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Dispute Settlement Body
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MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 11 JANUARY 2019

Chairperson: Ms. Sunanta Kangvalkulkij (Thailand)

Prior to the adoption of the Agenda, the item concerning the adoption of the Panel Report in the dispute on: "Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines: Recourse to Article 21.5 of the DSU by the Philippines" (DS371) was removed from the proposed Agenda following Thailand's decision to appeal the Panel Report.

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1 TURKEY – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

A. Request for the establishment of a panel by the United States (WT/DS561/2)

1.1. The Chairperson drew attention to the communication from the United States contained in document WT/DS561/2, and invited the representative of the United States to speak.

1.2. The representative of the United States said that several WTO Members were unilaterally retaliating against the United States for actions it had taken pursuant to Section 232 that, as national security actions, were fully justified under Article XXI of the GATT 1994. Those Members, including Turkey, were pretending that the US actions under Section 232 were so-called "safeguards", and further pretended that their unilateral, retaliatory duties constituted suspension of substantially equivalent concessions under the WTO Agreement on Safeguards. Just as those Members appeared ready to undermine the dispute settlement system by throwing out the plain meaning of Article XXI and 70 years of practice, so too were they ready to undermine the WTO by pretending they were following WTO rules while taking measures blatantly against those rules. And Members knew from the actions of those Members that they did not seriously believe that the US security measures under Section 232 were safeguards. Turkey, for example, had not addressed whether its action was in response to an alleged "safeguard" taken as a result of an absolute increase in imports. If there had been an absolute increase, the right to suspend substantially equivalent concessions under the Safeguards Agreement could not have been exercised for the first three years of the safeguard

measure. To be clear: Article XIX of the GATT 1994 could be invoked by a Member to depart temporarily from its commitments in order to take emergency action with respect to increased imports. The United States, however, was not invoking Article XIX as a basis for its Section 232 actions. Thus, Article XIX and the Safeguards Agreement were not relevant to the US actions under Section 232, and the United States had not utilized its domestic law on safeguards to take the actions under Section 232. Because the United States was not invoking Article XIX, there was no basis for another Member to pretend that Article XIX should have been invoked and to use safeguards rules that were simply inapplicable. The additional, retaliatory duties were nothing other than duties in excess of Turkey's WTO commitments and were applied only to the United States, contrary to Turkey's most-favoured-nation obligation. The United States would not permit its businesses, farmers, and workers to be targeted in this WTO-inconsistent way. For these reasons, the United States requested that the DSB establish a panel to examine this matter with standard terms of reference.

1.3. The representative of Turkey said that his country regretted that the United States had chosen to request a panel to examine this matter. Members were well aware that the current situation was not caused by the Turkish measures that were formally challenged by the United States in this dispute. Rather, the real reason was the US decision taken last year to impose unwarranted and unjustified unilateral measures on imports of steel and aluminium. Those US measures affected imports from all but a handful of WTO Members, including Turkey, and were subject to a series of other WTO disputes, including the" US – Steel and Aluminium Products (Turkey)" dispute (DS564) brought by Turkey. Clearly, the measures taken by Turkey, although technically they were subject of the US panel request at the present meeting, could not be viewed in isolation from this broader context. The import restrictions on steel and aluminium had been taken by the United States in order to protect the US industry from the economic effects of competing imports. The US measures were, by their very nature, their purpose and their design, economically-motivated safeguard measures. They were "emergency measures" to protect the domestic industry, within the meaning of Article XIX of the GATT 1994 and the Agreement on Safeguards, that suspended the US concessions and other obligations. Like many other Members, Turkey had no choice but to react to these unilateral safeguard measures, as the United States had left without any response Turkey's request of 20 April 2018, under Article 12.3 of the Safeguards Agreement, to engage in consultations to achieve precisely the goals set out in Article 8.1 of the Safeguards Agreement. Equally important, when imposing its measures on steel and aluminium, the United States had made no attempt, under Article 8.1 of the Safeguards Agreement, to maintain a balance of equivalent concessions and WTO obligations. Then, in August 2018, the United States had doubled the duty on imports of steel from Turkey and had threatened to do the same with respect to imports of aluminium. There had been no explanation, and no explanation had been given since then, as to why the United States felt that imports of steel from Turkey had to be burdened with double the duties imposed on other WTO Members. In any event, whatever the rationale behind the US discriminatory treatment of Turkey, Turkey was fully entitled under Article 8 of the Agreement on Safeguards, to withdraw equivalent concessions. And this was all that Turkey had done, nothing more and nothing less. And once the United States had chosen to escalate its duties on Turkey, Turkey had been, once again, fully entitled to withdraw equivalent concessions. And this was the reason why the current situation was before Members at the present meeting. Turkey wished to step back from the narrow confines of this dispute and express its sincere hope that this dispute could be resolved by a mutually agreeable solution in line with multilateral rules, without proceeding to a WTO panel process. However, this amicable resolution could only be achieved if the very root and the broader context of DS561 were addressed, namely, the unilateral US import restrictions on steel and aluminium. Turkey stood ready to engage in meaningful and constructive discussions with the United States on how this could be achieved. Turkey was ready to do so as a long-standing WTO Member that was deeply committed to its WTO obligations and to the multilateral trading system at large. For these reasons, Turkey considered the US panel request to be premature. Therefore, Turkey could not, at the present meeting, agree to the establishment of a panel.

1.4. The representative of the European Union said that the DSB, in its meetings towards the end of 2018, had considered five similar panel requests of the United States against other WTO Members that had suspended equivalent GATT obligations in response to the undeclared safeguard measures which the United States had taken to protect its steel and aluminium industries against imports. The EU had made a detailed statement at the 21 November 2018 DSB meeting in relation to the US panel request relating to the EU. His delegation wished to welcome the fact that Turkey likewise had resorted to its right to suspend equivalent obligations vis-à-vis the United States. The EU looked forward to defending the rules-based multilateral trading system and the right of itself and other

WTO Members to suspend equivalent obligations. The United States remained wrong in suggesting that actions of the EU had undermined this Organization, that its actions were blatantly in breach of WTO rules and that the EU was undermining the dispute settlement system. In reality, his delegation was standing up to the abuse of Article XXI of the GATT 1994 by the United States. The EU firmly believed that the US measures were safeguards, in no event covered by Article XXI of the GATT 1994, and that other WTO Members had the right to suspend equivalent GATT obligations.

1.5. The DSB took note of the statements and agreed to revert to this matter.

2 BRAZIL – CERTAIN MEASURES CONCERNING TAXATION AND CHARGES

A. Report of the Appellate Body (WT/DS472/AB/R and WT/DS472/AB/R/Add.1) and Report of the Panel (WT/DS472/R; WT/DS472/R/Add.1 and WT/DS472/R/Corr.1)

B. Report of the Appellate Body (WT/DS497/AB/R and WT/DS497/AB/R/Add.1) and Report of the Panel (WT/DS497/R; WT/DS497/R/Add.1 and WT/DS497/R/Corr.1)

2.1. The Chairperson proposed that the two sub-items under Agenda item 3 concerning the Appellate Body Reports and the Panel Reports in the respective disputes on "Brazil – Taxation" (DS472) and "Brazil – Taxation (Japan)" (DS497) be taken up together. She drew attention to the communication from the Appellate Body contained in document WT/DS472/12 – WT/DS497/10 transmitting the Appellate Body Reports on: "Brazil – Certain Measures Concerning Taxation and Charges", which had been circulated on 13 December 2018 in documents WT/DS472/AB/R and Add.1 – WT/DS497/AB/R and Add.1. She then wished to remind delegations that the Appellate Body Reports and the Panel Reports pertaining to these disputes had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "[a]n Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

2.2. The representative of Brazil said that his country wished to thank the Panel, the Appellate Body and the WTO Secretariat for their work in these disputes. Brazil was pleased that the Appellate Body had reversed a number of legal errors committed by the Panel. Brazil also welcomed a number of important systemic clarifications contained in the Appellate Body Reports that were being adopted by the DSB at the present meeting. However, Brazil wished to address, in its statement under this Agenda item, one particular aspect of the Appellate Body Report that raised serious concerns for Brazil – one which Brazil believed should be carefully considered by the Membership as a whole. First, Brazil welcomed the Appellate Body's reversal of the Panel's erroneous findings that the so-called "PEC" and "RECAP" programmes provided subsidies in the form of government revenue otherwise due that was foregone or not collected under Article 1.1(a)(1)(ii) of the SCM Agreement. The Panel's selection of the incorrect benchmark for comparison had created a subsidy where none had existed. It had also converted a tax administration measure, of broad application, into a prohibited export subsidy under Article 3.1(a) of the SCM Agreement. Brazil welcomed, in particular, the Appellate Body's finding that the Panel had erred in seeking to ascertain the existence of a general rule of taxation for all those enterprises that structurally accumulated tax credits in Brazil. As the Appellate Body had correctly noted, at the second stage of its analysis, panels were required to identify the tax treatment of comparably situated taxpayers, taking into account the Member's tax regime and its organizing principles. The Panel's failure to do so in these disputes, therefore, had constituted a reversible legal error. Brazil appreciated this decision by the Appellate Body. Second, Brazil also welcomed the Appellate Body's finding that – with the exception of the limited occurrence of so-called "nested Basic Productive Processes (PPBs)" – production requirements, or other requisites aimed at defining the class of eligible Brazilian producers under the subsidy programmes at issue, did not entail a condition requiring the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement. Third, Brazil welcomed the Appellate Body's reversal of the Panel's broad finding that any "aspects of a subsidy resulting in product discrimination" were not covered by Article III:8(b) of the GATT 1994. Such finding, if allowed to stand, would have deprived Article III:8(b) of any meaning, insofar as subsidies would almost always impact conditions of competition between the subsidized domestic product and the like imported product in the marketplace. Brazil, therefore, welcomed the Appellate Body's finding that both: (i) the effects of subsidies on competitive conditions in the marketplace; and (ii) the conditions for

eligibility that defined the class of domestic producers, by referencing them to their activities in the subsidized products' markets, could be justified under Article III:8(b) of the GATT 1994.

2.3. Brazil considered that the Appellate Body's findings had made some progress toward giving meaning to Article III:8(b) of the GATT 1994. Brazil was deeply concerned, nonetheless, with one aspect of the Appellate Body Reports in these disputes. Brazil was particularly troubled by the majority reading of the terms "payment of subsidies" in Article III:8(b). It encompassed, apparently, only those subsidies that involved the "expenditure of revenue" by a government understood in its narrowest possible meaning. By opting to remain dogmatically attached to a decades-old GATT decision to this effect – and failing to appreciate the context provided by the SCM Agreement – the majority in the Appellate Body division had established arbitrary distinctions among categories of subsidies without any interpretative basis in the covered agreements. As Members would recall, Article III:8(b) of the GATT 1994 provided that Article III – the national treatment obligation – "shall not prevent the payment of subsidies exclusively to domestic producers". The separate opinion of one Member of the Division articulated with great clarity, and on solid legal grounds, what Brazil believed was the proper interpretation of Article III:8(b). Brazil would not quote the separate opinion at length at the present meeting but strongly recommended its careful study by WTO Members.[1] What Brazil wished to do in its statement at the present meeting was to draw Members' attention to the consequences of what appeared to be the majority's interpretation. Brazil believed that this interpretation severely undermined, inconsistently with Article 3.2 of the DSU, the balance of rights and obligations enshrined in the subsidy disciplines of the WTO agreements. Article III of the GATT 1994 was understood broadly to mean that any internal measure capable of affecting the conditions of competition between domestic and like imported products to the detriment of the latter was, in principle, a violation of the national treatment obligation. This was a well-established interpretation. It was clear that subsidies granted exclusively to domestic producers would have, by definition, directly or indirectly affected conditions of competition in favour of domestic products. The Appellate Body Division had confirmed this view in its Reports. It stated that: "[s]ubsidies provided to domestic producers will often, if not always, have an impact on the conditions of competition between the product produced by the subsidized domestic producers … and the like imported product produced by foreign producers that are not paid the subsidy".[2] Showing that conditions of competition under Article III of the GATT 1994 had been affected was a rather simple test. It was not nearly as demanding as the demonstration, for example, of "serious prejudice" under Part III of the SCM Agreement. In order to demonstrate that a measure affected the conditions of competition, there was virtually no threshold. In fact, actual trade effects "do not have to be demonstrated for a measure to be found to be inconsistent with Article III".[3] Any modification of conditions of competition, however minimal, sufficed to violate the national treatment discipline. It was for no other reason that Article III:8(b) had been added to the GATT 1994. As noted by the Appellate Body Division itself, "[in] the absence of Article III:8(b), [subsidies] paid exclusively to domestic producers could therefore be seen as being inconsistent with the broadly worded national treatment obligation in Article III insofar as they alter the conditions of competition in favour of the product produced by the domestic producer to whom the subsidy is paid".[4] Article III:8(b) clearly stated, therefore, that the national treatment obligation "shall not prevent the payment of subsidies exclusively to domestic producers". Such subsidies, of course, while not subject to the national treatment obligation, were still subject to the disciplines of the SCM Agreement.

2.4. Brazil had argued, in its appeal, that Article III:8(b) of the GATT 1994 made no distinction as to what types of subsidies were covered by the exception. Brazil had argued, in particular, that subsidies in the form of "revenue foregone" should not additionally be subject to the national treatment obligation. This was only natural because, as the Appellate Body itself had recognized, "tax regimes may be used to achieve outcomes equivalent to the results that are achieved where a government provides a direct payment. This explains why the [SCM] Agreement includes the foregoing of government revenue otherwise due among the measures that constitute financial contributions under Article 1.1(a)(1)".[5] The majority of the Appellate Body division in these disputes, however, had restricted the coverage of Article III:8(b) in two ways. First, it had asserted that Article III:8(b) "was intended to exempt from the obligations of Article III only the payment of subsidies

[1] Appellate Body Reports, paras. 5.125-5.138.
[2] Appellate Body Reports, para. 5.93.
[3] Appellate Body Report, "Canada – Periodicals" (DS31), p. 18; see also Appellate Body Report, "Japan – Alcoholic Beverages II" (DS8, DS10, DS11), p. 16.
[4] Appellate Body Reports, para. 5.93.
[5] Appellate Body Report, "US – Large Civil Aircraft (2nd complaint)" (DS353), para. 811.

which involves the expenditure of revenue by a government".[6] Second, it had stated that Article III:8(b) "does not include within its scope the exemption or reduction of internal taxes affecting the conditions of competition between like products".[7] These two statements appeared to be out of balance with the remainder of the Appellate Body's analysis of Article III:8(b). If those statements were read narrowly, together with other sections of the reports, they would lead to results that, Brazil believed, the Appellate Body could not possibly have intended. The consequences of these findings would be drastic. Their inescapable logic could be summarized in three steps. First, subsidies paid exclusively to domestic producers were "inconsistent with the broadly worded national treatment obligation in Article III" of the GATT 1994 insofar as they alter – as they inevitably do - the conditions of competition in favour of the domestic product. Second, Article III:8(b) "was intended to exempt from the obligations of Article III only the payment of subsidies which involves the expenditure of revenue by a government", and "does not include within its scope the exemption or reduction of internal taxes affecting the conditions of competition between like products". Third, and as a result of the previous findings, entire categories of subsidies, which under the SCM Agreement might not be prohibited, actionable or even specific, would be considered to be prohibited because they were inconsistent with the national treatment obligation and were not covered by Article III:8(b).

2.5. Brazil stated that under what seemed to be the Appellate Body's majority's narrow interpretation of Article III:8(b), subsidies given exclusively to domestic producers not in the form of "expenditure of revenue" – but say in the form of credit guarantees, provision of goods or services, as well as revenue foregone – would all be illegal, as long as they could be shown to affect – as they had – the conditions of competition between domestic and imported products and, thereby, to violate the national treatment obligation. Brazil wished to mention a few examples to put the consequences of this interpretation of Article III:8(b) in perspective. First, the subsidies at issue in the "US – Tax Incentives" dispute (DS487), which the Appellate Body had found not to be prohibited under Article 3.1(b) of the SCM Agreement, would obviously be prohibited under Article III of the GATT 1994 as they could not have been justified under Article III:8(b).[8] Second, scores of measures routinely notified by WTO Members as subsidies in the form of revenue foregone would likewise be prohibited by Article III of the GATT 1994 as they could not be justified under Article III:8(b).[9] Third, Brazil wished to refer to a study entitled "OECD Review of National Research and Development (R&D) Tax Incentives and Estimates of R&D Tax Subsidy Rates, 2017".[10] According to this study, "[as] of 2017, 30 of the 35 OECD countries, 21 of 28 EU countries and a number of non-OECD economies provide tax relief on R&D expenditures".[11] The study noted, for instance, that "[over] the last decade, many countries have tried to increase the availability, simplicity of use and generosity of R&D tax incentives". In this context, the study pointed out that "Japan complemented its R&D tax credit regime with a new special tax credit for collaborative R&D".[12] The study also documented that, in 2017, R&D tax credit and allowance rates had increased in Japan and Poland.[13] In case of small and medium enterprises, the "generosity of R&D tax support", as defined in the study, was highest for France, Portugal and Chile in profit-making scenarios, and for the Netherlands and Portugal in loss-making scenarios. Large firms, in turn, "receive the [highest] tax subsidy rate in Portugal and Spain".[14] It should not be difficult to show that these tax incentives affected conditions of competition in favour of domestic producers and thus violated, in principle, the national treatment obligation. According to the majority's view, however, these tax incentives could not be justified under Article III:8(b). As a last example, Brazil wished to refer to domestic subsidies on agricultural products that did not involve the "expenditure of revenue" as narrowly interpreted by the majority of the Appellate Body Division. They surely did affect the conditions of competition in national markets in favour of domestic products. Brazil asked whether the Membership should understand that, even if those subsidies were fully consistent with the SCM Agreement and the Agreement on Agriculture, they

[6] Appellate Body Reports, paras. 5.122 and 5.124.

[7] Appellate Body Reports, paras. 5.122 and 5.124 (underlining added).

[8] See, for example, Appellate Body Report, "US – Tax Incentives" (DS487), para. 5.76 ("a subsidy requiring the siting of certain production activities in a Member's domestic territory can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, which would have the consequence of increasing the use of these subsidized domestic goods in downstream production and adversely affecting imports").

[9] See, for example, items 14.29, 16.8, 16.12 and 16.14 of document G/SCM/N/315/CAN.

[10] Version dated 18 April 2018, available at http://www.oecd.org/sti/rd-tax-stats-design-subsidy.pdf.

[11] 'OECD Review of National R&D Tax Incentives and Estimates of R&D Tax Subsidy Rates', 2017, p.5 and p.7, Table 1.

[12] "OECD Review of National R&D Tax Incentives and Estimates of R&D Tax Subsidy Rates, 2017", p.20.

[13] "OECD Review of National R&D Tax Incentives and Estimates of R&D Tax Subsidy Rates, 2017", p.22.

[14] "OECD Review of National R&D Tax Incentives and Estimates of R&D Tax Subsidy Rates, 2017", p.26.

were prohibited by Article III of the GATT 1994 because they violated the national treatment obligation and were not capable of being justified under Article III:8(b).

2.6. Brazil said that theoretically, under what seemed to be the majority's reading, there would appear to be two ways for WTO Members to use all such subsidies without conflicting with the national treatment obligation. One would be to design them so that, even if granted exclusively to domestic producers, they would not affect conditions of competition in favour of domestic products. This seemed to be impossible, given the Appellate Body's own and correct recognition that "[s]ubsidies provided to domestic producers will often, if not always, have an impact on the conditions of competition between the product produced by the subsidized domestic producers … and the like imported product produced by foreign producers that are not paid the subsidy".[15] The other way would be to extend the subsidies to foreign producers alike. This, however, would entail an obligation that WTO Members certainly had not intended to undertake. Brazil fully concurred with the opinion of the dissenting Member of the Division that the majority's interpretation "would undermine, inconsistently with Article 3.2 of the DSU as well as the fundamental principle of effectiveness in treaty interpretation, the careful balance of rights and obligations under the SCM Agreement with respect to an entire category of measures that are expressly included within the definition of a subsidy in Article 1.1, namely, the foregoing of Government revenue that is otherwise due".[16] Brazil believed that the Appellate Body could not possibly have intended to undermine that balance. It could not possibly have meant that subsidies in the form of revenue foregone – or any subsidy that did not involve a cash payment, for that matter – which affected conditions of competition in favour of domestic products, could never be justified under Article III:8(b) of the GATT 1994. Brazil, therefore, hoped that the majority's interpretation was understood in a manner that avoided the dire systemic consequences, which could otherwise entail.

2.7. The representative of the European Union said that his delegation wished to thank the Appellate Body, the Panel and their respective Secretariats for their hard work in this dispute. The EU welcomed the overall outcome of this dispute. The rulings of the Panel and of the Appellate Body vindicated most of the claims advanced by the EU with respect to Brazil's taxation measures. In particular, the Appellate Body had confirmed that the tax programmes put in place by Brazil discriminated against EU automotive and information and communication technology (ICT) intermediate and final products. This confirmed again that local content requirements that favoured the use or sale of domestic goods over imported goods were illegal under WTO law. The EU took note of the reversal of the findings of the Panel regarding the PEC and RECAP programmes. The EU accepted the Appellate Body Report unconditionally. The EU wished to underline that the identification of a benchmark for comparison for fiscal schemes was a particularly challenging task. The EU believed that the Panel's discussion around the existence of a general rule of taxation for credit accumulating companies was not tantamount to an analysis of a general rule and exception relationship. The Panel had done nothing more than define a benchmark for comparison that had entailed identifying the tax treatment of comparably situated tax payers on the basis of the structure and organizing principles of Brazil's tax system and its own rules of taxation concerning the tax credit and debit mechanism. As the Appellate Body itself had indicated, the challenged treatment had to be compared to an objectively identifiable benchmark. The mere fact that other companies in other sectors might have received similar tax benefits (i.e., the existence of other subsidy programmes) could not constitute an objectively identifiable benchmark, unless those benefits responded to the tax system's structure and organizing principles, as Brazil had tried to argue in the present case without convincing the Panel. A benchmark which was not based on the structure and organizing principles of a Member's tax system and its tax rules, but on the mere existence of a plurality of similar tax programmes, would end up being circular and meaningless. The EU expected that Brazil would promptly comply with all of the DSB's recommendations and rulings in this dispute, and in particular by withdrawing the prohibited subsidies without delay.

2.8. The representative of Japan said that her country wished to express its appreciation for the time and effort devoted to this case by the Panel, the Appellate Body and the respective Secretariats. Japan welcomed the findings and rulings by the Appellate Body and the Panel as modified by the Appellate Body that certain measures concerning taxation and charges by Brazil were in breach of its obligations under the GATT 1994 and the SCM Agreement. Japan requested the adoption of the Reports at the present meeting. The measures at issue concerned several Brazilian tax incentive programmes for the automotive sector, the information and communication technology (ICT) sector,

[15] Appellate Body Reports, para. 5.93.
[16] Appellate Body Reports, para. 5.137.

and exporting companies. In particular, the Panel and the Appellate Body clearly had ruled that all of the tax incentive programmes for the automotive sector and ICT products at issue provided incentives to use domestic over imported goods and were thus inconsistent with the national treatment obligation under Article III of the GATT 1994. The Panel had carefully reviewed all the complexities of Brazil's tax system, and had correctly found the challenged measures to be WTO-inconsistent. Japan highly appreciated that the Appellate Body had upheld the Panel's key findings and recommended that the DSB request Brazil to bring its WTO-inconsistent measures into conformity with its obligations under the GATT 1994 and the TRIMs Agreement. Japan believed that these findings would provide a definitive resolution of this dispute, and consequently would clarify that protectionist market-distorting measures, such as the above-mentioned measures, were not permissible under the WTO Agreement. Having said that, Japan had concerns about certain findings in the Appellate Body Report regarding the tax suspension programme applied to certain exporting companies. More specifically, Japan had concerns about the identification of the benchmark for comparison related to financial contributions. Japan understood from Brazil's statement that the tax suspensions at issue had been introduced to "avoid the structural accumulation of indirect taxes".[17] However, Brazil, who was in the best position to explain the structure and organizing principles of its own domestic tax regime, had failed to demonstrate how the tax suspensions had been structured and organized to tackle the problem of structural credit accumulation. That was why the Panel had concluded that "Brazil has not demonstrated that the tax suspensions are the benchmark treatment for structurally credit-accumulating companies".[18] Nevertheless, the Appellate Body had reversed the Panel's conclusion. The Appellate Body had noted that the Panel should have examined in detail the treatment of the categories of companies entitled to tax suspensions. Presumably, the Panel had acceded to Brazil's factual assertion that the tax suspensions for credit-accumulating companies were the organizing principle of its tax structure. The Appellate Body had observed that "a Member will be held to account for the tax structure and principles that it itself employs".[19] It was obvious that Brazil, and not Japan or the EU, was in the best position, and indeed was required, to explain in detail and substantiate the structure and operation of its tax programme, including the tax suspensions. Nevertheless, the Appellate Body had reversed the Panel's conclusion due to a seeming deficiency in the Panel's approach including its alleged failure to identify the benchmark on its own,[20] the consequence of which had to be borne by all parties. She said that Japan trusted that the Appellate Body's finding by no means indicated an alteration in the allocation of the burden of proof with regard to the tax structure and principles of each Member. Japan wished to add that the demonstration of the non-existence of Brazil's merely asserted and unsubstantiated tax structure and organizing principles would have been an impossible task for any Member but Brazil (let alone for the EU and Japan). Finally, Japan wished to note that the dispute settlement proceedings in this dispute had lasted a long time. Three and a half years had passed since Japan had requested consultations with Brazil under the DSU back in July 2015. After years of litigation, the Panel Report and Appellate Body Report in this dispute were finally on the Agenda of the DSB meeting. Japan hoped that this could be the end of the dispute settlement proceedings in this dispute. Japan urged Brazil to fully and promptly implement the DSB's recommendations and rulings without introducing any new measure which would undermine its implementation. In this regard, Japan emphasized that Article 21 of the DSU provided that: "[p]rompt compliance with the recommendations and rulings of the DSB is essential in order to ensure effective resolution of disputes", and that this same Article directed the Members to "comply immediately with the [DSB's] recommendations and rulings". Japan stood ready to engage in a dialogue with Brazil in a constructive manner in the weeks that would follow the present meeting, with a view to achieving prompt and full compliance by Brazil for the positive resolution of this dispute.

2.9. The representative of the European Union said that regarding the duration of the proceedings in this dispute, his delegation would also have liked for the proceedings to have been concluded sooner. Given their economic impact, the EU indeed had a strong interest in a swift removal of the measures at issue. However, with respect specifically to the duration of the Appellate Body proceedings, in the face of the objective reasons underpinning such duration, the EU wished to thank the AB Division and the AB Secretariat for their hard work. The EU wished to refer to paragraph 1.23 of the Appellate Body Report where these reasons were explained, a prominent reason being of course the reduced number of the Appellate Body members.

[17] Brazil Appellant Submission, paras. 312-316; Panel Reports, para. 7.1158.
[18] Appellate Body Report, para. 5.172 (citing Panel Reports, para. 7.1171).
[19] Appellate Body Report, "US – Large Civil Aircraft (2nd complaint)" (DS353), para. 813.
[20] Appellate Body Report, para. 5.171.

2.10. The DSB took note of the statements and adopted the Appellate Body Report contained in WT/DS472/AB/R and Add.1, and the Panel Report contained in WT/DS472/R and Add.1 and Corr.1, as modified by the Appellate Body Report; and the DSB adopted the Appellate Body Report contained in WT/DS497/AB/R and Add.1 and the Panel Report contained in WT/DS497/R and Add.1 and Corr.1, as modified by the Appellate Body Report.

3 UNITED STATES – MEASURES CONCERNING THE IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA PRODUCTS: RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

A. Report of the Panel (WT/DS381/RW/USA and WT/DS381/RW/USA/Add.1) and the report contained in WT/DS381/AB/RW/USA and WT/DS381/AB/RW/USA/Add.1

3.1. The Chairperson drew attention to the communication from the Appellate Body contained in document WT/DS381/48 transmitting the Appellate Body Report in the dispute: "United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products: Recourse to Article 21.5 of the DSU by the United States", which had been circulated on 14 December 2018 in document WT/DS381AB/RW/USA and Add.1. She reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "[a]n Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

3.2. The representative of the United States said, by way of introduction, that the United States thanked the members of the compliance Panels, the Appellate Body,[21] and the Secretariat assisting them for their work on these proceedings. A decade ago, in 2008, Mexico, once again, had challenged the US measure establishing the conditions under which producers could choose to market tuna products as "dolphin safe". Mexico had challenged this measure because it had not permitted tuna product harvested by "setting on dolphins" to be marketed as dolphin safe. Setting on dolphins meant intentionally chasing, encircling, and deploying purse seine nets on dolphins in order to catch tuna swimming beneath them. For the past ten years, the United States had been trying to establish that the dolphin safe labelling measure was not discriminatory but was a legitimate environmental measure concerned with the protection of dolphins and, as such, was consistent with US WTO obligations. The adoption at the present meeting of these reports marked – at last – the success of that endeavour and brought this long-running dispute to a close. Both of these reports agreed that the US dolphin safe labelling measure was consistent with Article 2.1 of the TBT Agreement[22] and, similar to the findings of the GATT 1947 panel,[23] was not inconsistent with the GATT 1994.[24] The United States welcomed this conclusion and supported the adoption of these reports. In particular, the United States commended the compliance Panels for their detailed and comprehensive review and analysis of the factual record before them. The Panels had reviewed and analysed scores of pages of argumentation and hundreds of exhibits on the risk profile for dolphins of different tuna fishing methods and fisheries. On the basis of this review, the Panels had made detailed findings concerning possible metrics for assessing the risk to dolphins posed by different fishing methods in different fisheries,[25] the nature and extent of the risks to dolphins posed by each of the fishing methods used to catch tuna generally and in each of the specific fisheries for which there had been evidence on the record,[26] and numerous other issues relevant to the analysis of the measure at issue.[27] This thorough and painstaking factual analysis by the Panels had been the basis for their correct factual and legal conclusions concerning the dolphin safe labelling measure and for the Appellate Body's upholding all the Panels' findings. Although the United States agreed with and welcomed the conclusion of these reports that the US dolphin safe labelling measure had been consistent with US WTO obligations, the United States was disappointed that it had taken more than a decade to resolve this matter. In the course of this dispute, the Appellate Body had developed

[21] For ease of reference, in this statement the term "Appellate Body" is utilized without prejudice to the adoption procedure applied by the DSB to any particular appellate report.
[22] Agreement on Technical Barriers to Trade ("TBT Agreement").
[23] "US – Tuna" (Mexico) (GATT) (DS21/R - 39S/155), paras. 5.43-44.
[24] General Agreement on Tariffs and Trade 1994 (GATT 1994).
[25] See, e.g., "US – Tuna II" (Article 21.5 – Mexico) (Panel), paras. 7.171-243.
[26] See, e.g., "US – Tuna II" (Article 21.5 – Mexico) (Panel), paras. 7.244-525.
[27] See, e.g., "US – Tuna II" (Article 21.5 – Mexico) (Panel), paras. 7.578-599, 7.636-648, 7.654-670.

increasingly demanding legal standards under Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994. These legal standards had not been based on the text of the relevant provisions, and negotiators had not agreed to them. In this dispute, the United States had been forced to expend considerable resources over nearly a decade trying to defend successfully what had always been an environmental measure with no element of protectionism. Frankly, it was unclear how many other Members would have been able to invest such resources. Other Members faced with similar multiple, protracted dispute settlement proceedings might be forced to abandon their legitimate objective and withdraw their measures rather than face suspension of concessions by another Member. Indeed, under the standard the Appellate Body had developed, it seemed likely that only Members with significant resources to devote to the effort would be able to defend legitimate public policy measures that had any effect on trade. At previous DSB meetings addressing this dispute and others, the United States had expressed concerns with the Appellate Body's interpretations of the non-discrimination provisions of the TBT Agreement and the GATT 1994.[28] While welcoming the ultimate outcome in this dispute, the United States highlighted the real cost to Members of these incorrect interpretations that narrowed the policy space afforded to Members and increased the likelihood of protracted litigation over non-discriminatory public policy measures.

3.3. With regard to the evolving legal standards in this dispute and US efforts to meet them, the United States said that in this dispute, the United States had faced evolving and increasingly demanding legal standards under Article 2.1 of the TBT Agreement[29] and Articles I:1, III:4, and XX of the GATT 1994. The original panel had found that the original dolphin safe labelling measure had been consistent with Article 2.1 because it had not reflected origin-based discrimination. The Appellate Body had reversed the panel and articulated a more demanding legal standard under which origin-based discrimination was irrelevant. In the compliance proceeding, the Appellate Body had raised the legal standard still further, requiring the United States to prove not only that the measure had not discriminated but that it never could have in a possible hypothetical scenario. Thus, the standard the Appellate Body had articulated was concerned not with origin-based discrimination but with the precision of the fit between the measure's effects (actual or hypothetical) and its objectives. While expressing concerns with the legal standards the Appellate Body had been developing, the United States had repeatedly tried to meet those standards by amending the measure. The development of this dispute, however, strongly suggested that many legitimate public policy measures could be found to be WTO-inconsistent, even for reasons unrelated to the trade issue presented, and few Members would be in a position to successfully defend those measures.

3.4. The United States said that, in the original proceeding, Mexico had challenged the US dolphin safe labelling measure, as set out in the Dolphin Protection Consumer Information Act ("DPCIA"), its implementing regulations, and a related court decision.[30] The measure provided that, since setting on tuna was inherently harmful to dolphins, tuna caught by setting on dolphins could not be labelled as "dolphin safe" in the US market. As challenged by Mexico, the measure did not distinguish tuna products based on origin: the ineligibility of tuna caught by setting on dolphins and the potential eligibility of tuna produced by other fishing methods was *the same* regardless of whether the tuna was produced by Mexico, the United States, or any other Member.[31] Nevertheless, Mexico had argued that the measure was inconsistent with Article 2.1 of the TBT Agreement because it *de facto* accorded "less favourable" treatment to Mexican tuna products than to the like products of other Members because of the manner in which Mexican producers chose to source tuna. The original panel had found that the measure was consistent with Article 2.1 because it did not reflect origin-based discrimination. Under the measure, the Mexican tuna industry faced the same options as other tuna industries: it could produce dolphin safe tuna by obtaining tuna from Mexican or non-Mexican vessels that fished *without* setting on dolphins, or it could produce tuna caught by setting on dolphins in the Eastern Tropical Pacific, or ETP, and market it without a dolphin safe label.[32] The fact that the Mexican industry generally produced tuna ineligible for the label, and some other industries produced tuna that did qualify, did not mean that the measure itself accorded less

[28] See, e.g., US DSB Statement, 13 July 2012 (https://geneva.usmission.gov/2012/06/14/statement-by-the-united-states-at-the-june-13-2012-dsb-meeting/); US DSB Statement, 3 December 2015 (https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec3.DSB_.Stmt_.as-delivered.Public.pdf).

[29] The United States would not cover in this intervention the US view that the dolphin safe label was a "standard", and not a "technical regulation" since it was a voluntary label. See "US – Tuna II" (Mexico), US appellant submission, paras. 24-73.

[30] "US – Tuna II" (Mexico), para. 2.

[31] "US – Tuna II" (Mexico) (Panel), para. 7.280.

[32] "US – Tuna II" (Mexico) (Panel), paras. 7.304-311.

favourable treatment to Mexican products.[33] The United States noted that, when the legislation was enacted, Mexican and US tuna producers had been in the same situation: both sourced tuna from the ETP, and both sourced from fleets that set on dolphins.[34] Subsequently, producers from the United States and other Members had chosen to adapt their practices to meet the conditions for the label. Producers from Mexico could also have made this choice by modifying their fishing or purchasing practices, but they had elected not to. Thus, any adverse effects on Mexican tuna products that had developed in the years since the legislation was passed had been simply the result of different business choices made by the Mexican industry and other industries and not a result of discrimination by the US measure.[35]

3.5. The Appellate Body had reversed the panel and had found that the measure was inconsistent with Article 2.1 of the TBT Agreement. The Appellate Body had found that the mere fact that Mexican products generally did not qualify for the label while other Members' products qualified meant that the measure had an "adverse impact on [the] competitive opportunities" of Mexican tuna products.[36] Citing a previous appellate report, the Appellate Body had then analysed whether the detrimental impact on Mexican products "stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products".[37] It had placed the burden of proof on the United States to show that the measure was *not* discriminatory.[38] Applying this standard, the Appellate Body had reviewed whether the US measure was properly "calibrated" to reflect risks to dolphins resulting from different fishing conditions and environmental factors across the world's oceans. The Appellate Body had noted the panel findings that setting on dolphins was a "particularly harmful" fishing method for dolphins and had found that the US measure addressed these adverse effects.[39] It had then found, however, that the measure had not sufficiently addressed risks to dolphins posed by other fishing methods.[40] It had explained that these risks "could only be monitored by imposing" on tuna caught by other fishing methods the requirement "that no dolphins were killed or seriously injured in the sets in which the tuna was caught".[41] On this basis, the Appellate Body had found that the United States had not shown that the different labelling conditions of the measure were "even-handed in the relevant respects, even accepting that the fishing technique of setting on dolphins is particularly harmful to dolphins".[42] As the United States had explained at the time, the Appellate Body's analysis had significantly reduced the complainant's burden to show a measure to be inconsistent with Article 2.1 and, conversely, had significantly increased the burden on the respondent to defend a measure. For example, rather than placing the burden on the complainant to show that the measure reflected discrimination, the Appellate Body had required the respondent to demonstrate that the measure did not.[43] Thus, the Appellate Body had required the United States to demonstrate that the measure was "calibrated" rather than requiring Mexico to demonstrate that the measure was discriminatory, even though the difference in treatment was not related to origin.

3.6. With regard to the first compliance proceeding, the United States said that nevertheless, the United States had proceeded to amend the dolphin safe labelling measure to address the DSB's recommendations in the original proceeding. In July 2013, the United States had amended the dolphin safe labelling measure to add the requirement that tuna labelled dolphin safe, when caught other than by setting on dolphins, be accompanied by "a captain's statement certifying that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught".[44] This directly addressed the DSB's recommendations and also reflected the original panel's suggestion, endorsed by the Appellate Body, that imposing an independent observer certification would not be necessary in all fisheries and that "the measure ... itself contemplates the possibility that only the captain provide such a certification".[45] In the first compliance proceeding, it had been uncontested that the 2013 amendments to the dolphin safe labelling measure fully

[33] "US – Tuna II" (Mexico) (Panel), paras. 7.312-319.
[34] "US – Tuna II" (Mexico) (Panel), paras. 7.320, 7.324.
[35] "US – Tuna II" (Mexico) (Panel), para. 7.378.
[36] "US – Tuna II" (Mexico) (AB), paras. 234-235.
[37] "US – Tuna II" (Mexico) (AB), para. 215 (citing "US – Clove Cigarettes" (AB)).
[38] "US – Tuna II" (Mexico) (AB), para. 216.
[39] "US – Tuna II" (Mexico) (AB), para. 287.
[40] "US – Tuna II" (Mexico) (AB), paras. 289, 292.
[41] "US – Tuna II" (Mexico) (AB), paras. 292, 296.
[42] "US – Tuna II" (Mexico) (AB), para. 297.
[43] See US DSB Statement, July 13, 2012.
[44] See Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, 78 Fed. Reg. 40,997, 40,998 (9 July 2013) (2013 Final Rule).
[45] "US – Tuna II" (Mexico) (AB), para. 296.

addressed the concerns identified in the panel and Appellate Body reports in the original proceeding. Mexico *had not even challenged* the revised aspect of the US measure.[46] Both the panel and Appellate Body reports had acknowledged that the amendments addressed the concern identified in the original proceeding and moved the measure towards compliance.[47] They had also reaffirmed that the objectives pursued by the US measure – consumer information and protecting dolphins – were legitimate for WTO purposes. Indeed, there had been no argument that the distinctions of the measure reflected origin-based discrimination. Nevertheless, in the first compliance proceeding the Appellate Body had found that the measure discriminated under Article 2.1 based on an aspect of its design that had been unchanged from the original measure and had never been applied. The original dolphin safe labelling measure provided that the National Oceanic and Atmospheric Association (NOAA) could impose observer requirements on tuna caught: (i) in a purse seine fishery outside the ETP with a comparable tuna-dolphin association; or (ii) in a non-purse seine fishery with regular and significant dolphin mortality or serious injury.[48] Mexico had advanced no argumentation concerning these provisions in the original proceeding, and they had not been discussed in the panel or Appellate Body reports. The 2013 rule amending the measure had made no change to these provisions. At the time of the first compliance proceeding, NOAA had never made a determination under either provision. The Appellate Body had nevertheless upheld the panel, basing its findings on those provisions, even though Mexico could have pursued a claim against these provisions, but had chosen not to, in the original proceeding. This was problematic enough on procedural grounds. But the Appellate Body had gone further and found that the design of these provisions rendered the measure inconsistent with Article 2.1 on the grounds that they did not address *all* possible scenarios "in which there may be heightened risks of harm to dolphins".[49] In particular, the Appellate Body had considered two alleged gaps in the provisions – (i) the possibility of a purse seine fishery with "regular and significant" dolphin mortality but *without* a regular and significant tuna-dolphin association; and (ii) the possibility of a non-purse seine fishery *with* a harmful "regular and significant" tuna-dolphin association but without "regular and significant" dolphin mortality. The Appellate Body had considered that these two alleged gaps rendered the US measure not even-handed.[50] To be clear, neither the panel nor the Appellate Body had found that Mexico had established that any fishery *actually* fell into either alleged gap. Rather, the 2013 measure had been found to be inconsistent with Article 2.1 on the basis of the *hypothetical* existence of such a fishery.

3.7. As the United States had explained in detail at the time, the Appellate Body's analysis had significantly increased the burden on a Member to demonstrate that its origin-neutral regulation was not discriminatory under Article 2.1.[51] First, although Mexico's claim had been one of *de facto* discrimination, the Appellate Body had found the measure inconsistent with Article 2.1 based entirely on the determination provisions' "design, structure, and expected operation". The "expected operation" that the Appellate Body had faulted was not based on facts as to how the measure did or likely would operate, but on speculation as to what might happen in a hypothetical situation that no facts suggested would occur. Under this standard, a measure with purely hypothetical gaps could be found inconsistent unless the responding Member proved it could *never* be discriminatory in any real or hypothetical scenario. Second, the findings had not been based on Mexico's case. The panel had raised the provisions on its own.[52] Thus, reaching out to address this hypothetical situation seemed to have been an academic exercise unrelated to trade, and an exercise in impermissibly making the case for a complaining party.

3.8. The United States said that the Appellate Body's analysis had also made it significantly easier to demonstrate that a measure was inconsistent with Articles I:1 or III:4 of the GATT 1994. In interpreting Articles I:1 and III:4, the Appellate Body had relied on its conclusions under Article 2.1 that the dolphin safe labelling measure "modifies the conditions of competition to the detriment of Mexican tuna products" by virtue of the fact that Mexican tuna products did not qualify for the label and other products did.[53] The Appellate Body had found that this alone was sufficient to demonstrate

[46] See "US – Tuna II" (Article 21.5 – Mexico) (Panel), para. 7.142.
[47] "US – Tuna II" (Article 21.5 – Mexico) (AB), paras. 7.241-242.
[48] "US – Tuna II" (Mexico), para. 173.
[49] "US – Tuna II" (Article 21.5 – Mexico) (AB), para. 7.258.
[50] "US – Tuna II" (Article 21.5 – Mexico) (AB), para. 7.258.
[51] See US DSB Statement, 3 December 2015 (https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec3.DSB_.Stmt_.as-delivered.Public.pdf).
[52] "US – Tuna II" (Article 21.5 – Mexico) (AB), para. 7.178 (referring to no legal argumentation in Mexico's affirmative case that concerned the design, structure, or operation of the "determination provisions").
[53] "US – Tuna II" (Article 21.5 – Mexico) (AB), para. 7.339.

that the measure was inconsistent with Articles I:1 and III:4.[54] At the same time, the Appellate Body's analysis had raised the standard for the United States to show that the measure was justified under Article XX for the same reasons discussed in the context of Article 2.1. The Appellate Body had required the United States to show that the measure could *never* be discriminatory in any hypothetical scenario, and it had reached out to address scenarios Mexico had not raised.[55] The United Sates noted that the determination provisions of the measure had no relevance to whether imports of tuna from *Mexico* could have access to the dolphin safe label. These provisions only affected whether other tuna products could have access to the label, and thus had no bearing on Mexico's trade concerns that were at issue in this dispute.

3.9. In relation to the current compliance proceeding, the United States said that, nevertheless, the United States had tried again to modify the dolphin safe labelling measure to satisfy the new, higher standard the Appellate Body had set. On 22 March 2016, the United States had issued an interim final rule amending the dolphin safe labelling measure. Like the 2013 amendment, the 2016 measure directly responded to the finding in the previous proceeding: it amended the determination provisions to eliminate the two hypothetical gaps that had been the basis for the finding of non-compliance in the first compliance proceeding.[56] Additionally, the 2016 measure imposed additional certification and tracking and verification requirements on tuna produced other than by setting on dolphins outside the ETP large purse seine fishery – in other words, on tuna *other than* Mexican tuna products.[57] The 2016 measure had been found to be *consistent* with Article 2.1 of the TBT Agreement and with the GATT 1994. The additional changes made by the 2016 measure – those not responding directly to the DSB finding in the first compliance proceeding – had been essential to that finding. In the meantime, the DSB had authorized Mexico to suspend concessions or other obligations to the United States pursuant to Article 22.7 of the DSU up to a level not exceeding US$163.23 million per year. Had the United States not had the resources to undertake a second revision of the measure, as well as a second compliance proceeding, it would have had to choose between withdrawing a legitimate environmental measure and facing suspension of concessions.

3.10. With regard to the issue that the Appellate Body's interpretations of the non-discrimination provisions of the TBT Agreement and the GATT 1994 were flawed, the United States said that the interpretations of Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994 discussed previously were not only changing and increasingly demanding – they were also incorrect and diminished the policy space Members had retained for themselves to regulate. As the United States had expressed in the past, Articles I:1 and III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement were, in fact, concerned with origin-based discrimination, not with achieving a perfect fit between a measure's effect and its objectives. It was far more difficult to justify public policy measures under the legal standard the Appellate Body had invented than under the standards to which Members had agreed. Therefore, the Appellate Body's standard significantly restricted the regulatory space afforded to Members to pursue legitimate public policy objectives consistent with their WTO obligations.

3.11. With regard to the issue that the non-discrimination provisions were concerned with origin-based discrimination, the United States said that Articles I:1 and III:4 of the GATT 1994 and 2.1 of the TBT Agreement set out Members' national treatment and most-favoured-nation ("MFN") obligations. The Appellate Body's recent approach under both Article 2.1 and Articles I:1 and III:4 was to first look to see if a measure had a "detrimental impact" on imported products of a Member compared to the like products of the importing Member or imported products of any other Member. Where there was a detrimental impact, then the Appellate Body's approach with respect to Article 2.1 was to conduct a further analysis to determine if any such detrimental impact stemmed exclusively from a legitimate regulatory distinction. However, with respect to Articles I:1 and III:4, the existence of a detrimental impact was alone sufficient to demonstrate a breach of those articles. The only recourse for a Member maintaining the measure was to invoke an affirmative defence, such as Article XX of the GATT 1994.

3.12. The United States said that the "detrimental impact" standard was problematic and should be of serious concern for Members. First and foremost, it would appear to be a standard that was easily and perhaps universally satisfied. As demonstrated in this dispute, it would appear that all that it

[54] "US – Tuna II" (Article 21.5 – Mexico) (AB), para. 7.340.
[55] See "US – Tuna II" (Article 21.5 – Mexico) (AB), paras. 7.354-360.
[56] "US – Tuna II" (Article 21.5 US / Mexico II) (AB), para. 5.16.
[57] See "US – Tuna II" (Article 21.5 US / Mexico II) (AB), paras. 5.13-24.

would take was for any producer in any Member to decide not to satisfy the requirements of the importing Member's measure. If any producer in any other Member satisfied the requirements under the measure, while a producer in the exporting Member did not, that would appear to suffice to find that the measure had a detrimental impact on the exporting Member's products. This applied not just for product standards and technical regulations, but for any measure establishing requirements for goods. Similarly, under the Appellate Body's approach, there would appear to be a "detrimental impact" on imports even where the producer chose to meet the importing Member's requirements, but it was more costly for the exporting producer to do so. This could result simply because of differences in production methods between producers in different Members. Exporting producers were likely to seek to meet the requirements of the Member in whose territory they produced as well as of each Member to which they wished to export. It was likely that it would be more expensive to adapt production for some Members' requirements than for others. And a measure that had no detrimental impact on imports in the past could very well have one in the present. For example, an exporting producer might change its product characteristics or production method. Thus, even where a Member made a significant effort to ensure that a measure was non-discriminatory, the Member had no assurance when adopting a measure that the measure would withstand a challenge in the future based on changes in the market or by exporting producers. The United States would ask Members whether this very low and unpredictable threshold really was the concept of discrimination that they understood. The Appellate Body's approach did not find support in the text of the relevant provisions, nor in the manner in which they had been applied under the GATT 1947 nor in prior panel or Appellate Body reports. It was difficult to imagine that Members would have agreed to an obligation under which *any* measure that had a disparate impact on the goods from another Member – even if the impact was entirely accidental – would be in breach. In fact, the Appellate Body's approach was contrary to the fact that the phrase "treatment no less favourable" in Article III:4 had been, in the past, always interpreted as providing regulatory space for Members to take otherwise legitimate measures that might restrict trade unevenly across the Membership of the WTO.[58] The general principle of Article III:1 of the GATT 1994,[59] which informed the meaning of Article III:4,[60] had made it clear that considerations of discrimination and "protection" were inherent in Article III:4.[61] The second sentence of Article III:4 conveyed a similar concept. It stated: "[t]he provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport *and not on the nationality of the product*". Thus, Article III:4 itself embraced the concept that the reason behind a measure was important for purposes of the Article III:4 analysis, and that "nationality of the product" was a key concept. However, the Appellate Body's "detrimental impact" approach said that a measure would be found to have a detrimental impact on imports even where the measure made no distinctions at all, either in law or in fact, based on the nationality of the imported product. Further, prior to 2012,[62] the Appellate Body had never interpreted Article III to mean that *any* detrimental impact on like imports was *per se* sufficient to support a finding of inconsistency. Rather, in every past dispute finding an Article III:4 inconsistency, the measure at issue either had explicitly discriminated against imported products, or it had established a system that, though facially neutral, discriminated against imported products *de facto*.

3.13. With regard to further problems under the Appellate Body's approach, the United States said that there were several other significant problems with the Appellate Body's approach. First, because

[58] See, e.g., "EC – Asbestos" (AB), para. 100 ("[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").

[59] Article III:1 of the GATT 1994 stated that: "Members recognize that internal taxes and other internal charges, laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of products ... should not be applied to imported or domestic products so as to afford protection to domestic production".

[60] See "Japan – Alcoholic Beverages2 (AB), pp. 17-18 (stating that the "general principle" of Article III:1 "informs the rest of Article III"); "EC—Asbestos" (AB), para. 94 (stating: "[i]n our view, Article III:1 has particular contextual significance in interpreting Article III:4, as it sets for the 'general principle' pursued by that provision")

[61] See "EC – Asbestos" (AB), para. 100 ("[t]he term 'less favourable treatment' expresses the general principle, in Article III:1, that internal regulations 'should not be applied ... so as to afford protection to domestic production"); see also "Chile – Alcoholic Beverages" (AB), paras. 69-71 (concluding that the absence of a clear relationship between the stated objectives of a measure and the structure of the Chilean tax measures confirmed its conclusion that, based on the architecture, structure and design of the measures, the measures were applied so as to afford protection).

[62] "United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products" (DS381), "United States - Certain Country of Origin Labelling (COOL) Requirements" (DS384, DS386), and "United States - Measures Affecting the Production and Sale of Clove Cigarettes" (DS406).

the GATT 1994 only provided for an affirmative defence for a limited list of objectives, some measures that pursued legitimate policy objectives might be indefensible. Under the Appellate Body's approach, any measure would be found in breach of Article I:1 or II:4 of the GATT 1994 if the measure had a detrimental impact on imports, no matter how small or accidental, or whether it was due to the conscious choice of exporting producers or the result of market changes. This meant that no Member could maintain any such measure, no matter how legitimate or compelling the policy objective of the measure, unless the measure pursued one of the policies eligible for an affirmative defence. But this was a very limited list of policy objectives. For instance, country of origin labelling was not listed as an objective under Article XX of the GATT 1994, even though it was recognized as a legitimate objective under Article IX of the GATT 1994. It was not difficult to think of other legitimate objectives that might not be covered by Article XX – labelling for geographic indications could be another example of such an objective. Second, the Appellate Body's approach interpreted identically worded provisions differently. Articles III:4 of the GATT 1994 and 2.1 of the TBT Agreement set out Members' national treatment obligations, with the relevant language being identical: products of other Members "shall be accorded treatment no less favourable than that accorded to like products of national origin". Under the customary rules of interpretation of public international law reflected in Article 31 of the Vienna Convention on the Law of Treaties, the text of these provisions should be interpreted using the ordinary meaning of the terms, in context, and in light of the object and purpose of the agreement.[63] The identical terms would have the same ordinary meaning. Furthermore, nothing in the provisions' context nor in the object and purpose of either agreement indicated that the terms should have different meanings. Indeed, the preamble to the TBT Agreement included: "[d]esiring to further the objectives of GATT 1994".[64] This also indicated the two provisions should be interpreted in the same way. Despite this, the Appellate Body's approach interpreted these two identically worded provisions differently. Third, the Appellate Body's approach raised the very real possibility that Article 2.1 of the TBT Agreement would become superfluous.[65] If the standards of Article 2.1 and Articles I:1 and III:4 were different, it was unclear why a Member would ever bring a claim under Article 2.1, when Articles I:1 and III:4 had a lower standard, and Article XX had only a limited list of defences and placed the burden of proof on the responding Member. The Appellate Body had sought to respond to this concern in part by stating that Members had not identified "concrete examples of a legitimate objective that could factor into an analysis under Article 2.1 of the TBT Agreement, but would not fall within the scope of Article XX of the GATT 1994".[66] However, such examples had been provided. One such example was provided by the TBT Agreement text itself. There the preamble referred to "measures necessary to ensure the quality of" a Member's exports. There was no parallel provision in Article XX of the GATT 1994. Fourth, the Appellate Body's standard of stemming exclusively from a legitimate regulatory distinction was found nowhere in the TBT Agreement and had never been the subject of negotiations. The Appellate Body had never explained the origin of this legal standard or the basis for importing it into Article 2.1 of the TBT Agreement. This legal standard raised numerous questions. For instance, what was the definition of a "legitimate regulatory distinction"? Who decided which distinctions were legitimate? On what basis was that decision made? How were Members, when adopting a technical regulation in good faith, supposed to have any confidence that the measure satisfied this test? Indeed, this standard appeared to call for subjective judgments by WTO adjudicatory bodies. However, that was not the role of panels or the Appellate Body. Similarly, what did "stem exclusively from" entail? All Members faced a number of constraints, including resource constraints. If the regulatory distinction was based in part on budgetary restraints faced by a Member, for instance, and not just the policy objective the Member was pursuing through the measure, did that mean the detrimental impact did not "stem exclusively from" legitimate regulatory distinctions? The United States had already seen some arguments that in such a situation, the measure would fail the Appellate Body's legal test.

3.14. The United States said that it was extremely difficult to justify legitimate and important public policy measures under the legal standard the Appellate Body had invented. The very high level of

[63] See Vienna Convention on the Law of Treaties, Article 31(1), stating: "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose" Note also that Article 31(4) provides: "[a] special meaning shall be given to a term if it is established that the parties so intended". No special meaning is assigned to the relevant terms in either the GATT 1994 or the TBT Agreement.

[64] TBT Agreement, preamble, 2nd recital.

[65] See, e.g., Minutes of the DSB meeting of 18 June 2014 (WT/DSB/M/346), para. 7.7 concerning the Appellate Body report in "European Communities – Measures Prohibiting the Importation and Marketing of Seal Products" (DS400 and DS401).

[66] WT/DS400/AB/R, WT/DS401/AB/R, para. 5.128.

scrutiny that had been applied under this legal standard in the Tuna dispute went far beyond an inquiry into whether a measure discriminated based on origin. A measure did not discriminate based on origin simply because an adjudicator considered it could have balanced costs and benefits better or designed a more effective or perfect measure. In fact, WTO Members had agreed to a different provision in the TBT Agreement (Article 2.2) that went to analysing the trade-restrictiveness of a measure in light of the objective a Member sought to fulfil. The United States had consistently expressed concern that the approach invented by the Appellate Body regarding discrimination would diminish WTO Members' rights to pursue legitimate and important public policy measures. Members had not agreed in the GATT 1994 or the TBT Agreement to an obligation to avoid a "detrimental impact" even where there was no discrimination.[67]

3.15. In conclusion, the United States said that it was pleased that the WTO dispute settlement system had ultimately reached the right result in this dispute. As the United States had noted, this result had taken far too long, as a result of the Appellate Body developing erroneous legal interpretations of the non-discrimination provisions of the TBT Agreement and the GATT 1994. The reports proposed for adoption at the present meeting brought to a close a dispute that had been ongoing since 2008. The United States proposed that the DSB adopt the reports contained in WT/DS381/RW/USA and Add.1 and WT/DS381/AB/RW/USA and Add.1.

3.16. The representative of Mexico said that her country wished to thank the WTO Secretariat for its hard work on this dispute, namely, the Legal Affairs Division, the Appellate Body Secretariat and the translators. Mexico's Government and its industry had played an important role in protecting dolphins from the adverse effects of tuna fishing. Thanks to Mexico's efforts, the United States had amended its measure on two occasions, which had led to enhanced requirements in fisheries by others than Mexico. The method used by the Mexican tuna fleet was regulated by the Agreement on the International Dolphin Conservation Programme (AIDCP), and was recognized by the Food and Agriculture Organization of the United Nations (FAO) as the most sustainable fishing method. It had not only protected dolphins, but had also safeguarded tuna stocks by preventing the capture of juvenile tuna, unlike the methods used by fishing fleets in other waters, which had severely endangered tuna and, in turn, the tuna supply. The Mexican dolphin-associated purse seine tuna fishery had recently been certified by the Marine Stewardship Council (MSC) as sustainable in terms of maintaining the target species, and had been recognized by the same body as a fishery that minimized any environmental impact it might have. This result had obliged Mexico to continue defending and promoting its tuna industry and the highly sustainable fishing method used, as well as the efforts made in multilateral forums to ensure protection not only of dolphins, but of other marine species affected by different fishing methods used in other waters. Mexico had hoped that, regardless of the ruling, the United States would recognize the effect that the fishing methods used by its fleet and those of other countries had on the marine ecosystem. Pursuant to Articles 16.4 and 17.14 of the DSU, Mexico wished to express its views on the Reports. Mexico could not agree with the reasoning, findings and conclusions of the panels and Appellate Body in the second Article 21.5 of the DSU compliance proceeding in this dispute. Mexico had noted that the Appellate Body, in paragraph 6.29 of its Report, agreed with Mexico that calibration was not a separate legal standard under Article 2.1 of the TBT Agreement, but, rather, a case-specific analytical tool used to assess whether the measure at issue in this dispute was consistent with this provision. In the Eastern Tropical Pacific Ocean tuna fishery, where the Mexican fleet operated, Mexico and its fleet complied with the AIDCP, under which there were comprehensive dolphin protection requirements, including the requirement to have an independent observer on each boat to monitor fishing practices and keep accurate records. No other fishery in the world ensured comparable protection for dolphins. The AIDCP had dramatically reduced the harm caused to dolphins and was widely accepted as one of the most successful multilateral environmental agreements in history.

3.17. Mexico said that the United States had initially been a strong supporter of the AIDCP and had agreed to change its definition of "dolphin safe" to encourage countries to ratify the Agreement. The United States had in fact changed the definition briefly, but had subsequently abandoned its commitment due to internal legal proceedings. This was what had led to the initiation of this dispute in 2008. During the first two stages of the dispute – which on the whole had lasted 10 years due, *inter alia*, to the complexity of the measure, its constantly moving objective and the cosmetic

[67] Article 19.2 of the DSU ("[i]n accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements"); Article 3.2 of the DSU ("[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements").

changes made by the United States – the WTO panels and Appellate Body had determined that the US measure discriminated against Mexican tuna products because US rules had allowed tuna products from other countries to use the dolphin safe label, even when dolphins had been harmed during tuna fishing operations in those countries. Throughout the years, and in response to the panel and Appellate Body Reports ruling against it, the United States had made some cosmetic changes to its legislation. These changes had not, however, put an end to the discrimination against Mexican products. Tuna from other fisheries, caught by the US fleet and fleets from other countries, was free to carry the dolphin safe label, even where there was no guarantee that dolphins were not harmed in those fisheries. Many dolphins were being killed in other tuna fisheries. Furthermore, illegal, unreported and unregulated (IUU) fishing prevented the accurate tracking of dolphin deaths in various oceanic areas. Perhaps the most striking aspect of the Appellate Body Report was that it had agreed with the United States that the fishing methods causing the extinction of dolphin populations in certain tuna fisheries were not harmful to dolphins, and that it was not discriminatory to allow tuna from these fisheries to be labelled "dolphin safe". Unfortunately, by refusing to recognize the continuing differences between the sustainable fishing practices of the Mexican fleet and the destructive fishing practices of other countries in other fisheries, the US measure together with the Appellate Body's decision would have the effect of encouraging the use of unsustainable fishing methods that were harmful to both dolphins and other marine species. In any case, the report would not discourage Mexico from maintaining its key role at the international level in the promotion of sustainable fishing and environmental protection. Mexico had addressed this issue as fully as possible and would continue to monitor the application of the US measure, including to see whether the legislation was ever applied to tuna from non-Mexican fisheries. Regarding the underlying systemic issues in the dispute, in particular that relating to the holding of hearings partially open to the public, Mexico strongly rejected the US practice of modifying the legal scope of the provisions of the DSU. Mexico recalled that this had not been the first case in which the United States had requested authorization from panels to hold hearings partially open to the public. This type of request fell outside the jurisdiction of the panels, as it affected the carefully negotiated balance of WTO obligations. The decision and findings of the panels in this dispute, concerning their alleged authority to authorize a partially open hearing without the consent of the parties to the dispute, added to or diminished the rights and obligations of Members provided in the DSU. The Appellate Body itself had implicitly recognized and questioned this authority when stating, in paragraph 7.15 of its Report, that the fact that it had found it unnecessary to rule on this matter in this appeal "should not be construed as an endorsement of the Panels' decision to conduct a partially open meeting of the parties without the consent of both parties". Mexico wished to reiterate its commitment to international law and multilateral bodies, in particular where their aim was to ensure the peaceful settlement of disputes. This included those that formed part of this forum, most notably the Appellate Body.

3.18. The representative of the European Union said that his delegation noted that the title of the present Agenda item referred to the "report contained in WT/DS381/AB/RW/USA and WT/DS381/AB/RW/USA/Add.1". There was no reference to "Report of the Appellate Body" in the title of this Agenda item, unlike the title of the previous Agenda item. He said that even a cursory look at these documents confirmed that what was contained therein was the Report of the Appellate Body and its addendum. The EU wished to stress that there was no doubt that this Report was a Report of the Appellate Body, subject to the adoption procedure laid down in Article 17.14 of the DSU, i.e., by negative consensus. The EU recalled that the rules and procedures of the DSU excluded the right of any particular WTO Member to block the adoption of panel or Appellate Body Reports. This was a central feature of the DSU, and a major difference with the dispute settlement mechanism that had operated under the GATT 1947. Article 17.14 of the DSU was clear: "[a]n Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report". The EU understood that there was no formal objection at the present meeting to the adoption of the Appellate Body Report. But in any event, the EU wished to emphasize that it would not be the case at the present meeting that "the DSB decides by consensus not to adopt" the reports. Therefore, both Panel and Appellate Body Reports would in any event be "adopted by the DSB" within the meaning of Articles 16.4 and 17.14 of the DSU. The EU wished to recall that these provisions were without prejudice to the right of Members to express their views on the report, and such views had been expressed at this meeting. However, while there was a right to express a view, there was no right to veto. Any theories attempting to underpin such a right to veto were without any merit.

3.19. The representative of the United States said that the United States took note of the view expressed by the EU concerning Article 17.14 of the DSU. The United States had previously expressed its view that the adoption procedures reflected in Article 17.14 contemplated an appellate report issued consistently with the requirements of Article 17 of the DSU. However, it might not be necessary to have an extensive debate on this issue at the present meeting. In this dispute, the United States had supported the adoption of the panel and appellate reports and the United States had understood that the other party to the dispute did also. The United States had, therefore, proposed that the DSB adopt the reports contained in WT/DS381/RW/USA and Add.1 and WT/DS381/AB/RW/USA and Add. 1.

3.20. The representative of Canada said that his delegations simply wished to indicate that the Report that had been prepared by the Appellate Body was clearly an Appellate Body Report, as contemplated by Article 17.14 of the DSU. Canada therefore agreed with the view expressed by the EU that the adoption of this Report was subject to the negative consensus rule.

3.21. The DSB took note of the statements and adopted the Appellate Body Report contained in WT/DS381/AB/RW/USA and Add.1 and the Panel Report contained in WT/DS381/RW/USA and Add.1, as upheld by the Appellate Body Report.