1 GENERAL

1.1 Relationship with the GATT 1994

1. The Appellate Body in *EC – Asbestos* stated that

> "[A]lthough the *TBT Agreement* is intended to 'further the objectives of GATT 1994', it does so through a specialized legal regime that applies solely to a limited class of measures. For these measures, the *TBT Agreement* imposes obligations on Members that seem to be *different* from, and *additional* to, the obligations imposed on Members under the GATT 1994."[1]

2. The Appellate Body in *US – Clove Cigarettes* considered that the second recital of the preamble of the TBT Agreement "indicates that the *TBT Agreement* expands on pre-existing GATT disciplines and emphasizes that the two Agreements should be interpreted in a coherent and consistent manner."[2]

3. The Appellate Body in *US – Clove Cigarettes* further observed that

> "The balance set out in the preamble of the *TBT Agreement* between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX."[3]

4. The Panel in *US – COOL* noted that

> "According to its preamble, the TBT Agreement serves 'to further the objectives of GATT 1994'.[4] Also, 'no conflicting, i.e. mutually exclusive, obligations arise'[5] 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."[6]

5. Faced with claims under both the TBT Agreement and the GATT 1994, panels considered claims under the TBT Agreement first.[7]

6. Having found that the measure at issue violated Article 2.2 but was not inconsistent with Articles 2.1 and 2.4 of the TBT Agreement, the panel in *US – Tuna II (Mexico)* exercised judicial economy with respect to Mexico's claims under Articles I:1 and III:4 of the GATT 1994.[8] The Appellate Body considered that the panel acted inconsistently with Article 11 of the DSU and reasoned as follows:

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[1] Appellate Body Report, *EC – Asbestos*, para. 80.
[2] Appellate Body Report, *US – Clove Cigarettes*, para. 91.
[3] Appellate Body Report, *US – Clove Cigarettes*, para. 96.
[4] *(footnote original)* See also Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.464.
[5] *(footnote original)* Panel Report, *EC – Bananas III*, para. 7.162.
[6] Panel Reports, *US – COOL*, para. 7.233.
[7] Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.2-7.6; *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.3-7.8; *EC – Seal Products*, paras. 7.57-7.69; *US – COOL*, paras. 7.70-7.73; *US – Tuna II (Mexico)*, paras. 7.39-7.46; *US – Clove Cigarettes*, paras. 7.7- 7.19; *EC – Sardines*, paras. 7.14-7.19; and *EC – Asbestos*, paras. 8.15-8.17.
[8] Panel Report, *US – Tuna II (Mexico)*, para. 8.1.

> "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.[9]"[10]

1.2 Relationship with the TRIPS Agreement

7. In *Australia – Tobacco Plain Packaging*, the Panel examined the relationship between the TBT Agreement and the TRIPS Agreement, and their relevant provisions, to the extent necessary to determine whether it would be inappropriate to consider under Article 2.2 of the TBT Agreement the tobacco plain packaging measures relating to the use of trademarks on tobacco products and their retail packaging. The Panel noted that:

> "[W]e see no basis to assume the existence of a conflict between Article 20 of the TRIPS Agreement and Article 2.2 of the TBT Agreement – either under the various definitions of conflict described above, or in the sense suggested by Australia, that would require us to abstain from examining aspects of the TPP measures that may fall within the scope of application of both the TBT and TRIPS Agreements. Rather, as elaborated above, we must assume that both agreements apply cumulatively and harmoniously."[11]

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[9] *(footnote original)* Appellate Body Report, *Australia – Salmon*, para. 223.
[10] Appellate Body Report, *US – Tuna II (Mexico)*, para. 405.
[11] Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.106. See also ibid. para. 7.107.