

4. 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

I. Introduction

- The United States would like to thank the members of the compliance Panels, the Appellate Body,¹ and the Secretariat assisting them for their work on these proceedings.
- A decade ago, in 2008, Mexico once again challenged the U.S. measure establishing the conditions under which producers may choose to market tuna products as “dolphin safe”. Mexico challenged this measure because it did not permit tuna product harvested by “setting on dolphins” to be marketed as dolphin safe. Setting on dolphins means 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 has been trying to establish that the dolphin safe labeling measure is not discriminatory but is a legitimate environmental measure concerned with the protection of dolphins and, as such, is consistent with U.S. WTO obligations.
- The adoption today of these reports marks – at last – the success of that endeavor and brings this long-running dispute to a close. Both of these reports agree that the U.S. dolphin safe labeling measure is consistent with Article 2.1 of the TBT Agreement² and, similar to the findings of the GATT 1947 panel,³ is not inconsistent with the GATT 1994.⁴ The United States welcomes this conclusion and supports the adoption of these reports.
- In particular, the United States commends the compliance Panels for their detailed and comprehensive review and analysis of the factual record before them. The Panels reviewed and analyzed 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 made detailed findings concerning possible metrics for assessing the risk to dolphins posed by different fishing methods in different fisheries,⁵ the nature

¹ 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.

² *Agreement on Technical Barriers to Trade* (“TBT Agreement”).

³ *US – Tuna (Mexico) (GATT)* (DS21/R - 39S/155), paras. 5.43-44.

⁴ *General Agreement on Tariffs and Trade 1994* (GATT 1994).

⁵ *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.171-243.

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 was evidence on the record,⁶ and numerous other issues relevant to the analysis of the measure at issue.⁷ This thorough and painstaking factual analysis by the Panels was the basis for their correct factual and legal conclusions concerning the dolphin safe labeling measure and for the Appellate Body's upholding all the Panels' findings.

- Although the United States agrees with and welcomes the conclusion of these reports that the U.S. dolphin safe labeling measure is consistent with U.S. WTO obligations, we are disappointed that it has taken more than a decade to resolve this matter.
- In the course of this dispute, the Appellate Body developed 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 were not based on the text of the relevant provisions, and negotiators did not agree to them. In this dispute, the United States was forced to expend considerable resources over nearly a decade trying to defend successfully what was always an environmental measure with no element of protectionism.
- Frankly, it is 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 has developed, it seems likely that only Members with significant resources to devote to the effort will be able to defend legitimate public policy measures that have any effect on trade.
- At previous meetings addressing this dispute and others, the United States has expressed concerns with the Appellate Body's interpretations of the non-discrimination provisions of the TBT Agreement and the GATT 1994.⁸
- While welcoming the ultimate outcome in this dispute, the United States highlights the real cost to Members of these incorrect interpretations that narrow the policy space afforded to Members and increase the likelihood of protracted litigation over non-discriminatory public policy measures.

II. The evolving legal standards in this dispute and U.S. efforts to meet them

⁶ See, e.g., *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.244-525.

⁷ See, e.g., *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.578-599, 7.636-648, 7.654-670.

⁸ See, e.g., U.S. DSB Statement, July 13, 2012 (<https://geneva.usmission.gov/2012/06/14/statement-by-the-united-states-at-the-june-13-2012-dsb-meeting/>); U.S. DSB Statement, Dec. 3, 2015 (https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec3.DSB_.Stmt_.as-delivered.Public.pdf).

- In this dispute, the United States has faced evolving and increasingly demanding legal standards under Article 2.1 of the TBT Agreement⁹ and Articles I:1, III:4, and XX of the GATT 1994.
- The original panel found that the original dolphin safe labeling measure was consistent with Article 2.1 because it did not reflect origin-based discrimination. The Appellate Body reversed the panel and articulated a more demanding legal standard under which origin-based discrimination was irrelevant.
- In the compliance proceeding, the Appellate Body raised the legal standard still further, requiring the United States to prove not only that the measure did not discriminate but that it never could in a possible hypothetical scenario. Thus, the standard the Appellate Body articulated is 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 was developing, the United States repeatedly tried to meet those standards by amending the measure. The development of this dispute, however, strongly suggests 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.

A. The original proceeding

- In the original proceeding, Mexico challenged the U.S. dolphin safe labeling measure, as set out in the Dolphin Protection Consumer Information Act (“DPCIA”), its implementing regulations, and a related court decision.¹⁰ The measure provided that, since setting on tuna is inherently harmful to dolphins, tuna caught by setting on dolphins could not be labeled as “dolphin safe” in the U.S. 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.¹¹ Nevertheless, Mexico 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.

⁹ We will not cover in this intervention the U.S. view that the dolphin-safe label is a “standard”, and not a “technical regulation” since it is a voluntary label. *See US – Tuna II (Mexico)*, U.S. appellant submission, paras. 24-73.

¹⁰ *US – Tuna II (Mexico)*, para. 2.

¹¹ *US – Tuna II (Mexico) (Panel)*, para. 7.280.

- The original panel 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.¹² 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 favorable treatment to Mexican products.¹³
- We note that, when the legislation was enacted, Mexican and U.S. tuna producers were in the same situation: both sourced tuna from the ETP, and both sourced from fleets that set on dolphins.¹⁴ Subsequently, producers from the United States and other Members chose 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 elected not to.
- Thus, any adverse effects on Mexican tuna products that developed in the years since the legislation was passed were simply the result of different business choices made by the Mexican industry and other industries and not a result of discrimination by the U.S. measure.¹⁵
- The Appellate Body reversed the panel and found that the measure was inconsistent with Article 2.1. The Appellate Body 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.¹⁶ Citing a previous appellate report, the Appellate Body then analyzed whether the detrimental impact on Mexican products "stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products."¹⁷ It placed the burden of proof on the United States to show that the measure was *not* discriminatory.¹⁸
- Applying this standard, the Appellate Body reviewed whether the U.S. 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 noted the panel findings that setting on dolphins is a "particularly harmful" fishing method for dolphins and found that the U.S. measure addressed these adverse effects.¹⁹ It

¹² *US – Tuna II (Mexico) (Panel)*, paras. 7.304-311.

¹³ *US – Tuna II (Mexico) (Panel)*, paras. 7.312-319.

¹⁴ *US – Tuna II (Mexico) (Panel)*, paras. 7.320, 7.324.

¹⁵ *US – Tuna II (Mexico) (Panel)*, para. 7.378.

¹⁶ *US – Tuna II (Mexico) (AB)*, paras. 234-235.

¹⁷ *US – Tuna II (Mexico) (AB)*, para. 215 (citing *US – Clove Cigarettes (AB)*).

¹⁸ *US – Tuna II (Mexico) (AB)*, para. 216.

¹⁹ *US – Tuna II (Mexico) (AB)*, para. 287.

then found, however, that the measure did not sufficiently address risks to dolphins posed by other fishing methods.²⁰ It 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.”²¹

- On this basis, the Appellate Body found that the United States had not shown that the different labeling 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.”²²
- As the United States explained at the time, the Appellate Body’s analysis significantly reduced the complainant’s burden to show a measure to be inconsistent with Article 2.1 and, conversely, 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 required the respondent to demonstrate that the measure did not.²³ Thus, the Appellate Body 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.

B. The first compliance proceeding

- Nevertheless, the United States proceeded to amend the dolphin safe labeling measure to address the DSB recommendations in the original proceeding. In July 2013, the United States amended the dolphin safe labeling measure to add the requirement that tuna labeled 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.”²⁴
- This directly addressed the DSB 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.”²⁵

²⁰ *US – Tuna II (Mexico) (AB)*, paras. 289, 292.

²¹ *US – Tuna II (Mexico) (AB)*, paras. 292, 296.

²² *US – Tuna II (Mexico) (AB)*, para. 297.

²³ See U.S. DSB Statement, July 13, 2012.

²⁴ See *Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products*, 78 Fed. Reg. 40,997, 40,998 (July 9, 2013) (2013 Final Rule).

²⁵ *US – Tuna II (Mexico) (AB)*, para. 296.

- In the first compliance proceeding, it was uncontested that the 2013 amendments to the dolphin safe labeling measure fully addressed the concerns identified in the panel and Appellate Body reports in the original proceeding. Mexico *did not even challenge* the revised aspect of the U.S. measure.²⁶ Both the panel and Appellate Body reports acknowledged that the amendments addressed the concern identified in the original proceeding and moved the measure towards compliance.²⁷
- They also reaffirmed that the objectives pursued by the U.S. measure – consumer information and protecting dolphins – were legitimate for WTO purposes. Indeed, there was no argument that the distinctions of the measure reflected origin-based discrimination.
- Nevertheless, in the first compliance proceeding the Appellate Body found the measure discriminated under Article 2.1 based on an aspect of its design that was unchanged from the original measure and had never been applied.
- The original dolphin safe labeling measure provided that the National Oceanic and Atmospheric Association (NOAA) could impose observer requirements on tuna caught in (1) a purse seine fishery outside the ETP with a comparable tuna-dolphin association or (2) in a non-purse seine fishery with regular and significant dolphin mortality or serious injury.²⁸ Mexico advanced no argumentation concerning these provisions in the original proceeding, and they were not discussed in the panel or Appellate Body reports.
- The 2013 rule amending the measure 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 nevertheless upheld the panel, basing its findings on those provisions, even though Mexico could have pursued a claim against these provisions, but chose not to, in the original proceeding. This is problematic enough on procedural grounds.
- But the Appellate Body went 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.”²⁹
- In particular, the Appellate Body considered two alleged gaps in the provisions – (1) the possibility of a purse seine fishery with “regular and significant” dolphin mortality but *without* a regular and significant tuna-dolphin association and (2) the possibility of a non-

²⁶ See *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.142.

²⁷ *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.241-242.

²⁸ *US – Tuna II (Mexico)*, para. 173.

²⁹ *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.258.

purse seine fishery *with* a harmful “regular and significant” tuna-dolphin association but without “regular and significant” dolphin mortality. The Appellate Body considered that these two alleged gaps rendered the U.S. measure not even-handed.³⁰

- To be clear, neither the panel nor the Appellate Body found that Mexico had established that any fishery *actually* fell into either alleged gap. Rather, the 2013 measure was found to be inconsistent with Article 2.1 on the basis of the *hypothetical* existence of such a fishery.
- As the United States explained in detail at the time, the Appellate Body’s analysis significantly increased the burden on a Member to demonstrate that its origin-neutral regulation is not discriminatory under Article 2.1.³¹
- First, although Mexico’s claim was one of *de facto* discrimination, the Appellate Body 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 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 proves it could *never* be discriminatory in any real or hypothetical scenario.
- Second, the findings were not based on Mexico’s case. The panel had raised the provisions on its own.³² Thus, reaching out to address this hypothetical situation seemed to be an academic exercise unrelated to trade, and an exercise in impermissibly making the case for a complaining party.
- The Appellate Body’s analysis 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 relied on its conclusions under Article 2.1 that the dolphin safe labeling 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.³³ The Appellate Body found that this alone is sufficient to demonstrate that the measure is inconsistent with Articles I:1 and III:4.³⁴

³⁰ *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.258.

³¹ See U.S. DSB Statement, Dec. 3, 2015 (https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec3.DSB_.Stmt_.as-delivered.Public.pdf).

³² *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”).

³³ *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.339.

³⁴ *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.340.

- At the same time, the Appellate Body’s analysis 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 required the United States to show that the measure could *never* be discriminatory in any hypothetical scenario, and it reached out to address scenarios Mexico had not raised.³⁵
- We note 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 the dispute.

C. The current compliance proceeding

- Nevertheless, the United States tried again to modify the dolphin safe labeling measure to satisfy the new, higher standard the Appellate Body had set.
- On March 22, 2016, the United States issued an interim final rule amending the dolphin safe labeling 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 were the basis for the finding of non-compliance in the first compliance proceeding.³⁶
- 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 – that is, on tuna *other than* Mexican tuna products.³⁷
- The 2016 measure was 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 – were 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 \$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.

³⁵ See *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.354-360.

³⁶ *US – Tuna II (Article 21.5 US / Mexico II) (AB)*, para. 5.16.

³⁷ See *US – Tuna II (Article 21.5 US / Mexico II) (AB)*, paras. 5.13-24.

III. The Appellate Body’s interpretations of the non-discrimination provisions of the TBT Agreement and the GATT 1994 are flawed

- The interpretations of Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994 discussed previously are not only changing and increasingly demanding – they are also incorrect and diminish the policy space Members retained for themselves to regulate.
- As the United States has expressed in the past, Articles I:1 and III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement are, in fact, concerned with origin based discrimination, not with achieving a perfect fit between a measure’s effect and its objectives.
- It is far more difficult to justify public policy measures under the legal standard the Appellate Body has invented than under the standards to which Members agreed. Therefore, the Appellate Body’s standard significantly restricts the regulatory space afforded to Members to pursue legitimate public policy objectives consistent with their WTO obligations.

A. The non-discrimination provisions are concerned with origin-based discrimination

- Articles I:1 and III:4 of the GATT 1994 and 2.1 of the TBT Agreement set out Members’ national treatment and most-favored-nation (“MFN”) obligations.
- The Appellate Body’s recent approach under both Article 2.1 and Articles I:1 and III:4 is to first look to see if a measure has 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 is a detrimental impact, then the Appellate Body’s approach with respect to Article 2.1 is to conduct a further analysis to determine if any such detrimental impact stems exclusively from a legitimate regulatory distinction.
- However, with respect to Articles I:1 and III:4, the existence of a detrimental impact is alone sufficient to demonstrate a breach of those articles. The only recourse for a Member maintaining the measure is to invoke an affirmative defense, such as Article XX of the GATT 1994.
- The “detrimental impact” standard is problematic and should be of serious concern for Members. First and foremost, it would appear to be a standard that is easily and perhaps universally satisfied. As demonstrated in this dispute, it would appear that all that it would take is 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 satisfies the requirements under the measure, while a producer in the exporting Member does not, that would appear to suffice to find that the measure has a detrimental impact on the exporting Member's products. This applies 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 chooses to meet the importing Member's requirements, but it is 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 are likely to seek to meet the requirements of the Member in whose territory they produce as well as of each Member to which they wish to export. It is likely that it will be more expensive to adapt production for some Members' requirements than for others.
- And a measure that had no detrimental impact on imports yesterday could very well have one today. For example, an exporting producer may change its product characteristics or production method. Thus, even where a Member makes a significant effort to ensure that a measure is non-discriminatory, the Member has no assurance when adopting a measure that the measure will withstand a challenge in the future based on changes in the market or by exporting producers.
- We would ask Members – is this very low and unpredictable threshold really the concept of discrimination that they understood?
- The Appellate Body's approach does not find support in the text of the relevant provisions, nor in the manner in which they were applied under the GATT 1947 nor in prior panel or Appellate Body reports.
- It is difficult to imagine that Members would agree 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 is contrary to the fact that the phrase "treatment no less favourable" in Article III:4 was, in the past, always interpreted as providing regulatory space for Members to take otherwise legitimate measures that may restrict trade unevenly across the membership of the WTO.³⁸

³⁸ 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.”).

- The general principle of Article III:1 of the GATT 1994,³⁹ which informs the meaning of Article III:4,⁴⁰ makes it clear that considerations of discrimination and “protection” are inherent in Article III:4.⁴¹
- The second sentence of Article III:4 conveys a similar concept. It states: “The 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 embraces the concept that the reason behind a measure is important for purposes of the Article III:4 analysis, and that “nationality of the product” is a key concept.
- However, the Appellate Body’s “detrimental impact” approach says that a measure will be found to have a detrimental impact on imports even where the measure makes no distinctions at all, either in law or in fact, based on the nationality of the imported product.
- Further, prior to 2012,⁴² the Appellate Body had never interpreted Article III to mean that *any* detrimental impact on like imports is *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 explicitly discriminated against imported products, or it established a system that, though facially neutral, discriminated against imported products *de facto*.

B. Further problems under the Appellate Body’s approach

- There are several other significant problems with the Appellate Body’s approach.

³⁹ Article III:1 of the GATT 1994 states:

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.

⁴⁰ See *Japan – Alcoholic Beverages (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.”)

⁴¹ See *EC – Asbestos (AB)*, para. 100 (“The 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).

⁴² *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)*.

- First, because the GATT 1994 only provides for an affirmative defense for a limited list of objectives, some measures that pursue legitimate policy objectives may be indefensible.
- Under the Appellate Body’s approach, any measure will be found in breach of Article I:1 or II:4 of the GATT 1994 if the measure has a detrimental impact on imports, no matter how small or accidental, or whether it is due to the conscious choice of exporting producers or the result of market changes.
- This means that no Member could maintain any such measure, no matter how legitimate or compelling the policy objective of the measure, unless the measure pursues one of the policies eligible for an affirmative defense.
- But this is a very limited list of policy objectives. For instance, country of origin labeling is not listed as an objective under Article XX of the GATT 1994, even though it is recognized as a legitimate objective under Article IX of the GATT 1994. It is not difficult to think of other legitimate objectives that may not be covered by Article XX – labeling for geographic indications could be another example of such an objective.
- Second, the Appellate Body’s approach interprets 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.⁴³ The identical terms would have the same ordinary meaning. Furthermore, nothing in the provisions’ context nor in the object and purpose of either agreement indicates that the terms should have different meanings. Indeed, the preamble to the TBT Agreement includes: “Desiring to further the objectives of GATT 1994.”⁴⁴ This also indicates the two provisions should be interpreted in the same way.
- Despite this, the Appellate Body’s approach interprets these two identically worded provisions differently.

⁴³ See Vienna Convention on the Law of Treaties, Art. 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.

⁴⁴ TBT Agreement, preamble, 2nd recital.

- Third, the Appellate Body’s approach raises the very real possibility that Article 2.1 of the TBT Agreement will become superfluous.⁴⁵
- If the standards of Article 2.1 and Articles I:1 and III:4 are different, it is unclear why a Member would ever bring a claim under Article 2.1, when Articles I:1 and III:4 have a lower standard, and Article XX has only a limited list of defenses and places the burden of proof on the responding Member.
- The Appellate Body has sought to respond to this concern in part by stating that Members have 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.”⁴⁶
- However, such examples have been provided. One such example is provided by the TBT Agreement text itself. There the preamble refers to “measures necessary to ensure the quality of” a Member’s exports. There is no parallel provision in Article XX of the GATT 1994.
- Fourth, the Appellate Body’s standard of stemming exclusively from a legitimate regulatory distinction is found nowhere in the TBT Agreement and was never the subject of negotiations. The Appellate Body has 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 raises numerous questions. For instance, what is the definition of a “legitimate regulatory distinction”? Who decides which distinctions are legitimate? On what basis is that decision made? How are Members, when adopting a technical regulation in good faith, supposed to have any confidence that the measure satisfies this test? Indeed, this standard appears to call for subjective judgments by WTO adjudicatory bodies. However, that is not the role of panels or the Appellate Body.
- Similarly, what does “stem exclusively from” entail? All Members face a number of constraints, including resource constraints. If the regulatory distinction is based in part on budgetary restraints faced by a Member, for instance, and not just the policy objective the Member is pursuing through the measure, does that mean the detrimental impact does not “stem exclusively from” legitimate regulatory distinctions? We have already seen some arguments that in such a situation, the measure would fail the Appellate Body’s legal test.

⁴⁵ See, e.g., Minutes of the DSB meeting of June 18, 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).

⁴⁶ WT/DS400/AB/R, WT/DS401/AB/R, para. 5.128.

- It is extremely difficult to justify legitimate and important public policy measures under the legal standard the Appellate Body has invented.
- The very high level of scrutiny that has been applied under this legal standard in the Tuna dispute goes far beyond an inquiry into whether a measure discriminates based on origin.
- A measure does not discriminate based on origin simply because an adjudicator considers it could have balanced costs and benefits better or designed a more effective or perfect measure. In fact, WTO Members agreed to a different provision in the TBT Agreement (Article 2.2) that goes to analyzing the trade-restrictiveness of a measure in light of the objective a Member seeks to fulfill.
- The United States has 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 did not agree in the GATT or the TBT Agreement to an obligation to avoid a "detrimental impact" even where there is no discrimination.⁴⁷

IV. Conclusion

- We are pleased that the WTO dispute settlement system has ultimately reached the right result in this dispute.
- As noted, this result has 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 today bring to a close a dispute that has been ongoing since 2008. The United States proposes that the DSB adopt these reports contained in WT/DS381/RW/USA and Add.1 and WT/DS381/AB/RW/USA and Add.1.

Second Intervention

- We take note of the view expressed by the EU concerning Article 17.14 of the DSU.
- The United States has previously expressed its view that the adoption procedures reflected in Article 17.14 contemplate an appellate report issued consistently with the requirements of Article 17.

⁴⁷ DSU Article 19.2 ("In 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."); DSU Article 3.2 ("Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.").

- However, it may not be necessary to have an extensive debate on this issue today.
- In this dispute, the United States supports the adoption of the panel and appellate reports and we understand that the other party to the dispute does also.
- The United States has 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.