approach in *US – Clove Cigarettes*, this required ascertainment whether the measure modified the conditions of competition in the US market to the detriment of imported like products (i.e. tuna). Such analysis, however, had to be supplemented with an additional examination in order to determine whether such detrimental impact "stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products."[16] The burden of proof in this respect was on the US as a defendant. On the basis of the factual determinations made by the panel, the Appellate Body reversed the panel's finding as to the compatibility of the US measure with Article 2.1.[17] Firstly, it found that the measure modified the conditions of competition by effectively foreclosing access to the "dolphin-safe" label for Mexican tuna products. Second, it held that such a detrimental impact on Mexican products did not stem exclusively from a legitimate regulatory distinction made by the US. In this context, the Appellate Body explained that the US failed to demonstrate that its different treatment of Mexican tuna was caused by the different levels of risks faced by dolphins inside and outside the ETP region (when using fishing techniques characteristic for a relevant region), which could justify its more stringent treatment of ETP tuna.[18]

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11 *Ibidem*, para. 7.728.

12 Qualification of a measure as either technical regulation or standard changes the set of applicable TBT provisions.

13 Appellate Body Report, *US – Tuna II*, para. 188.

14 *Ibidem*, para. 194.

15 *Ibidem*, para. 196.

16 *Ibidem*, para. 215, quoting Appellate Body Report in *US – Clove* (para. 182).

17 The panel took a different analytical approach under Article 2.1 It asked whether the measure accorded different treatment to Mexican (imported) products as compared to US (domestic) products and whether this differential treatment was based on the origin of products. This seems to limit the examination to *de jure* discrimination and disregards the fact that discrimination can also be of a *de facto* nature.

18 Appellate Body Report, *US – Tuna II*, para. 297.

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The Appellate Body also reversed the panel's findings under Article 2.2. It explained that evaluation of the measure under that article requires determinations regarding: (i) the existence of a legitimate objective(s), (ii) the degree to which a contested measure contributes to such an objective(s), "(iii) the trade-restrictiveness of a contested measure, and (iv) the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure."[19] The latter three elements are used to establish whether a measure is more trade-restrictive than necessary and involve a balancing process. In line with the GATT 1994 practice, the Appellate Body also endorsed in this instance a comparison of a contested measure with (reasonably) available alternatives as a conceptual tool for ascertaining its relative necessity. Against this analytical framework, the Appellate Body found that alternative measure identified by the Mexico (i.e. the co-existence of two labels) would contribute to a lesser degree than the current US measure to both objectives (i.e. consumer information and dolphin protection) because "overall, it would allow more tuna harvested [in the ETP region] in conditions that adversely affect dolphins to be labelled 'dolphin-safe'."[20]

Although the Appellate Body found that the panel erred in its findings under Article 2.4, it ultimately upheld the conclusions reached by the panel. The Appellate Body stressed that in order to qualify the AIDCP rules as an international standard, one had to determine in the first place whether they were adopted by an "international standardizing body". The last term was understood very broadly as "a body [which however does not need to be an organization] that has recognized activities in standardization and whose membership is open to the relevant bodies of at least all [WTO] Members."[21] According to the Appellate Body, although such a body had to be active in the standardization field, the standardizing function did not need to be its primary task. The AIDCP did not meet at least one of these conditions. In particular, the Appellate Body found that Mexico failed to show that the AIDCP is open to the relevant bodies of at least all WTO Members, as accession thereto was not automatic and required an invitation issued following a consensual decision of all the current parties. This process was not regarded by the Appellate Body as pure formality and therefore could not be considered as meeting the criteria set out by Article 2.4.[22]

IV. Comments

The report of the Appellate Body in *Tuna II* clarifies some of the TBT provisions and includes a number of noteworthy (albeit sometimes controversial) developments. Unfortunately due to the space limitations it is not possible to discuss all of them here. Consequently, this section only highlights some issues that appear to be of particular interest, in the opinion of the author of this report.[23]

Probably one of the most important aspects of the report is its confirmation of the approach taken by the Appellate Body in *US – Clove Cigarettes* as the applicable analytical framework when examining a measure under Article 2.1. Thus a panel is expected to follow a two-step analysis and determine: (i) whether a measure modifies the conditions of competition in the relevant market to the detriment of imported like products; and (ii) whether such a detrimental impact stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported like products. Such a reading of Article 2.1 diverges from the interpretation taken under the parallel provision of GATT 1994 (i.e. Article III:4), where the second element is not present. This difference results not so much from the different language of the relevant provisions but primarily from the fact that the TBT Agreement does not contain the general exception comparable to Article XX. Although, the Appellate Body did not explicitly state so, the analytical approach reflected in the report seems to suggest that measures found to be incompatible with TBT provisions cannot be saved under the GATT 1994 general exception. Therefore, in order to guarantee

19 *Ibidem*, para. 322.

20 *Ibidem*, para. 330.

21 *Ibidem*, para. 359.

22 *Ibidem*, paras. 396–399. For a more elaborate discussion on the disciplines provided by Article 2.4, as interpreted by the Appellate Body and the panel, see Carola Glinski, "Private Norms as International Standards? – Regime Collisions in Tuna-Dolphin II", 3(4) *European Journal of Risk Regulation* (2012), forthcoming.

23 For other issues (and their criticism or appraisal), see for example the post of Joost Pauwelyn on the worldtradelaw.net blog and his discussion on the relevance of the Appellate Body's findings for the process and product methods distinction under the TBT Agreement (<http://worldtradelaw.typepad.com/ielpblog/2012/05/ tuna-the-end-of-the-ppm-distinction-the-rise-of-international-standards.html#comments>, last accessed on 16 July 2012) or the post of Rob Howse (<http://worldtradelaw.typepad.com/ielpblog/2012/05/quick-thoughts-on-tuna.html>, last accessed on 16 July 2012).

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a comparable balance of rights and obligations under both agreements, the Appellate Body decided to supplement the traditional test of Article III.4 with an additional element that would allow it to single out those measures that discriminate for legitimate purposes.[24] In principle, this finding should be welcomed. It contributes to the consistency of TBT case law and clarifies the relationship between the TBT and GATT 1994 disciplines. It also ensures (at least to some extent) that the regulatory freedom of WTO Members in the field of technical regulations is not unnecessarily constrained. On the other hand, one may legitimately ask whether step (ii) of the analysis under Article 2.1 fully reflects the freedom granted to national governments within the context of Article XX. If not, the aim of achieving an equivalent balance of rights and obligations under both agreements will not be fulfilled. Although it will be necessary to await future TBT cases to definitively answer this question, the rather narrow formulation of what is required under step (ii) raises some doubts as to whether the balance is the same. In particular, one may wonder whether the narrow formulation ("stems *exclusively* from") really corresponds to the "arbitrary or unjustifiable discrimination" standard of Article XX. What if a legitimate regulatory distinction between like products is only partially responsible for a detrimental impact? Does it change anything if elements other than a legitimate regulatory distinction have only a marginal influence on detrimental impact? The Appellate Body will definitely need to address these nuances in its future reports.

Another interesting development relates to the treatment of decisions by the TBT Committee. The Appellate Body, when enquiring into the normative content of Article 2.4, correctly identified them (here the Decision on Principles or the Development of International Standards, Guides and Recommendations) as "subsequent agreement[s] between the parties regarding the interpretation of the treaty or the application of its provisions" as provided by Article 31.3(a) of the Vienna Convention on the Law of Treaties ("VCLT"). Consequently, WTO dispute settlement bodies are obliged under Article 3.2 of the Dispute Settlement Understanding to take them into account when interpreting specific TBT provisions. While this is not a revolutionary step, it clarifies an important issue that was not entirely clear in the previous case law.[25] Decisions of the TBT (and SPS) Committee clearly meet the requirements of Article 31.3(a) of the VCLT. In addition, since the process of their adoption is inclusive and based on consensus, they provide reports of the WTO dispute settlement bodies with some additional legitimacy. An understanding of the term "agreement" which is not limited to subsequent international treaty and extends to less formal or even informal arrangements is also compatible with the practice of other international courts.[26] Last but not least, an approach of the Appellate Body can be seen as a way to address deficiencies in the political process that takes place at the WTO (no binding interpretation has been ever adopted pursuant to Article IX: 2 of the *WTO* Agreement) and move WTO rules forward.

One should also welcome the detailed instruction given by the Appellate Body with regard to Article 2.2. The report establishes relatively clear guidelines for future panels, and therefore improves the predictability of the dispute settlement mechanism with respect to TBT claims. Since, the *Clove Cigarettes* appeal did not require making any findings under Article 2.2, this is also the first extensive analysis of its disciplines provided by the Appellate Body.[27] This should be even more appreciated if one recognizes that both appeals in *Tuna II* were limited to selected issues, while the Appellate Body ultimately decided to give a comprehensive description of all requirement included in Article 2.2. In particular, the Appellate Body made clear that the article does not contain a closed list of legitimate objectives.[28] Technical regulation as such does not need to fully achieve an objective. Instead, the degree to which a measure contributes to a legitimate objective is rather one of the elements in the balancing process that takes place under Article 2.2.[29] Other measures used for com-

24 See Appellate Body Report, *US – Clove Cigarettes*, fn 372 (rejecting the proposition that under Article III:4 of the GATT 1994, panels should inquire whether "the detrimental effect is unrelated to the foreign origin of the product").

25 See e.g., Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted on 29 September 2010, para. 7.136. Although the panel recognized the relevance of the decisions of the SPS Committee it failed to identify Article 31 of the VCLT as the relevant basis for such a conclusion.

26 See Richard Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), pp. 220–21.

27 The analysis of the panel in *US – Clove Cigarettes* was also limited. In the *EC – Sardines* case the panel, exercising judicial economy with regard to claims under Article 2.2, refrained from making findings under this Article.

28 Appellate Body, *US – Tuna II*, para. 314.

29 *Ibidem*, paras. 315–317.

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parison, in order to be regarded as alternatives, need to make an equivalent contribution to the relevant legitimate objective.[30] The burden of making a *prima facie* case with regard to all the above elements is on the complainant. Overall, this approach seems to be relatively sympathetic to national governments when it comes to an assessment of the necessity of domestic technical measures.

30 *Ibidem*, para. 321.

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