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13 June 2012

MINUTES OF MEETING

Held in the Centre William Rappard
on 13 June 2012

Chairman: Mr. Shahid Bashir (Pakistan)

1. United States – Measures concerning the importation, marketing and sale of tuna and tuna products

(a) Report of the Appellate Body (WT/DS381/AB/R) and Report of the Panel (WT/DS381/R)

1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS381/14 and Corr.1 transmitting the Appellate Body Report on: "United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products", which had been circulated on 16 May 2012 in document WT/DS381/AB/R, in accordance with Article 17.5 of the DSU. He 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: "An 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".

2. The representative of Mexico said that his country thanked the members of the Appellate Body, the Panel and the respective Secretariats for their work in this dispute. Mexico also thanked the third parties and third participants for participating in the proceedings. Many of them shared Mexico's views. The Reports were of special relevance to Members since they provided an interpretation of the TBT Agreement, which would help Members to better understand the obligations contained in that Agreement. It was widely accepted that the protection of marine mammals, including dolphins and whales, was an important objective of society. In the past, the United States had played a key role in fostering measures to protect some of these marine mammals from the risks associated with fishing. Mexico recognized that the WTO did not prohibit Members from adopting measures or technical regulations to pursue a legitimate objective, such as the protection of human and animal life and health, provided such measures were consistent with WTO rules. The recent history of protecting dolphins during tuna fishing in the Eastern Tropical Pacific Ocean (ETP) under the Agreement on the International Dolphin Conservation Programme (AIDCP), to which the Members in this dispute were party, showed that US efforts in this regard were obsolete and counter-productive. It was high time for the United States to reassess and adjust its policies in this area.

3. The central issue in this dispute brought by Mexico was the fact that the United States prohibited the use of an AIDCP-endorsed "dolphin-safe" label for tuna imports from Mexico, despite authorizing the use of a "dolphin-safe" label for tuna products from the United States and third countries. Thus, the adoption of the Panel Report, as modified by the Appellate Body Report, was

important for Mexico and for the strengthening of the multilateral trading system, for several reasons. The Reports would help to eliminate the stigma against the fishing methods used by Mexico, since those methods, being internationally regulated, had as their primary objective the effective protection of dolphins during tuna fishing operations. The Reports also highlighted that, in reality, US consumers had no access to labelling that provided information on the risks to dolphins arising from different fishing techniques in different areas of the ocean, and yet the United States allowed the use of a "dolphin-safe" label in such cases. More specifically, the Reports revealed that the tuna consumed in the United States labelled "dolphin-safe" did not provide consumers with true information on the risks and harm caused to these mammals, despite the use of this label.

4. From a legal point of view, the Panel and Appellate Body Reports were relevant as they had correctly considered the "dolphin-safe" labelling measure to constitute a "technical regulation" within the meaning of the TBT Agreement. Moreover, Mexico welcomed the Appellate Body's conclusion to reverse the Panel's finding and determine that the US measures were inconsistent with the obligation set forth in Article 2.1 of the TBT Agreement, since they modified the conditions of competition in the US market to the detriment of tuna products from Mexico. Before looking more closely at the Appellate Body's legal determinations, it was important to emphasize certain factual findings that had not been reversed by the Appellate Body, which clearly showed how the US measures were not duly calibrated in relation to the risks to dolphins associated with tuna fishing in other zones and using other methods. Various findings of fact highlighted the uneven-handed nature of the measures imposed by the United States.

5. The following findings were of particular importance to underline. It was demonstrated that the observable and unobservable adverse effects on dolphins occurred in ocean areas other than the ETP, and as a result of the use of fishing methods other than setting on dolphins, and that the United States had not only failed to take steps to address these adverse effects, but allowed tuna products from these geographical areas (over 90 per cent of its imports) to carry the "dolphin-safe" label even when dolphins had been harmed or killed during fishing operations.[1] The risks to dolphins arising from the use of other fishing methods outside the ETP were not lower or insignificant, as the United States had tried to claim in this dispute. The Panel had stated that: "there are clear indications that the use of certain tuna fishing techniques other than setting on dolphins may also cause harm to dolphins". This finding had not been reversed by the Appellate Body. In contrast, within the ETP, the Panel had recognized that dolphin mortality and injury had fallen to 0.1 per cent under the controlled conditions of the AIDCP. This finding had not been modified on appeal.

6. With regard to the definition of technical regulation, Mexico welcomed the Panel's and the Appellate Body's findings that characterized the measure at issue as a "technical regulation" under the TBT Agreement. This was the first time that the Appellate Body had elaborated upon the scope of the definition of "technical regulation" found in the TBT Agreement.[2] The United States had very simplistically argued during the Panel proceedings and appeal that its "dolphin-safe" labelling measures did not constitute a "technical regulation" for the purposes of the TBT Agreement, and had submitted that "compliance with a labelling requirement is 'mandatory'… if there is a requirement to use a particular label in order to place a product for sale on the market…".[3] The Appellate Body had correctly concluded that the language of the TBT Agreement did not indicate that a labelling requirement was "mandatory" only if there was a requirement to use a particular label in order to place a product for sale on the market. For the Appellate Body, a fundamental issue in its analysis

[1] Report of the Appellate Body, para. 247.

[2] The Appellate Body effectively recognized that "…a panel's determination of whether a particular measure constitutes a technical regulation must be made in the light of the characteristics of the measure at issue and the circumstances of the case. In some cases, this may be a relatively straightforward exercise. In others, the task of the panel may be more complex…". Report by the Appellate Body, para. 188.

[3] Idem.

had been the fact that the US measures established a single definition of "dolphin-safe" and penalized any statement on a tuna product regarding dolphin protection where the conditions of these measures were not met.[4] Mexico believed that the Appellate Body's conclusions regarding the definition of "technical regulation" were consistent with and respected the text of the TBT Agreement, and in no way threatened the fundamental difference between a "technical regulation" and a "standard". Nor did they confuse the term "requirement" with the term "mandatory".

7. With regard to Article 2.1 of the TBT Agreement on non-discrimination, Mexico considered the Appellate Body's findings relating to the interpretation of the phrase "treatment no less favourable" in Article 2.1 of the TBT Agreement to be appropriate. On the basis of the Report in "US - Clove Cigarettes", the Appellate Body had determined that the correct way to analyse whether the measure was inconsistent with Article 2.1 was to determine whether it modified the conditions of competition in the relevant market to the detriment of the group of imported products *vis-à-vis* the group of like domestic products or like products imported from any other country. In conducting this analysis, the Appellate Body had made a number of important determinations. First, it had confirmed that "the lack of access to the 'dolphin-safe' label of tuna products containing tuna caught by setting on dolphins has a detrimental impact on the competitive opportunities of Mexican tuna products in the US market."[5] Second, it had clarified the extent of "government intervention" in the modification of the conditions under which domestic and imported like products competed in a Member's market, highlighting that it was the US measures that established the conditions for the use of a "dolphin-safe" label on tuna products.

8. The Appellate Body had further stated that to determine whether Article 2.1 had been violated, it was necessary to analyse whether the existence of the detrimental impact reflected the existence of discrimination. It was, therefore, necessary to analyse in detail whether the detrimental impact on imports stemmed exclusively from a legitimate regulatory distinction. For this, it was necessary to analyse whether the measure was even-handed.[6] In this specific case, the Appellate Body had analysed whether the United States had managed to demonstrate that the difference in the "dolphin-safe" labelling conditions relating to different fishing methods and different areas of the ocean had been a legitimate regulatory distinction, and hence whether the detrimental impact of the measure had stemmed exclusively from this distinction rather than reflecting discrimination.[7] In this regard, the Appellate Body had carefully analysed the Panel's findings appealed by the United States under Article 11 of the DSU, and had concluded that the Panel had acted consistently with its duties, which was why the Panel's factual findings that fishing methods other than setting on dolphins posed a risk to and inflicted harm on these animals were maintained. The Appellate Body had, therefore, reversed the Panel's findings and had correctly determined that the US measure afforded Mexican tuna products "less favourable treatment" than that afforded to like products from the United States and other countries and that it was, therefore, inconsistent with Article 2.1 of the TBT Agreement.

9. With regard to Article 2.2 of the TBT Agreement, in Mexico's view, the Panel had correctly concluded that there was a less trade-restrictive alternative for the objectives pursued by the United States, which entailed allowing the coexistence of the US and AIDCP "dolphin-safe" labels. For this reason, Mexico did not agree with the Appellate Body's reversal of this conclusion. Nor did Mexico agree with the Appellate Body's reversal of the Panel's finding in determining that the

[4] In this respect, the Appellate Body stated that "In doing so, the US measure prescribes in a broad and exhaustive manner the conditions that apply for making any assertion on a tuna product as to its "dolphin-safety", regardless of the manner in which that statement is made". Report of the Appellate Body, para. 199.

[5] Report of the Appellate Body, para. 235.

[6] Report of the Appellate Body, para. 215.

[7] Report of the Appellate Body, para. 284.

measure at issue was not more trade-restrictive than necessary to fulfil its legitimate objectives, as "the US measure did fulfil the United States' objectives to a certain extent".[8]

10. In accordance with the Appellate Body's analysis, the following elements must be assessed in order to determine a violation of Article 2.2 of the TBT Agreement: (i) "Legitimate objective": it was necessary to determine what a Member was trying to achieve by adopting a technical regulation and to conduct an independent and objective assessment of the legitimate objective pursued; (ii) "Fulfil": the analysis appeared to indicate that although the degree of contribution that the measure made to the legitimate objective was relevant, a significant contribution to the achievement of that objective was not necessary; (iii) "Unnecessary obstacles to international trade" and "shall not be more trade-restrictive than necessary": the next step must be to analyse "necessity". This term "involves a relational analysis of the trade-restrictiveness of the technical regulation, the degree of contribution that it makes to the achievement of a legitimate objective, and the risks non-fulfilment would create"[9]; (iv) "Comparative analysis" and "the risks non-fulfilment would create": the trade-restrictiveness and the degree of achievement of the objective by the measure at issue must be compared with that of possible alternative measures that may be reasonably available and less trade-restrictive. The nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective must also be considered.[10] Under this analysis, a less trade-restrictive and reasonably available alternative measure may be taken into account only when it at least contributed to the legitimate objective equivalent to that of the measure at issue, taking account of the risks non-fulfilment would create. In Mexico's view, a measure that contributed minimally or insignificantly to the fulfilment of its supposed objective created unnecessary barriers to trade. In Mexico's view, the complexity of this analysis may result in a Member establishing its legitimate objectives so specifically that they could only be fulfilled with the technical regulation adopted by the Member in question, leaving no room for any other less restrictive and reasonably available alternative measure. This technical regulation may then be considered WTO-consistent, even when its contribution to the fulfilment of the legitimate objectives was minimal or insignificant.

11. With regard to the Appellate Body's determination regarding Article 2.4 of the TBT Agreement, Mexico wished to emphasize that there was no doubt that the United States was a founding Member of the AIDCP and that it had participated actively in the creation and establishment of the "dolphin-safe" label within that forum. The creation of the AIDCP "dolphin-safe" standard had been in the pipeline since the Panama Declaration, the objective of which was to ensure access to the US market for tuna products when this fish was caught in accordance with internationally agreed "dolphin-safe" guidelines. It was clear that for the United States, this standard and the AIDCP organization must be considered relevant to its technical regulation. Curiously, this standard had been relevant to US measures when the United States had tried to amend its legislation and allow the AIDCP "dolphin-safe" label. Mexico hoped that the United States would promptly comply with the DSB's recommendations and that the measures taken to comply would be consistent with the covered agreements and lead to the settlement of this dispute.

12. The representative of the United States said that his country would like to thank the members of the Appellate Body, the Panel and the Secretariat assisting them for their work on this dispute. This dispute involved US measures – particularly the Dolphin Protection Consumer Information Act and associated regulations – that established the conditions under which producers may choose to label tuna products as dolphin safe. Under these measures, producers were not allowed to claim that their tuna product was dolphin safe if the tuna had been caught by "setting on dolphins". The United States said that setting on dolphins was a fishing practice that involved intentionally chasing, encircling, and deploying purse seine nets on dolphins in order to catch tuna that frequently swam

[8] Report of the Appellate Body, para. 341.
[9] Report of the Appellate Body, para. 318.
[10] Report of the Appellate Body, para. 321.

below dolphins. As the Panel had found, setting on dolphins was not dolphin safe since it resulted in death and serious injury to dolphins.[11] Unlike other fishing operations that had moved away from setting on dolphins, most large Mexican tuna fishing vessels continued to engage in this fishing practice. Nevertheless, Mexican tuna products may be sold in the United States. The measures simply sought to ensure that any claims that tuna products were dolphin safe – whether from Mexico, the United States, or anywhere else − were accurate and not made when the tuna was caught in a way that adversely affected dolphins. This dispute had raised a number of new, significant issues. The United States was pleased that the Appellate Body had reversed the Panel's conclusion that the US measures were "more trade restrictive than necessary" under Article 2.2 of the TBT Agreement. The United States was particularly pleased that the Panel and the Appellate Body had agreed with the United States that the legitimate objectives of the measures were: (i) to "ensur[e] that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins", and (ii) to "contribut[e] to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins".[12] The United States agreed with the Appellate Body that the alternative measure put forth by Mexico based on the Agreement on the International Dolphin Conservation Program (AIDCP) would not fulfill these objectives. Notably, the Appellate Body had accepted that some technical regulations could and would involve restrictions on trade. In reviewing those measures, the issue was whether the measures pursued a legitimate objective in a way that was no more trade restrictive than necessary. The United States agreed with the Appellate Body's analysis and appreciated confirmation that US measures were not unnecessary obstacles to trade. The United States said that it also appreciated the Appellate Body's confirmation that the AIDCP had not established international standards on dolphin safe labeling within the meaning of Article 2.4 of the TBT Agreement.

13. The United States was, however, disappointed by the Appellate Body's interpretation of technical regulations and standards as those terms were set out in the TBT Agreement. As the Appellate Body had noted, both standards and technical regulations could contain conditions that must be met to use a label, and those conditions could be "compulsory", "binding", and "enforceable". The United States agreed. The United States did not understand, however, why the Appellate Body believed that the factors it had relied on to determine whether a measure was a technical regulation or standard in fact distinguished those types of TBT measures. Indeed, the Appellate Body's reliance on the concept of "covering the field" or "single set of requirements" was fundamentally at odds with the goal stated in the TBT Agreement of harmonizing standards on as wide a basis as possible. By their nature, standards sought convergence around one particular set of requirements. Instead, in the context of labeling, the proper distinction between a technical regulation and a standard was whether compliance with the measure was mandatory such that a producer must label its product. If labeling was voluntary in that a producer need not label its product, then the measure in question was a standard.

14. With respect to Article 2.1 of the TBT Agreement, the United States agreed that a determination of whether imported products were accorded less favorable treatment called for an analysis of whether the measure at issue modified the conditions of competition to the detriment of imported products. The United States believed, however, that the Appellate Body had misapplied this concept. Particularly concerning was that the Appellate Body had ignored the fact that at the time the measures were adopted, Mexican and US tuna product producers were in the exact same situation. Both fished the same ocean for tuna and both set on dolphins.[13] Any adverse effects that accrued to Mexican tuna products *vis-à-vis* those of the United States had resulted from the private choices individual producers made: producers from the United States and other Members had chosen to adapt their practices to meet the conditions for use of the dolphin safe label; producers from Mexico had

[11] Panel Report, paras. 7.438, 7.493, 7.504, 7.738.
[12] Panel Report, paras. 7.413, 7.425, 7.444; Appellate Body Report, para. 325.
[13] Panel Report, para. 7.320.

chosen not to. This did not constitute an "adverse impact on competitive opportunities". Article 2.1 of the TBT Agreement was a guarantee that technical regulations would not be applied in a way that afforded protection to domestic producers. Article 2.1 was not a guarantee that producers who decided not to meet the conditions for a label would be in the same position as producers who chose to meet those conditions. The Panel's analysis in this regard was correct and the United States commended it to Members.[14]

15. Having determined that Mexican tuna producers were disadvantaged by not being able to claim that their tuna products were dolphin safe, the Appellate Body then had considered whether this was the result of discrimination. Strikingly, the Appellate Body had not placed the burden of showing discrimination on the complainant; rather, the Appellate Body found that the respondent must show that its measures were not discriminatory because they were based on "legitimate regulatory distinctions". In this light, the Appellate Body had reviewed the Panel's assessment of whether the US measures were properly "calibrated" to reflect risks to dolphins resulting from different fishing conditions and environmental factors across the world's oceans and found the evidence on the record did not justify the distinctions drawn by the measures. Thus, even though the difference in treatment of Mexican tuna products had been incidental to their origin, the Appellate Body had considered the measure discriminatory. This raised a number of significant concerns. Panels may now need to review the calibration of the measure to risk, cost, and benefit, even if in the end the difference in treatment was not related to origin. Members had nowhere agreed that panels or the Appellate Body should conduct such an inquiry. Nor were panels and the Appellate Body equipped to conduct such an inquiry and second-guess the myriad regulatory issues involved. Indeed, in this case, the Panel faced a complex scientific record that, it had felt compelled to note, involved an area "in which the collection and analysis of information is inherently difficult".[15] A preferable approach to reviewing national treatment claims under Article 2.1 would be a return to determining whether a measure at issue accorded less favorable treatment that was related to the origin of the product. In this regard, the United States recalled that when, before a GATT panel, Mexico had brought similar claims against US dolphin safe labeling provisions under the almost identically worded provision of the GATT 1947, the Panel had rejected those claims.

16. The United States was also disturbed by the Appellate Body's finding that WTO committee decisions could be subsequent agreements that must be "read into" the covered agreements. The United States did not believe that Members had considered or given their approval to decisions taken by WTO committees to be subsequent agreements with interpretative effect. This contravened Article IX of the Marrakesh Agreement and circumvented the protections negotiated there. Furthermore, at a time when Members had reemphasized the value of the WTO committees, this finding risked making the approval and adoption of committee decisions significantly more difficult.

17. On a procedural matter related to Article 17.5 of the DSU, the United States noted that this Report had been issued 116 days after the notice of appeal was filed. While the United States and Mexico had agreed that the appeal would exceed the 90-day period set out in the DSU, the United States remained disappointed that the Appellate Body had not provided transparency about the parties' agreement in its 60-day notice to Members and in its report. The United States thanked Mexico for agreeing to circulate their joint letter agreeing that the parties would deem the Report to be an Appellate Body report for purposes of DSU Article 17.5 in order to provide transparency to all Members. The United States continued to urge the Appellate Body to provide Members with the level of transparency it provided in proceedings exceeding 90 days prior to 2011.

18. Finally, the United States said that it would like to recall for Members that on 24 March 2009, the United States had invoked Article 2005(4) of the North American Free Trade Agreement. In that

[14] Panel Report, paras. 7.320-7.334.
[15] Panel Report, para. 7.504.

provision, the NAFTA parties had agreed that certain disputes which pertained to matters arising under both the WTO Agreement and the standards-related provisions of the NAFTA, and which concerned human, animal or plant life or health or the environment and raised factual issues concerning the environment or conservation, would be heard – at the responding party's option – solely under the NAFTA's dispute settlement procedures. This dispute met the criteria set out in that NAFTA provision. The United States regretted Mexico's decision to continue with WTO dispute settlement in disregard of its obligations. In closing, the United States wished to reiterate its commitment to fulfilling the legitimate objectives of the Dolphin Protection Consumer Information Act.

19. The representative of the European Union said that the EU had participated as a third party in this dispute due to its interest in the systemic issues raised and the relevant interpretation of the relevant obligations set out in Articles 2.1, 2.2 and 2.4 of the TBT Agreement. The EU welcomed the Appellate Body's clarification that the interpretation of the term "technical regulation" in Annex 1.1 to the TBT Agreement required a comprehensive analysis of the measure at issue, including all its characteristics. Moreover, the EU welcomed the Appellate Body's clarification on the proper interpretation of the less favourable treatment test in Article 2.1 of the TBT Agreement. The Appellate Body had applied, in a consistent manner, the test it had set out in its Report in the "US - Cloves Cigarettes" dispute, whereby assessing the consistency of a measure with Article 2.1 required a twofold analysis. First, whether the measure at issue distorted the competitive conditions to the detriment of imported products. Second, whether the detrimental impact on imported products "stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products". The EU was also pleased with the Appellate Body's interpretative analysis of Article 2.2 of the TBT Agreement, where it had set out the factors that were to be taken into account to assess whether a measure was more trade-restrictive than necessary to achieve the legitimate objective at issue, as well as the Appellate Body's remark that the burden of proof under Article 2.2 laid with the complainant.

20. The representative of Australia said that his country welcomed the adoption of the Reports by the DSB. Australia had participated in this dispute as a third party due to its systemic interest in the interpretation and application of the TBT Agreement. Australia noted that this Appellate Body Report, along with the Appellate Body's recent Report in the "US - Clove Cigarettes" dispute, had helped give Members a better understanding of the precise meaning and interpretation of their obligations under the TBT Agreement. Australia expected that those issues be further elaborated in the forthcoming Report in the dispute: "US - Country of Origin Labelling".

21. Nonetheless, Australia had some concerns arising from the Appellate Body Report pertaining to the present dispute. With regard to the interpretation and application of Annex 1.1 and 1.2 to the TBT Agreement, Australia noted that the Appellate Body Report had provided relatively limited analysis on the characterization of the measure at issue in the dispute as a technical regulation. In Australia's view, Members would have benefited from a more detailed explanation of the process of defining and applying the relevant interpretative tools, particularly with respect to the difference between "mandatory" in the case of a technical regulation, and "not mandatory" in the case of a standard. This issue was of particular importance given the serious consequences that followed from a finding that a measure was a technical regulation rather than a standard. In Australia's view, in determining whether a measure was a technical regulation or a standard, it was essential to maintain as clear a distinction between these concepts as the text of the TBT Agreement would permit, so as to assist Members in the design and implementation of their measures.

22. Australia emphasized the importance of ensuring that future decisions on issues of this magnitude clearly set out the interpretive process, which had been followed by the Appellate Body, including drawing upon Article 31 of the Vienna Convention on the Law of Treaties in determining the meaning of significant terms. It was important to remember that Members had deliberately

distinguished between technical regulations and standards in the drafting of the TBT Agreement, so that rules applying to one set of measures were quite different from the rules applying to another. Properly interpreted in light of the definitions in Annex 1 of the TBT Agreement, a measure could not be determined to be a technical regulation if it was a standard, and vice versa. Australia looked forward to further clarification of those issues in relevant future disputes.

23. Australia also noted that the Appellate Body Report had been circulated outside the maximum 90-day time-frame set down in Article 17.5 of the DSU. Australia wished to express its appreciation for and understanding of the recent heavy workload of the Appellate Body. Australia had always emphasized that the quality of Appellate Body reports was paramount. Nevertheless, now that the workload of the Appellate Body had eased, Australia hoped that future Appellate Body reports could be issued within the mandated 90-day time-frame. Australia thanked the Appellate Body, the Panel and the Secretariat for their work in this dispute. Australia hoped that the DSB's recommendations would be implemented in a timely manner so as to bring this dispute to a close.

24. The representative of Japan said that his country thanked the Panel, the Appellate Body and the respective Secretariats for their hard work and for their Reports. As an interested third party, Japan had participated in this dispute due to its systemic interest in the proper interpretation of the relevant provisions of the TBT Agreement at issue in this dispute. Japan was still analyzing the Appellate Body's findings and their possible implications, but wished to make some preliminary observations. First, the Appellate Body appeared to reject the Panel's approach that regulatory distinction based on other factors than "national origin *per se* cannot be relevant in assessing the consistency of a particular measure with Article 2.1 of the TBT Agreement", because it was "difficult to reconcile with the fact that a measure may be *de facto* inconsistent with Article 2.1 when it is origin-neutral on its face".[16] Thus the Appellate Body had made it clear that "any adverse impact on competitive opportunities for imported product *vis-à-vis* like domestic product that is caused by a particular measure may potentially be relevant".[17]

25. Second, while reaffirming that the sixth recital of the preamble would constitute a relevant context regarding "the meaning and ambit of the 'treatment no less favorable' requirement in Article 2.1"[18], the Appellate Body appeared to reject the legal theory that the sixth recital "sets out a test that is separate and independent from Article 2.1" and "each of the criteria of the sixth recital" must be examined to determine the consistency of a technical regulation at issue with Article 2.1.[19]

26. Third, with respect to the burden of proof under the Article 2.1 claim, the Appellate Body had found that the burden of demonstrating that a technical regulation at issue was inconsistent with Article 2.1 was on the complainant, which would presumably include the showing that the detrimental impact on imports reflected discrimination against imports rather than stemming exclusively from a legitimate regulatory distinction (e.g. possible by showing that "the measure is not even-handed").[20] However, the Appellate Body also appeared to recognize that it was for the respondent to show "that the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction"[21], the issue that a panel must analyze to determine no less favorable treatment under Article 2.1.[22]

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[16] Appellate Body Report, para. 225
[17] Appellate Body Report, para. 225.
[18] Appellate Body Report, para. 213; see also Appellate Body Report, "US - Clove Cigarettes", para. 173.
[19] Appellate Body Report, para. 219.
[20] Appellate Body Report, paras. 216 and 283.
[21] Appellate Body Report, paras. 216, 283-284.
[22] Appellate Body Report, para. 214; see also Appellate Body Report, "US - Clove Cigarettes", paras. 182 and 215.

27. Fourth, Japan noted that the Appellate Body appeared to emphasize the need to inquire the measure's "even-handedness" in the analysis of no less favorable treatment requirement under Article 2.1.[23] This notion of "even-handedness" or, the "even-handedness" test had first been introduced by the Appellate Body in "US - Clove Cigarettes"[24] and was given further prominence in this appeal. Specifically, in this dispute, the Appellate Body had scrutinized the measure's "even-handedness" in its analysis of whether the "difference in labeling conditions is a legitimate regulatory distinction".[25] However, Japan still wondered about the precise content or scope of the notion of "even-handedness" and where this "even-handedness" test would be situated in the overall "no less favorable treatment" inquiry.

28. Fifth, after reversing the Panel's finding under Article 2.1, the Appellate Body had relied on the Panel's factual findings made in the context of the analysis under Article 2.2 when it had continued to assess whether the detrimental impact reflected discrimination.[26] Japan recognized that there was a certain overlap between the issue under Article 2.1 and the issue explored and decided by the Panel under Article 2.2, and to a certain extent those Panel's factual findings made under Article 2.2 would be relevant to the inquiry of whether the detrimental impact stemmed exclusively from a legitimate regulatory distinction. However, as the Appellate Body had explained, the scope of inquiries under Articles 2.1 and 2.2 in this dispute differed and the different questions had been presented under these two different provisions. Japan wished to simply recall, in this respect, the Appellate Body's previous statement in another dispute that "in the absence of a full exploration of [the] issues, completing the analysis might affect the due process rights of the participants".[27]

29. Sixth, the Appellate Body had found that the Panel exercised a false judicial economy by not ruling on Mexico's claims under GATT 1994 while finding no violation under Article 2.1 of the TBT Agreement, partly because "as we have found above, the scope and content of these provisions is not the same".[28] However, no preceding part of the Report was cited and Japan was unable to identify such findings in the Report. It would be useful if the Appellate Body could have provided clarity on this point.

30. Finally, with respect to Article 17.5 of the DSU to which the United States and Australia had referred, Japan agreed that, for the purpose of full transparency, the parties' consent should have been recorded in the Appellate Body Report, as had been the customary practice of the Appellate Body in the past.

31. The representative of Argentina said that his country thanked the Panel, the Appellate Body and the Secretariat for their work in this dispute and for the Reports to be adopted by the DSB at the present meeting. Argentina had participated as a third party in this dispute, given its systemic interest in the correct interpretation of the provisions at issue in this dispute, in particular with regard to the TBT Agreement. Argentina was pleased to note that both the Panel and the Appellate Body had ruled that the measure at issue was a technical regulation within the meaning of Annex 1 to the TBT Agreement and was consequently subject to its provisions. Argentina also welcomed the Appellate Body's reversal of the Panel's decision concerning the consistency of the US technical regulation with Article 2.1 of the TBT Agreement. In its third-party statement, Argentina had pointed out that the US measures on "dolphin safe" labelling were discriminatory and ultimately inconsistent with that provision. This was because basing the criteria for granting a label on a production system or conditions, such as, in the present case, on the use of a particular method of fishing, led to

[23] Appellate Body Report, e.g. footnote 461 to para. 215, paras. 216, 225, 232, and 281-298.
[24] Appellate Body Report, "US - Clove Cigarettes", paras. 95, 182 and 215.
[25] Appellate Body Report, para. 284.
[26] Appellate Body Report, e.g. para. 243.
[27] Appellate Body Report, "EC - Sugar", para. 339.
[28] Appellate Body Report, para. 405 (emphasis added).

discrimination between like products. The US measures discriminated on the basis of where the tuna was caught and the fishing method employed. The Appellate Body had taken the same view in reversing the Panel's findings, considering that the measures at issue modified the conditions of competition in the US market to the detriment of Mexican tuna products.

32. In its third-party statement, Argentina had also noted that the definition of "dolphin safe" in the Agreement on the International Dolphin Conservation Program (AIDCP) did not constitute a "relevant international standard", given that the Agreement was not a "recognized body" for the setting of "international standards" that required other WTO Members to adjust their domestic legislation. This was important because countries such as Argentina that were not contracting parties to this agreement were under no obligation to comply with standards issued by organizations to which they were not party. Argentina welcomed the Appellate Body's ruling that the AIDCP dolphin safe definition did not constitute a "relevant international standard" requiring mandatory compliance by WTO Members. Thus, Argentina was satisfied with the way in which this case had been settled, avoiding in particular, forms of discrimination in international trade flows that were unjustifiable in light of the principles of the multilateral trading system.

33. The representative of Mexico said that his country wished to comment on the US statement. At the Panel stage, it had been demonstrated that the fishing method used by the Mexican fleet had a dolphin mortality or injury rate of 0.1 per cent, and the Appellate Body had not reversed that finding. It had also been demonstrated, and in fact recognized by the United States, that the "dolphin-safe" label used or allowed in the United States did not necessarily imply that no dolphins were killed or injured in the course of tuna fishing. This conclusion had not been reversed.

34. With regard to the issue of technical regulation and the difference between a technical regulation and standard in the specific case of this appeal, it had been determined that government intervention whereby a technical regulation was issued should also be taken into account for the purposes of differentiating between a regulation and a standard. Mexico, therefore, agreed with the Panel's interpretation on this matter, which had not been reversed by the Appellate Body. The United States noted that the Mexican fleet did not change its fishing methods. However, it should be emphasized that in the course of the Appellate Body's proceedings, the United States had argued that the imposition of a condition that an observer certify that no dolphins were killed or seriously injured on a particular fishing trip outside the ETP would have significant monetary and infrastructure implications for most nations whose vessels fished for tuna outside the ETP and exported to the United States. The Mexican fleet was the only fleet that would have to assume the costs. With regard to the issue of discrimination, Mexico attached considerable significance to the fact that, with a view to determining a violation of Article 2.1 of the TBT Agreement, the Appellate Body had stated that while it was possible to sell tuna products without a "dolphin-safe" label in the United States, any producer, importer, exporter, distributor or seller of tuna products must comply with the measure at issue in order to make any "dolphin-safe" claim. This was what provided evidence of less favourable treatment.

35. With regard to the parties' consent to circulate the Appellate Body Report outside the time-limit stipulated in Article 17.5 of the DSU, Mexico noted that the United States had made a special request in this regard and Mexico had agreed to delay the issuance of the Report. With regard to the US argument that the dispute should have been settled under the NAFTA's dispute settlement procedures, Mexico noted that the NAFTA mechanism was not operating properly because of the problems related to the roster of panelists. At the same time, Mexico pointed out that the United States had not referred the dispute "Mexico-Corn Syrup" to the NAFTA procedures. In Mexico's view, the US position on this issue was not consistent. Mexico considered that this dispute was highly complex and had addressed many relevant aspects. Mexico believed that the Appellate Body had carried out sound analysis and had taken into account the findings made in previous cases such as "US - Clove Cigarettes".

36. The representative of the United States said that, with respect to Mexico's comments on the characterization of certain facts in this dispute, at this time the United States would simply point out that it would have a copy of its statement available after the present meeting, which included citations to specific findings in the Panel and Appellate Body Reports, so Members could check for themselves what had been debated at the present meeting. With respect to NAFTA panel composition, this was an issue the United States had discussed with Mexico in the past, and the United States looked forward to doing so again.

37. The DSB took note of the statements, and adopted the Appellate Body Report contained in document WT/DS381/AB/R and the Panel Report contained in document WT/DS381/R, as modified by the Appellate Body Report.