United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products:

***Recourse to Article 21.5 of the DSU by Mexico* (DS381)**

Second Written Submission of
the United States of America

July 22, 2014

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TABLE OF ACRONYMS

Acronym	Full Name
2013 Final Rule	Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, 78 Fed. Reg. 40,997 (July 9, 2013)
AIDCP	Agreement on the International Dolphin Conservation Program
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
C.F.R.	Code of Federal Regulations
DMLs	Dolphin Mortality Limits
DPCIA	Dolphin Protection Consumer Information Act
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
EPO	Eastern Pacific Ocean
ETP	Eastern Tropical Pacific Ocean
EEZ	Exclusive Economic Zones
FAD	Fish Aggregating Device
FAO	United Nations Food and Agriculture Organization
FCO or Form 370	NOAA Fisheries Certificate of Origin
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Commission for the Conservation of Atlantic Tunas
IDCP	International Dolphin Conservation Program
IDCPA	International Dolphin Conservation Program Act

IOTC	Indian Ocean Tuna Commission
IRP	International Review Panel
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
NRDC	National Resources Defense Council
PBR	Potential Biological Removal Level
PIROP	Pacific Islands Regional Observer Program
RFMOs	Regional Fishery Management Organizations
RPT	Reasonable Period of Time
SPC	Secretariat of the Pacific Community
SPS	Sanitary and Phytosanitary
TBT Agreement	Agreement on Technical Barriers to Trade
TTF	Tuna Tracking Form
TTVT	Tuna Tracking and Verification Program
U.S.C.	United States Code
WCPFC	Western and Central Pacific Fisheries Commission
WCPO	Western and Central Pacific Ocean
WTO	World Trade Organization

TABLE OF REPORTS

Short title	**Full Citation**
Brazil – Retreaded Tyres (AB)	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007
Canada – Autos (Panel)	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R
Chile – Price Band System (Article 21.5 – Argentina)(Panel)	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/RW and Corr.1, adopted 22 May 2007, upheld by Appellate Body Report WT/DS207/AB/RW
China – Publications and Audiovisual Products (AB)	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010
EC – Asbestos (AB)	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001
EC – Bed Linen (Article 21.5 – India)(AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003
EC – Sardines (AB)	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002
EC – Seal Products (AB)	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014
EC – Seal Products (Panel)	Panel Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R / WT/DS401/R / and Add. 1, adopted 18 June 2014, as modified by Appellate Body Reports, WT/DS400/AB/R / WT/DS401/AB/R

Japan – Apples (AB)	Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003
Korea – Various Measures on Beef (AB)	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
Mexico – Corn Syrup (Article 21.5 – US)(AB)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001
Thailand – Cigarettes (Philippines) (AB)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011
US – Clove Cigarettes (AB)	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012
US – COOL (AB)	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012
US – Gambling (AB)	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)(AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/AB/RW, adopted 11 May 2007
US – Poultry (China)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010
US – Shrimp (AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998

US – Shrimp (Article 21.5 – Malaysia)(AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001
US – Shrimp (Article 21.5 – Malaysia) (Panel)	Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW, adopted 21 November 2001, upheld by Appellate Body Report WT/DS58/AB/RW
US – Tuna II (Mexico)(AB)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012
US – Tuna II (Mexico)(Panel)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R
US – Tuna (Mexico) (GATT)	GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R, DS21/R, 3 September 1991, unadopted
US – Upland Cotton (Article 21.5 – Brazil)(AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton– Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008
US – Wool Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1
US – Zeroing (EC) (Article 21.5 – EC)(AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009

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Exhibit Number	Description
82	WCPFC, *Tuna Fishery Yearbook 2012* (2013)
83	NMFS, Pacific Islands Regional Observer Program, "Deep Set Annual Status Report: 2012" (2013)
84	NMFS, Pacific Islands Regional Observer Program, "Deep Set Annual Status Report: 2013" (2014)
85	Hernandez-Milian, et al., "Results of a Short Study of Interactions of Cetaceans and Longline Fisheries in Atlantic Waters," 612 *Hydrobiologia* 251 (2008)
86	William Jacobson Second Witness Statement (July 21, 2014)
87	NMFS, *Canned Tuna Industry Update* (2013)
88	NMFS, Fisheries Statistics and Economics Division, "Trade Query: Tuna Imports, All Countries Individually, 2012"
89	NMFS, Fisheries Statistics and Economics Division, "Trade Query: Tuna Imports, Iran, Pakistan, Yemen, 2012"
90	Simon P. Northridge, *Driftnet Fisheries and Their Impacts on Non-Target Species: A Worldwide Review* § 2.3.2, FAO Fisheries Technical Paper No. 320 (1991)
91	Hsiang-Wen Huang, "Bycatch of High Sea Longline Fisheries and Measures Taken by Taiwan: Actions and Challenges," 35 *Mar. Pol'y* 712 (2011)
92	WCPFC, Chinese Taipei: Annual Report, at 6, 5th Reg. Sess. Sci. Comm. (2009)
93	WCPFC, Chinese Taipei: Annual Report, at 5, 6th Reg. Sess. Sci. Comm. (2010)
94	WCPFC, Chinese Taipei: Annual Report, at 5, 7th Reg. Sess. Sci. Comm. (2011)
95	WCPFC, Chinese Taipei: Annual Report, at 5, 8th Reg. Sess. Sci. Comm. (2012)
96	WCPFC, Chinese Taipei: Annual Report, at 5, 9th Reg. Sess. Sci. Comm. (2013)
97	W.F. Perrin et al., *Report of the Second Workshop on the Biology and Conservation of Small Cetaceans and Dugongs of South-East Asia*, CMS Technical Series Publication No. 9 (2002)
98	Susan Reed, "A Filmmaker Crusades to Make the Seas Safe for Gentle Dolphins," People (Aug. 6, 1990) and Anthony Ramirez, "Epic Debate Led to Heinz Tuna Plan," *NY Times* (Apr. 16, 1990) (Orig. Exh. Amicus-2)
99	Statement of Rep. Barbara Boxer before the H. Rep., 136 Cong. Rec. H11878-02, 101st Cong. (Oct. 23, 1990)
100	IDCP IRP, *Summary of Pending Special Cases Monitored by the IRP*, Doc. IRP-45-09b (June 17, 2008)

101	IDCP IRP, *Summary of Pending Special Cases Monitored by the IRP*, Doc. IRP-54-08b (Oct. 17, 2013)
102	Civil Monetary Penalties; Adjustment for Inflation, 77 Fed. Reg. 72915 (Dec. 7, 2012)
103	18 U.S.C. § 1001
104	16 U.S.C. § 1377
105	16 U.S.C. § 3374
106	18 U.S.C. § 545
107	50 C.F.R. § 300.17
108	50 C.F.R. § 300.22
109	50 C.F.R. §§ 300.174-175
110	50 C.F.R. § 300.218
111	50 C.F.R. § 660.708
112	AIDCP Budget, Doc. MOP-29-06, 29th Mtg. of the Parties, Lima, Peru (July 8, 2014)
113	Determination of Observer Programs as Qualified and Authorized by the Assistant Administrator for Fisheries, 79 Fed. Reg. 40,718 (July 14, 2014)
114	NMFS, *National Observer Program FY 2012 Annual Report* (2013)
115	WCPFC, *WCPFC Record of Fishing Vessels*, http://www.wcpfc.int/record-fishing-vessel-database (accessed July 21, 2014)
116	AIDCP Budget, Doc. MOP-27-06, at 2, 27th Mtg. of the Parties (Veracruz, Mexico, 4 June 2013)
117	IATTC, "AIDCP Observer Program Info" (data received by Erika Carlsen, NOAA, from Ernesto Altamirano Nieto, IATTC) (July 14, 2014)
118	IATTC, *Quarterly Report – October-December 2012* (2013)
119	"Conservation," *Oxford English Dictionary*, at 485 (Oxford: Clarendon Press, 1993)

I. INTRODUCTION

1. In its second written submission, Mexico continues to claim that the U.S. dolphin safe labeling requirements are wholly illegitimate. In Mexico's view, it is not possible for the United States, consistent with its WTO obligations, to draw distinctions between tuna product containing tuna caught using different fishing methods for purposes of the dolphin safe label. As Mexico has previously declared, "all tuna fishing methods should be either disqualified or qualified."[1]

2. But because the amended dolphin safe labeling measure does draw a distinction between tuna product containing tuna caught by setting on dolphins and other fishing methods, and Mexican vessels continue to set on dolphins to catch tuna, Mexico argues that the amended measure discriminates against Mexican tuna product inconsistently with Article 2.1 of the *Agreement on Technical Barriers to Trade* (TBT Agreement) and Articles I:1 and III:4 of the *General Agreement on Tariffs and Trade 1994* (GATT 1994). Mexico considers the amended measure to be so illegitimate, in fact, that it makes *no* contribution to the protection of dolphins, nor *even relates* to the conservation of dolphins.[2]

3. Mexico's goal is clear. For Mexico, the Panel should find that under the covered agreements the United States must choose: declare setting on dolphins to be a dolphin safe fishing method or end the labeling regime entirely. Mexico is wrong on both the law and the facts.

4. As to the law, an examination of the 2013 Final Rule and the recommendations and rulings of the Dispute Settlement Body (DSB) clearly demonstrates that the United States has come into compliance with Article 2.1 of the TBT Agreement. Indeed, the 2013 Final Rule *directly addresses* the concerns of the Appellate Body in this dispute. It is further clear that no matter what one's views are with respect to whether Mexico has proven its GATT 1994 claims, the DSB recommendations and rulings and the 2013 Final Rule together establish that the amended measure is fully justified under Article XX of the GATT 1994.

5. Mexico adopts two strategies to address these high hurdles. First, it sets forth what amounts to an "appeal" of the DSB recommendations and rulings, arguing that the original panel and Appellate Body simply got it wrong the first time around. For Mexico, they got it wrong that the distinction between setting on dolphins and other fishing methods is legitimate;[3] they got it wrong that the original measure contributes to its objective;[4] and they got it wrong that the measure does not "coerce" Mexico – they simply got it wrong. Second, Mexico urges the Panel not to proceed in this compliance proceeding on the bases of the adopted DSB recommendations and rulings. Instead, Mexico suggests that other aspects of the measure, which have not been found to be WTO-inconsistent and which are *unchanged* from the original measure, prove that

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[1] Mexico's First Written 21.5 Submission, para. 263.

[2] *See* Mexico's Second Written 21.5 Submission, paras. 270, 296.

[3] *See, e.g.*, Mexico's Second Written 21.5 Submission, paras. 133-43; Mexico's First Written 21.5 Submission, paras. 247-265.

[4] Mexico's Second Written 21.5 Submission, para. 268.

the United States has not come into compliance. But these record-keeping/verification and observer requirements are wholly irrelevant to the TBT Article 2.1 analysis in this proceeding, and, because these aspects do not constitute a breach of either GATT 1994 Article I:1 or III:4, they are similarly irrelevant to the Article XX analysis. Both of Mexico's strategies fail.

6. As to the facts, it is clear that Mexico cannot prove what it asserts. Although Mexico repeatedly claimed in its first submission that all other fishing methods "have adverse effects on dolphins that are equal to or greater" than setting on dolphins does,[5] the United States has shown that this is not the case.[6] The data proves just the opposite of what Mexico claims, a point that Mexico notably ignores in its second submission.

7. Mexico now appears to abandon *its own* framework and argues that the United States cannot draw distinctions between different fishing methods because all fishing methods result in at least *some* harm to dolphins.[7] But Mexico's argument misses the point. All tuna products are treated the same – if they were produced in manner that harms dolphins, they are not eligible for the dolphin safe label. That harm would come from setting on dolphins, as the evidence shows this fishing method is particularly harmful, or from a dolphin being killed or seriously injured. Furthermore, different fishing methods do not cause the *same* harm. And there is no indication in the covered agreements or in the DSB recommendations and rulings that the United States cannot narrowly tailor its measure to the available science.[8] Indeed, what Mexico is arguing is essentially that the United States must ignore the obvious fact that there are key differences between setting on dolphins and other fishing methods.[9]

8. Mexico thus fails, as a matter of law and fact, to establish that the United States may not distinguish between intentional setting on dolphin and other fishing methods for the purpose of a dolphin safe label. As such, Mexico's insistence that the United States has acted contrary to its obligations under the TBT Agreement and the GATT 1994 is simply incorrect. Mexico's case fails.

9. The United States respectfully requests the Panel to reject Mexico's claims that the United States has not brought its measures into compliance with the DSB recommendations and rulings.

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[5] *See, e.g.*, Mexico's First Written 21.5 Submission, paras. 13, 248, 263, 306.

[6] *See* U.S. First Written 21.5 Submission, sec. II.C.

[7] *See, e.g.*, Mexico's Second Written 21.5 Submission, paras. 28, 142.

[8] Just the opposite is true, of course. *See, e.g.*, *EC – Seal Products (AB)*, para. 5.317; *US – Clove Cigarettes (AB)*, para. 225.

[9] *See US – Tuna II (Mexico) (Panel)*, para. 7.438 ("[C]ertain fishing techniques seem to pose greater risks to dolphins than others. It is undisputed, in particular, that the fishing method known as setting on dolphins may result in a substantial amount of dolphin mortalities and serious injuries").

II. FACTUAL BACKGROUND

10. In its first submission, the United States explained why the facts do not support Mexico's claims. In its second submission, Mexico largely ignores the evidence the United States submitted, and instead makes new assertions that lack any evidentiary support. In this section, the United States explains that: a) Mexico has no factual basis for its claims, regardless of what level of harm setting on dolphins causes; b) Mexico has ignored the evidence as to the harms to dolphins caused by setting on dolphins; c) Mexico has ignored the evidence as to the harms to dolphins caused by fishing methods used to produce tuna for the U.S. tuna product market; d) Mexico has ignored both the lack of relevance and the evidence as to the harms to dolphins caused by fishing methods not used to produce tuna for the U.S. tuna product market; and e) Mexico has misstated the evidence as to which Members are producing tuna and tuna product for the U.S. tuna product market.

A. Mexico Has No Factual Basis for Its Claims, Regardless of What Level of Harm Setting on Dolphins Causes

11. As discussed above, the central issue in this proceeding is whether the United States can, consistent with its WTO obligations, draw distinctions between different fishing methods for purposes of its dolphin safe labeling regime. Specifically, the question is whether the amended measure can declare tuna product containing tuna caught by setting on dolphins to be ineligible for the label while tuna product containing tuna caught by other fishing methods is potentially eligible for the label.

12. The debate between the parties on this issue has thus far centered on the harm (both observed and unobserved) to dolphins caused by the various fishing methods in various parts of the world. But the Panel need not wade through these exhibits to determine that Mexico's argument lacks a sufficient factual basis. While Mexico claims that all fishing methods are essentially the same – "all tuna fishing methods should be either disqualified or qualified"[10] – the fact is that there is *only* one fishing method that *targets* dolphins. Commonly employing speedboats and helicopters (flying low to the water), large purse seine vessels in the ETP regularly chase down dolphins and force them into a tight group (which can take 2-3 hours), capturing the dolphins and the tuna in the same net, and then attempting to release the captured dolphins without drowning or otherwise injuring them.[11]

13. Mexico claims that setting on dolphins is "dolphin safe" (or at least as "dolphin safe" as any other tuna fishing method). It is not. Even if no dolphins are observed to be killed or injured in a particular set, the *intentional harassment* of those dolphins by large vessels, speedboats, and helicopters is not "safe" for the dolphins. While the United States is fully supportive of the significant efforts of the parties to the Agreement on the International Dolphin Conservation Program (AIDCP) to reduce dolphin mortalities in the Eastern Tropical Pacific Ocean (ETP), and

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[10] *See* Mexico's First Written 21.5 Submission, para. 263.

[11] U.S. First Written 21.5 Submission, paras. 81-83 (citing *US – Tuna II (Mexico) (Panel)*, paras. 7.604, 7.738; Barbara E. Curry, Stress in Mammals: *The Potential Influence of Fishery-Induced Stress on Dolphins in the Eastern Tropical Pacific Ocean*, NOAA Technical Memorandum NMFS, at 6 (1999) (Exh. US-36)).

does not bar Mexico's non-dolphin safe tuna product from the U.S. market, drawing a distinction between tuna product produced using this unique fishing method and tuna product produced using other methods is correct for purposes of a dolphin safe labeling regime.

14. Mexico disagrees, and repeatedly asserts in its submissions that the Panel must determine whether setting on dolphins is dolphin safe through a comparison of the harms caused by the different fishing methods used in fisheries outside the ETP. According to Mexico, the regulatory distinction drawn between setting on dolphins and other fishing methods is illegitimate because *all* other methods of fishing "have adverse effects on dolphins that are equal to or greater" than setting on dolphins.[12] In making this argument, Mexico never sets forth the level of harm Mexico considers to be relevant to the comparison. Indeed, Mexico appears to ignore that setting on dolphins harms dolphins all together.[13] But it is clear that whatever level of harm caused by setting on dolphins is used, Mexico's case fails.

15. If a comparison of the harm caused by setting on dolphins and other fishing methods is needed, the comparison would begin (and, we would think, end) with the harm caused by setting on dolphins prior to the early 1990s. Such an analysis allows for comparison of the *inherent* harms caused by the different fishing methods, without regard to the particular unique safeguards that the IATTC members began putting in place in the 1990s (ultimately becoming the AIDCP's record-keeping/verification and observer requirements that are at issue in this proceeding).

16. As to these pre-1990s harms, it is undisputed that setting on dolphins in the ETP has no equal. Between 1959 and 1972, large purse seine vessels in the ETP killed an estimated 350,000-650,000 dolphins each year, and these vessels were still killing tens of thousands of dolphins annually through 1992.[14] The number of dolphins killed in the ETP tuna purse seine fishery since the fishery began in the late 1950s *is the greatest known for any fishery*,[15] and Mexico puts forward no evidence that other fishing methods, such as purse seine fishing other than by setting on dolphins, longlining, or pole and line fishing, has ever killed remotely this many dolphins in *any fishery* over *any time period*.

17. Not surprisingly, Mexico appears to argue for a different approach. Throughout its first submission (and inconsistently in its second submission), Mexico argues that the Panel should be comparing "AIDCP-consistent" setting on dolphins to other fishing methods when determining whether all other methods of fishing "have adverse effects on dolphins that are equal to or

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[12] *See, e.g.*, Mexico's First Written 21.5 Submission, paras. 13, 248, 263, 306; Mexico's Second Written 21.5 Submission, para. 140.

[13] *See* Mexico's Second Written 21.5 Submission, para. 107 ("[T]una contained in [Mexican] tuna products is caught in full compliance with the AIDCP regime *and without harm to dolphins* . . .") (emphasis added).

[14] U.S. First Written 21.5 Submission, para. 79 (citing Exh. US-34; US-35, at 71, Table 8).

[15] Tim Gerrodette, "The Tuna-Dolphin Issue," in Perrin, Wursig & Thewissen (eds.) *Encyclopedia of Marine Mammals* (2d ed. 2009), at 1192 (Exh. US-29); *see US – Tuna II (Mexico) (Panel)*, para. 7.493 ("The number of dolphins killed in the ETP before the adoption of the controls established by the AIDCP, and the ensuing degradation of the dolphins stocks in this area, are well-documented.").

greater" than setting on dolphins.[16] Under such an approach, the most appropriate benchmark for mortalities from setting on dolphins would be the 5,000 observed dolphin deaths that large purse seine vessels are allowed to cause annually when fishing in an AIDCP-consistent manner.[17] Yet, as discussed in the U.S. first submission, Mexico puts forward no evidence that any other fishery is killing this many dolphins or causing anywhere close to the amount of observed harm that is allowed under the AIDCP.[18] Indeed, Mexico fails to prove that any fishery is causing an "equal to or greater" amount of harm even when using the lower number of 1,127 – the average number of dolphins that are reported killed annually, in recent years, by large purse seine vessels in the ETP.[19] And, of course, Mexico is unable to put forward any evidence that the unobserved harms in other fisheries are remotely close to the level caused in the ETP.[20]

18. Now, Mexico appears to drop the comparison between setting on dolphins and other fishing methods in different parts of its second submission, alleging that it is enough to find that the denial of eligibility for tuna product containing tuna caught by setting on dolphins is illegitimate if other fishing methods result in "many" or "substantial" dolphin mortalities.[21] Leaving aside the various unfounded statements Mexico makes in its second submission,[22] this

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[16] *See, e.g.*, Mexico's First Written 21.5 Submission, para. 248 (arguing that "qualified" fishing methods have adverse effects on dolphins "equal to or greater than the disqualified tuna fishing method of setting on dolphins *in an AIDCP-compliant manner*.") (emphasis added); Mexico's Second Written 21.5 Submission, para. 140. While Mexico does not dispute the 5,000 dolphin mortality figure, it criticizes the United States for "misleadingly" citing this figure "rather than the actual mortalities." Mexico's Second Written 21.5 Submission, para. 72. The relevance of the overall dolphin mortality cap is clear: Mexico repeatedly asserts that "fishing methods outside the ETP have adverse effects on dolphins equal to or greater than setting on dolphins in the ETP *in an AIDCP-consistent manner*," *see id*. para. 140 (emphasis added), and the AIDCP *allows* the large purse vessels operating in the ETP to collectively kill approximately 5,000 dolphins each and every year. There is nothing misleading about this number.

[17] U.S. First Written 21.5 Submission, para. 61 (citing AIDCP, Article 5, para. 1 (Exh. MEX-30); *see* William H. Bayliff, IATTC, *Organization, Functions, and Achievements of the Inter-American Tropical Tuna Commission*, IATTC Special Report 13, at 89 (2001) (Exh. US-21)).

[18] U.S. First Written 21.5 Submission, paras. 129-61.

[19] U.S. First Written 21.5 Submission, paras. 129-61.

[20] In this regard, the United States does not suggest that fishing methods other than setting on dolphins do not cause *any* unobserved harm to dolphins. As we have said, many fishing techniques have the potential to harm marine mammals, including dolphins, and direct harms will have indirect (and unobserved) effects. *See* U.S. First Written 21.5 Submission, para. 71. If a mother dolphin is accidentally drowned in a FAD purse seine set, for example, that observed harm may result in unobserved harm to her calf, namely increased vulnerability to predators and starvation. But Mexico puts forward no evidence that other fishing methods produce anywhere close to the level of unobserved harm that setting on dolphins causes as a result of "the chase in itself." *US – Tuna II (Mexico) (Panel)*, para. 7.504 (recognizing "that such effects would arise as a result of the chase in itself, and would thus exist even if measures are taken in order to avoid the taking and killing of dolphins in the nets, as is the case under the AIDCP"); *see also* U.S. First Written 21.5 Submission, paras. 95-96 and the sources cited therein.

[21] *See* Mexico's Second Written 21.5 Submission, paras. 28, 142, 269.

[22] As discussed elsewhere, Mexico continues to make three additional unfounded assertions: other fishing methods cause "equal to or greater" harm; other fishing methods produce "higher risks of mortality"; and setting on dolphins is not harmful to dolphins *at all*. *See* Mexico's Second Written 21.5 Submission, para. 140 ("Mexico has put forward evidence that demonstrates that fishing methods outside the ETP have adverse effects on dolphins *equal to or greater* than setting on dolphins in the ETP in an AIDCP-consistent manner.") (emphasis added); *id*. para. 170 ("[D]olphins outside the ETP *face higher risks of mortality* or serious injury than dolphins within the ETP when tuna

latest approach appears to be nothing more than saying that tuna product produced from any fishing method that has at least some dolphin bycatch must be treated the same under the amended measure ("all tuna fishing methods should be either disqualified or qualified"[23]). But that is surely wrong. As the original panel rightly found, "certain fishing techniques seem to pose greater risks to dolphins than others,"[24] and the United States does not act inconsistently with its WTO obligations by distinguishing among tuna products based on the undisputable fact that there are important differences in the fishing methods that produce the tuna product.[25]

19. In this context, the denial of eligibility for tuna product containing tuna caught by setting on dolphins is entirely correct – "setting on dolphins *is* particularly harmful to dolphins."[26] The United States does not act inconsistently with its WTO obligations by refusing to allow tuna product containing tuna caught by setting on dolphins to carry the dolphin safe label. The facts support this conclusion, as discussed below.

B. Mexico Ignores the Evidence as to the Harms Caused by Setting on Dolphins

20. In the U.S. first submission, the United States explained the significant observed and unobserved harms caused by setting on dolphins both with the AIDCP requirements in place and without them.[27] Such evidence is entirely consistent with the Appellate Body's conclusions that "the fishing method of setting on dolphins causes observed and unobserved adverse effects on

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is being fished in an AIDCP-compliant manner.") (emphasis added); *id*. para. 107 ("[T]una contained in [Mexican] tuna products is caught in full compliance with the AIDCP regime *and without harm to dolphins* . . .") (emphasis added).

[23] Mexico's First Written 21.5 Submission, para. 263.

[24] *US – Tuna II (Mexico) (Panel)*, para. 7.438; *see also US – Tuna II (Mexico) (AB)*, para. 262 ("[W]e do not see that the Panel found that harm to dolphins resulting from setting on them is equivalent to harm resulting from other fishing methods.").

[25] And, of course, tuna product containing tuna caught where a dolphin was killed or seriously injured is ineligible for the label. *See* 50 C.F.R. § 216.91(a)(4) (Exh. US-2).

[26] *US – Tuna II (Mexico) (AB)*, para. 289 (emphasis added). Mexico asserts that the United States "mischaracterizes" this statement." *See* Mexico's Second Written 21.5 Submission, para. 10. This is untrue. The Appellate Body stated that "the fishing technique of setting on dolphins is particularly harmful to dolphins" without any qualifier relating to the AIDCP. *See US – Tuna II (Mexico) (AB)*, paras. 289, 297. Further, the panel report paragraph cited by the Appellate Body states: "[C]ertain fishing techniques seem to pose greater risks to dolphins than others. It is undisputed, in particular, that the fishing method known as setting on dolphins may result in a substantial amount of dolphin mortalities and serious injuries, especially when used without applying certain fishing gear and procedures designed to reduce bycatch." *See US – Tuna II (Mexico) (Panel)*, para. 7.438. Thus the original panel found that setting on dolphins was a fishing technique that poses greater risks and *especially* when conducted without precautions. It is undisputed that setting on dolphins is more dangerous *without* the AIDCP protections than with them, but it is not accurate that the panel found that *other methods* pose the same risks of observed and unobserved harm to dolphins. *See US – Tuna II (Mexico) (AB)*, para. ("*[W]e do not see that the Panel found that harm to dolphins resulting from setting on them is equivalent to harm resulting from other fishing methods*. Instead, as noted above, the Panel stated that it was not 'persuaded' that the risks arising from fishing methods other than setting on dolphins to catch tuna outside the ETP are demonstrated to be lower than the *similar* threats faced by dolphins in the ETP,' which *we understood as referring to threats from fishing methods other than setting on dolphins in the ETP*.") (emphasis added).

[27] *See* U.S. First Written 21.5 Submission, paras. 89-101.

dolphins,"[28] and that "setting on dolphins is particularly harmful to dolphins."[29] In making this (and other) findings on this issue, the Appellate Body wholly affirmed the original panel's findings regarding the harms of setting on dolphins.[30] Notably, the Appellate Body recognized that it was *uncontested* in the original proceeding that the setting on dolphins may cause harm to dolphins, including observed[31] and unobserved harms.[32]

21. Mexico puts forward no evidence that questions these findings, and appears to wholly ignore a central part of *its own comparison* of the harms allegedly occurring in different fisheries. Mexico merely asserts – without evidence – that "tuna contained in [Mexican] tuna products is caught in full compliance with the AIDCP regime *and without harm to dolphins* . . ."[33] That is an entirely false statement. Just the opposite is true – dolphin mortality in the ETP, even with the AIDCP requirements in place, "remains among the largest documented cetacean bycatch in the world."[34] Indeed, Mexico has not shown that any other tuna fishery has cetacean bycatch even approaching the average annual in the ETP of 1,127 dolphins killed, much less the 5,000 dolphins mortalities that the AIDCP allows.

C. Mexico Ignores the Evidence as to the Difference in Harms Caused by Fishing Methods Used to Produce Tuna Product for the U.S. Market

22. As the United States explained in its first submission, three fishing methods – purse seine fishing (other than by setting on dolphins), longline fishing, and pole-and-line fishing – produce

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[28] *See US – Tuna II (Mexico) (AB)*, para. 287 ("The United States has presented extensive evidence and arguments, and the Panel has made uncontested findings, to the effect that the fishing method of setting on dolphins causes observed and unobserved effects on dolphins."); *see also id.* para 246 (stating that the panel "found that the United States had put forward sufficient evidence to raise a presumption 'that the method of setting on dolphin has the capacity of resulting in observed and unobserved adverse effects on dolphins") (citing *US – Tuna II (Mexico) (Panel)*, paras. 7.737, 7.560).

[29] *US – Tuna II (Mexico) (AB)*, para. 289.

[30] *See, e.g.*, *US – Tuna II (Mexico) (AB)*, paras. 245-51.

[31] *US – Tuna II (Mexico) (AB)*, para. 245 ("The Panel also noted that 'both parties recognize that setting on dolphins may adversely affect dolphins.'"); *id.* ("Mexico does not deny that dolphins may be killed or seriously injured during purse-seine net fishing manoeuvres."); *id.* ("[Mexico] does not deny that setting on dolphins even according to the AIDCP may still result in observed dolphin mortality or serious injury, Mexico's second written submission, para. 204.").

[32] *US – Tuna II (Mexico) (AB)*, para. 246 ("The Panel further remarked that 'there is a degree of uncertainty in relation to the extent to which setting on dolphins may have an adverse impact on dolphins beyond observed mortality.' Nonetheless, the Panel determined 'that sufficient evidence has been put forward by the United States to raise a presumption that genuine concerns exist in this respect.' The Panel also found that the United States had put forward sufficient evidence to raise a presumption 'that the method of setting on dolphins 'has the capacity' of resulting in observed and unobserved adverse effects on dolphins.'") (quoting *US – Tuna II (Mexico) (Panel)*, paras. 7.504, 7.737); *US – Tuna II (Mexico) (AB)*, n.513 ("as we have accepted earlier, setting on dolphins may result in observed and unobserved harmful effects on dolphins" and stating, "In response to questioning at the oral hearing, *Mexico indicated that it did not contest this finding by the Panel*.") (quoting *US – Tuna II (Mexico) (Panel)*, para. 7.560) (emphasis added).

[33] Mexico's Second Written 21.5 Submission, para. 107.

[34] NOAA Southwest Fisheries Science Center, *The Tuna Dolphin Issue* (Nov. 6, 2008) (Exh. US-39).

99.9 percent, by weight, of the U.S.-caught tuna processed by U.S. canners and sold on the U.S. market and account for 95.2 percent of vessel records associated with imported tuna and tuna product since 2005.[35] Mexico does not appear to contest these facts and, in any event, does not present evidence that any other fishing method produces significant amounts of tuna product for the U.S. market. Of course, this evidence makes sense because, as the original panel noted,[36] the vast majority of tuna product sold in the United States is produced from tuna caught in the Western Central Pacific Ocean (WCPO), where these three fishing methods are dominant.[37] And, of course, any tuna product containing tuna caught where a dolphin was killed or seriously injured would not be eligible for the dolphin safe label.[38]

23. Even with respect to the more general question, as to whether these three fishing methods cause direct harm to dolphins "equal to or greater" than the harm caused by setting on dolphins,[39] Mexico simply ignores the evidence that the United States has put forward showing that they do not. Specifically, Mexico ignores that:

- in the ETP, dolphin sets account for *virtually all* observed dolphin mortalities and serious injuries despite the fact that dolphin sets constitute less than half the total number of sets on average. The numbers are stark – the percentage of dolphins killed in the ETP purse seine fishery from dolphin sets <u>*has never fallen below 99 percent*</u> of total observed dolphin mortalities in the years 2009-2013[40];

- in the WCPO tuna purse seine fishery – where nearly all sets are unassociated or floating object sets – dolphin mortality per 1,000 sets was an estimated 26.98 dolphins in 2007-2009 and 2.64 dolphins in 2010, whereas, in the ETP purse seine fishery, dolphin mortality per 1,000 sets was 56.1 dolphins in 2009 and 53.4 dolphins

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[35] *See* U.S. First Written 21.5 Submission, paras. 118, 125 (Table 2), 127 (Table 3) (citing William Jacobson Witness Statement, Appendix 2-3 (May 26, 2014) (Exh. US-4)).

[36] *See US – Tuna II (Mexico) (Panel)*, para. 7.533.

[37] *See* WCPFC, *Tuna Fishery Yearbook 2012*, Table 84 (2013) (Exh. US-82).

[38] 50 C.F.R. § 216.91(a)(4) (Exh. US-2).

[39] *See* Mexico's First Written 21.5 Submission, paras. 13, 248, 263, 306.

[40] U.S. First Written 21.5 Submission, para. 133 (citing IATTC, EPO Dataset 2009-2013 (May 9, 2014) (Exh. US-26); IATTC, *Annual Report of the Inter-American Tropical Tuna Commission – 2009*, at 54 (2013) (Exh. US-35) (2009 IATTC Annual Report); IATTC, *Annual Report of the Inter-American Tropical Tuna Commission – 2008*, at 50-51 (2010) (Exh. US-43) (2008 IATTC Annual Report)). Exhibit US-26 notes that in 2009, 1,235 of the 1,237 dolphins killed (99.8%) in the ETP purse seine fishery were killed in dolphin sets, which accounted for 49.0 percent of all sets by large purse seine vessels in the ETP in that year. In 2010, 1,169 of the 1,170 dolphins killed (99.9%) in the ETP purse seine fishery were killed in dolphin sets, which accounted for 52.9 percent of all sets. In 2011, 976 of the 986 dolphins killed (99.0%) in the ETP purse seine fishery were killed in dolphin sets, which accounted for 44.0 percent of all sets. In 2012, 870 of the 870 dolphins killed (100%) in the ETP purse seine fishery were killed in dolphin sets, which accounted for 41.3 percent of all sets. In 2013, 797 of the 798 dolphins killed (99.9%) in the ETP purse seine fishery were killed in dolphin sets, which accounted for 46.6 percent of all sets. *See* IATTC, EPO Dataset 2009-2013.

in 2010.[41] (Considering only sets on dolphins, dolphin mortality per 1,000 sets in the ETP was 113.4 animals in 2009 and 100.4 animals in 2010[42]);

- the average numbers of dolphins killed each year in the Atlantic and Hawaii U.S. longline fisheries between 2006 and 2010 are *mere fractions* of the number killed each year in the ETP and of the number allowed to be killed under the AIDCP[43];
- in the Hawaii longline fishery, which is about half as large as the ETP purse seine fishery in terms of registered vessels, estimated average annual dolphin mortality from 2006-2010 was 40.4 animals per year – only 3.8 percent of average annual dolphin mortality in the ETP during the same period (1,060.4 dolphins) and 0.8 percent of what was allowed under the AIDCP (5,000 dolphins)[44];
- pole and line fishing is not associated with dolphin bycatch or bycatch of any marine mammal[45]; and
- purse seine fishing other than by setting on dolphins, longline fishing, and pole and line fishing are often employed without any dolphin within sight of the vessel and without any dolphin interaction at all, whereas all dolphin sets are inherently dangerous to dolphins.[46] For example, in the Hawaii-based pelagic longline fishery targeting tuna in 2012 and 2013, cetacean interactions occurred in only 1.9 percent (5 out of 263) and 3.7 percent (10 out of 273) of observed trips.[47]

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[41] U.S. First Written 21.5 Submission, para. 132 (citing *Summary Information on Whale Shark and Cetacean Interactions in the Tropical Purse Seine Fishery*, at 4-6, Paper prepared by SPC-OFP, 8th Reg. Sess., Tumon, Guam, Mar. 26-30, 2012 (Jan. 18, 2012) (WCPFC Cetacean Interactions Paper) (Exh. US-58); IATTC, *Tunas and Billfishes in the Eastern Pacific Ocean in 2012*, Doc. IATTC-85-03, at 43-44 (June 14, 2013) (Exh. US-44) (IATTC, *Tunas and Billfishes*); IATTC, *Report on the International Dolphin Conservation Program*, Doc. MOP-28-05, at 15, Table 3 (Oct. 18, 2013) (Exh. MEX-3)).

[42] *See* IATTC, EPO Dataset 2009-2013 (Exh. US-26).

[43] U.S. First Written 21.5 Submission, paras. 139-41 (citing NMFS, "False Killer Whale: Hawaiian Islands Stock Complex," at 267 (Jan. 8, 2013) (Exh. US-59); NMFS, "Short-Finned Pilot Whale: Western North Atlantic Stock," at 75 (Dec. 2011) (Exh. US-61); NMFS, "Risso's Dolphin: Western North Atlantic Stock," at 53 (May 2013) (Exh. US-62); NMFS, "Long-Finned Pilot Whale: Western North Atlantic Stock," at 60 (Dec. 2011) (Exh. US-63)).

[44] U.S. First Written 21.5 Submission, para. 145 (citing "U.S. National Bycatch Report First Edition Update," Table 8.3 (2012) (Exh. US-67); "U.S. National Bycatch Report First Edition Update," Table 8.4 (2012) (Exh. US-68)).

[45] U.S. First Written 21.5 Submission, para. 149 (citing Eric L. Gilman & Carl Gustaf Lundin, *Minimizing Bycatch of Sensitive Species Groups in Marine Capture Fisheries: Lessons from Tuna Fisheries*, at 3 (2009) (Exh. US-69)).

[46] U.S. First Written 21.5 Submission, paras. 74, 113 (citing Gerrodette 2009, at 1192 (Exh. US-29)),

[47] *See* NMFS Pacific Islands Regional Observer Program (PIROP), "Deep Set Annual Status Report: 2012" (2013) (Exh. US-83); NMFS PIROP, "Deep Set Annual Status Report: 2013" (2014) (Exh. US-84). This data is consistent with other studies of longline fisheries. In a study of eight Spanish commercial longline vessels operating in the Atlantic in 2006-2007 (observing a total of 635 sets), cetacean bycatch occurred in only 1 instance (0.16

24. As to whether these three fishing methods cause *unobserved* harms equal to or greater than those caused by setting on dolphins, Mexico fails to put forward *any* evidence to support its assertion.[48]

25. Instead of responding to these facts, Mexico focuses on an incident involving two U.S. vessels. Mexico asserts that the *Freitas* case shows U.S. vessels set on dolphins without self-reporting,[49] but presents no evidence that the conduct of the *Freitas* vessels is typical or widespread or that any tuna product sold in the U.S. market was falsely labeled dolphin safe.[50] Without such evidence, the *Freitas* case demonstrates primarily that NOAA takes its responsibilities seriously and monitors and enforces U.S. laws governing fishing.[51]

26. Mexico also asserts that the United States finds dolphin mortality due to longline fishing "acceptable" for purposes of dolphin safe labeling.[52] This is incorrect. Under the amended measure, tuna caught in a longline set during which a dolphin was killed or seriously injured *would not be eligible* for the dolphin safe label.[53] Further, the United States does not cite to the potential biological removal (PBR) calculations in particular fisheries "to defend dolphin mortalities" in the Atlantic but to demonstrate that dolphin mortalities caused by the Atlantic longline fleet are *a small fraction* of dolphin mortalities caused by setting on dolphins in the ETP.[54]

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percent of sets). *See* Hernandez-Milian, et al., "Results of a Short Study of Interactions of Cetaceans and Longline Fisheries in Atlantic Waters," 612 *Hydrobiologia* 251, 254 (2008) (Exh. US-85). Furthermore, a cetacean interaction occurred in only 28 sets (4.4 percent of the total). *See id.* Thus, in 95.6 percent of the sets, cetaceans, including dolphins, seemed to be unaffected by the tuna fishing activity. *See id.* With sets on dolphins, by contrast, dolphins are affected, even if they are not killed, in 100 percent of sets.

[48] *See* Mexico's Second Written 21.5 Submission, paras. 50-55; Mexico's First Written 21.5 Submission, paras. 126-51.

[49] Mexico's Second Written 21.5 Submission, paras. 30-31.

[50] Mexico's Second Written 21.5 Submission, paras. 30-31.

[51] *See* U.S. First Written 21.5 Submission, para. 271.

[52] Mexico's Second Written 21.5 Submission, paras. 32, 34.

[53] Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, 78 Fed. Reg. 40,997, 41002 (Exh. MEX-7) (2013 Final Rule); *see also* U.S. First Written 21.5 Submission, paras. 32, 34, 36.

[54] *See* U.S. First Written 21.5 Submission, paras. 138-41 ("The PBRs for both species and the number of animals killed or seriously injured are a mere fraction of the number of dolphins . . . killed . . . each year in the ETP, even under the AIDCP monitoring regime").

Mexico is also wrong that the United States "claims that the AIDCP does not provide for the monitoring of the number of dolphins seriously injured." *See* Mexico's Second Written 21.5 Submission, para. 35. In fact, the United States stated that U.S. data "includes serious injuries" whereas "IATTC data on dolphin mortality in the ETP does not." *See* U.S. First Written 21.5 Submission, para. 141. This is accurate. The IATTC *collects* data on dolphin injury, *see* IATTC, EPO Dataset 2009-2013 (Exh. US-26), but injuries are not counted in published mortality figures or counted against parties' dolphin mortality limits (DMLs). *See, e.g.*, IATTC, *Tunas and Billfishes*, at 97, Table 1 (Exh. US-44); AIDCP, *Report on the International Dolphin Conservation Program*, Doc. MOP-26-05, 26th Mtg. of the Parties (2012) (Exh. US-41). By contrast, data published in the U.S. Stock Assessment Reports includes mortalities *and serious injuries*. *See, e.g.*, NMFS, "False Killer Whale: Hawaiian Islands Stock Complex," at 264 (Exh. US-59). This and the myriad other data that NMFS collects on a routine basis demonstrates the absurdity of

27. Mexico fails to prove its assertion that the harms to dolphins caused by the three fishing methods that produce tuna for the U.S. tuna product market "have adverse effects on dolphins that are equal to or greater" than setting on dolphins.

D. Mexico Ignores Both the Lack of Relevance and the Evidence of the Harms Caused by Fishing Methods that Are Not Used to Produce Tuna Product for the U.S. Market

28. As the United States explained in its first submission, three fishing methods – hand line fishing, gillnet fishing, and trawl fishing – collectively account for less than one percent of the vessel records associated with imported tuna and tuna product sold in the U.S. tuna product market.[55] Mexico does not appear to contest this data and does not provide any evidence that any one of these fishing methods produces above a *de minimis* amount of tuna or tuna product for the U.S. tuna product market. In fact, Mexico seems to wholly ignore the irrelevance of these fishing methods to its claim, which cannot be built upon hypotheticals or trace amounts of trade.[56]

29. In any event, Mexico clearly fails to prove what it asserts as to these fishing methods. For observed harms:

- Mexico asserts that gillnet fishing kills "hundreds of thousands" of dolphins and that this method is "used by some of the nations" that supply tuna sold on the U.S. tuna product market.[57] But Mexico ignores the fact that: 1) the studies upon which it relies are out of date or concern fisheries that no longer exist[58]; 2) Mexico relies on studies analyzing fisheries that target fish other than tuna[59]; and 3) the NOAA Form 370 data demonstrates that gillnet fishing produces virtually no tuna sold on the U.S. tuna product market.[60]

Mexico's claim that "NMFS has never undertaken to evaluate the risks to dolphins in other oceans." *See* Mexico's Second Written 21.5 Submission, para. 141. In fact, both Mexico and the United States rely extensively on data NMFS has collected regarding the risks to dolphins posed by fishing activities around the world. *See, e.g.*, Exh. MEX-18, 40, 58, 60, 61, 62, 106; Exh. US-59, 61, 62, 63, 67, 68.

[55] *See* U.S. First Written 21.5 Submission, paras. 150, 152, 157 (citing William Jacobson Witness Statement, Appendix 2 (Exh. US-4)); *see also* Table 1 *infra*.

[56] *See* U.S. First Written 21.5 Submission, para. 124.

[57] *See* Mexico's Second Written 21.5 Submission, para. 53.

[58] *See* U.S. First Written 21.5 Submission, para. 115 (citing Mexico's First Written 21.5 Submission, paras. 128-30 and Council Regulation (EC) No. 1239/98 Amending Regulation (EC) No 894/97 Laying Down Certain Technical Measures for the Conservation of Fishery Resources (8 June 1998) (Exh. US-72)).

[59] *See* U.S. First Written 21.5 Submission, para. 115 (citing K.S.S.M. Yousuf et al., "Observations on Incidental Catch Of Cetaceans in Three Landing Centres Along The Indian Coast," 2 *Marine Biodiversity Records* 1, 2-3 (2009) (Exh. MEX-50)).

[60] *See* U.S. First Written 21.5 Submission, paras. 127-28, Table 3. The data from the WCPFC, the area where the majority of all tuna sold on the U.S. tuna product market is caught, confirms this data, showing that the vast majority of tuna caught using longline, pole-and-line, and purse seine nets. *See Tuna Fishery Yearbook 2012*,

- Mexico asserts that trawl fishing "kills and injures dolphins."[61] But Mexico does not contest the U.S. evidence that: 1) trawl fishing is not well-suited to fishing for tuna and is not commonly used in tuna fisheries[62]; and 2) trawl fishing produces virtually no tuna for the U.S. tuna product market.

- Mexico ignores hand line fishing entirely, even though it accounts for the largest number of vessel records of any of these three methods. Mexico appears to concede that this fishing method is not associated with dolphin bycatch.[63]

30. As to unobserved harms, Mexico simply presents no evidence that these fishing methods cause unobserved harms at anywhere close to the level caused by setting on dolphins. In fact, Mexico puts forward no evidence at all on this point.[64]

31. Mexico fails to prove its assertion that the harms to dolphins caused by the three fishing methods that produce no tuna, or only *de minimis* amounts of tuna, for the U.S. tuna product market "have adverse effects on dolphins that are equal to or greater" than setting on dolphins.

E. Mexico Misstates the Evidence as to Which Members Are Producing Tuna and Tuna Product for the U.S. Tuna Product Market

32. As the United States stated in its first written submission, tuna product from Ecuador, Indonesia, the Philippines, Thailand, Vietnam, and the United States accounts for approximately 96 percent of the U.S. tuna product market, and it is with these products that Mexico must make its case.[65] Mexico responds that not all tuna product imported from these Members is caught by vessels flagged to these Members and that United States does not know how and by whose

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Table 84 (2013) (Exh. US-82). As we have noted previously, gillnets are used largely in small to medium sized local fisheries that are not integrated into the international tuna product market. *See* U.S. First Written 21.5 Submission, para. 153 (citing FAO, "Tuna Driftnet Fishing" (Exh. MEX-49)).

[61] Mexico's Second Written 21.5 Submission, para. 55.

[62] *See* U.S. First Written 21.5 Submission, para. 158-59 (citing William Jacobson Witness Statement, Appendix 1 (Exh. US-4); Gilman & Lundin 2009, at 3 (Exh. US-69)).

[63] *See* U.S. First Written 21.5 Submission, para. 151. With respect to large-scale driftnet fishing, Mexico asserts that there is "no mechanism" to prevent the entry of fish caught in high seas driftnets, ignoring that the NOAA Form 370 provides such a mechanism. *See* Mexico's Second Written 21.5 Submission, para. 54; U.S. First Written 21.5 Submission, para. 25 (citing William Jacobson Witness Statement, Appendix 1 (Exh. US-4)). Mexico also alleges that the United States did not address the three vessel records marked "DN" for large-scale high seas driftnet. In fact, U.S. Exhibit 4 explains that all three were submitted in 2006 by Philippines-flagged vessels and that the NMFS has good reason to believe that all three were miscoded. *See* William Jacobson Witness Statement, Appendix 1 (Exh. US-4).

[64] *See supra*, secs. II.C, II.D.

[65] *See* U.S. First Written 21.5 Submission, para. 124 (citing "U.S. Market for Canned Tuna Products, by Source Country, 2010-2013" (Exh. US-53)); *see also* Mexico's First Written 21.5 Submission, para. 314 (asserting that the "advantage" of the dolphin safe label "is made available to tuna products originating in other countries, *including Thailand and the Philippines*, who are the largest sources of imported tuna products into the United States") (emphasis added).

vessels tuna processed in foreign canneries and exported to the United States is caught.[66] While Mexico is correct as to the former, it is wrong as to the latter.[67] The United States keeps detailed records of where, how, and by whom all tuna contained in imported tuna product was caught.[68]

33. Specifically, every imported shipment of tuna and tuna product must be accompanied by a NOAA Form 370, which includes information about each harvesting vessel, including the flag, gear type, ocean area of harvest, trip dates, and vessel name.[69] This applies equally to all frozen and processed tuna importations.[70] Thus, even if tuna product were a product of Thailand under U.S. customs law, it must be accompanied by a Form 370 that would report the flag and gear type of all vessels that caught tuna contained in that shipment. Information from the NOAA Form 370s is stored in a NMFS database, so that it is possible to present a complete picture, by vessel flag and harvesting gear, of the vessels catching tuna sold on the U.S. tuna product market.[71]

34. Table 1 below presents this information for all imports of non-fresh tuna (processed and unprocessed) from the top 15 sources since 2005:

Table 1. Individual Vessel Records Accompanying Imported Tuna and Tuna Product, 2005-2013[72]

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[66] *See* Mexico's Second Written 21.5 Submission, paras. 25, 18.

[67] Thus, the phrasing in paragraph 117 of the U.S. first submission is inaccurate. *See* U.S. First Written 21.5 Submission, para. 117 (referring to "*vessels flagged* to Thailand, the Philippines, Vietnam, Ecuador, and the United States") (emphasis added). Paragraph 124 presents the correct phrasing: "Thailand, the Philippines, Vietnam, Ecuador, and Indonesia *produce* the vast majority of the *imported tuna products* sold in the United States." *See id.* para. 224.

[68] *See US – Tuna II (Panel) (Mexico)*, para. 2.32 ("[E]very import of every tuna product . . . must be accompanied by a Fisheries Certificate of Origin (NOAA Form 370)" and "US tuna processors must submit monthly reports to the TTVP containing the dolphin-safe status, ocean area of capture, catcher vessel, trip dates, carrier name, unloading dates, and location of unloading of tuna for both imported and domestic receipts."); *see also* U.S. First Written 21.5 Submission, para. 49 (quoting same); William Jacobson Witness Statement, at 1 (Ext. US-4).

[69] *See* U.S. First Written 21.5 Submission, para. 127 ("[T]he TTVP collects Form 370s for each shipment of imported tuna products and the associated vessel records tie each shipment to the gear type used by the harvesting vessel") (citing William Jacobson Witness Statement, Appendix 2 (Exh. US-4): "Vessel records (one record for each harvesting vessel) are associated with the Form 370 submitted with any shipment of imported tuna"); NOAA Form 370 (Exh. MEX-22) (requiring that "vessel flag" be specified (among other things)).

[70] *See* William Jacobson Witness Statement, Appendix 1 (Exh. US-4).

[71] William Jacobson Witness Statement, Appendix 1 (Exh. US-4).

[72] *See* William Jacobson Second Witness Statement (July 21, 2014) (Exh. US-86). The records compiled from the TTVP Form 370 database. *See id.* The TTVP Form 370 database records vessel records, as reported on the NOAA Form 370s submitted by importers. Consequently, entries where the United States is reported as the vessel flag comprise U.S.-caught tuna processed at foreign locations and imported into the United States. The Form 370 database does not cover U.S.-caught tuna processed at U.S.-canneries. Tuna processed at U.S. canneries accounts for approximately 49 percent of all canned tuna on the U.S. market, *see* Exh. US-53, and U.S. caught tuna accounts for approximately 33 percent of tuna processed at U.S. canneries, *see* NMFS, *Canned Tuna Industry Update* (2013) (Exh. US-87). The vessel records from U.S.-caught tuna processed at U.S. canneries were presented in Table 2 of the U.S. First Written 21.5 Submission.

VESSEL FLAG	VESSEL RECORDS	PERCENT OF TOTAL
Taiwan	34,566	13.3%
Indonesia	28,270	10.9%
Philippines	27,271	10.7%
China	23,241	8.9%
Ecuador	21,280	8.2%
United States	17,745	6.8%
Vanuatu	15,779	6.1%
Vietnam	13,765	5.3%
Korea	10,301	4.0%
Mexico*	10,037	3.9%
Japan	9,797	3.8%
Fiji	8,241	3.2%
Canada	4,753	1.8%
Marshall Islands	3,917	1.5%
Thailand	3,706	1.4%
TOTAL**	**233,119**	**89.68%**

* Of the 10,057 Mexican vessel records, 9,878 records pertain to purse seine-caught, non-dolphin-safe tuna.
** The table depicts all countries that account for at least one percent of vessel records.

Thus, the countries that are the top sources of imported tuna product (Ecuador, Indonesia, the Philippines, Thailand, and Vietnam) are also among the top countries catching the tuna contained in that tuna product.

35. Notably, these sources *do not include* any of the countries to which much of the evidence presented in Mexico's first submission related – India, Iran, Pakistan, Sri Lanka, and Yemen.[73] Rather, as the United States showed in its first submission, *hardly any* tuna imported into the United States – either as tuna or as tuna product processed in a foreign cannery – was caught by vessels flagged to any of these countries.[74] It is simply inaccurate to suggest that significant amounts of imported tuna product contain tuna caught by the vessels of these countries.[75]

[73] *See* Mexico's First Written 21.5 Submission, paras. 46, 128, 129, 130 n.103, 153, 154.

[74] *See* U.S. First Written 21.5 Submission, para. 117 ("Of the 284,541 vessel records associated with the Form 370s submitted to NOAA since 2002 up to December 31, 2013, 340 (0.12%) were from India, 2 (0.00%) were from Pakistan, 401 (0.14%) were from Sri Lanka, and 0 (0.00%) were from Yemen.") (citing NMFS, "Individual Vessel Record Gear Types Since the Inception of the 370 Database: India, Pakistan, Sri Lanka, Yemen" (May 23, 2014) (Exh. US-54)).

[75] Indeed, Mexico's Exhibit 98 demonstrates the nearly non-existent share that Sri Lankan, Indian, Iranian, Pakistani, and Yemeni tuna product has of the U.S. market. In 2012, the United States imported 224,454 kilograms of tuna product from India and 1,944,339 kilograms of tuna and tuna product from Sri Lanka, *see* Exh. MEX-98, of which only 620,187 kilos were covered by the dolphin safe labeling measure (the remainder being fresh tuna, which is not covered), *see* 16 U.S.C. § 1385(c)(5) (Exh. MEX-5); NOAA Form 370, at 1 (Exh. MEX-22). Thus, in 2012, Indian and Sri Lankan tuna product accounted for 0.09 percent and 0.24 percent, by weight, of imported tuna product (excluding fresh tuna). *See* NMFS, Fisheries Statistics and Economics Division, "Trade Queries: Tuna Imports, Sri Lanka, India, 2012" (Exh. MEX-98); NMFS, Fisheries Statistics and Economics Division, "Trade Query: Tuna Imports, All Countries Individually, 2012" (Exh. US-88). There were *zero* imports of tuna of any kind from Yemen, Pakistan, or Iran. *See* NMFS, Fisheries Statistics and Economics Division, "Trade Query: Tuna Imports, Iran, Pakistan, Yemen, 2012" (Exh. US-89). This is consistent with Form 370 records from 2002-2012, which show that only a tiny portion of vessel records (0.12 and 0.14 percent, respectively) reported India and Sri

36. Moreover, Mexico's allegations concerning the countries that *do* catch tuna sold on the U.S. tuna product market mostly have no bearing on the fishing activities that produce the tuna imported into the United States and certainly do not suggest that such activities cause anything like the level of harm to dolphins caused by setting on dolphins.

37. Concerning Vietnam and the Philippines, Mexico asserts that these governments have inadequate systems for tracking the catch of their vessels or the origin of their imports.[76] This is simply not relevant to the dispute. The United States does not rely on certificates from governments to determine the country of origin or gear type of the harvesting vessel but on the Form 370s that accompany all imports of frozen and processed tuna. These are generated by the vessel captains and processors themselves, not by the government of the country in which the processor is located. Mexico has presented no evidence that the tuna processing *industry* does not know the origin of tuna products and, indeed, U.S. law requires that they do.

38. Additionally, Mexico criticizes the fishing practices of a number of Members but fails to connect these allegedly poor fishing practices to tuna product sold in the United States. Mexico alleges that Philippine tuna seiners have killed thousands of dolphins in the WCPO, when, in fact, the underlying study is over two decades old,[77] and the recent data generated by the Western Central Pacific Fisheries Commission (WCPFC) confirms that dolphin mortality in the WCPO purse seine fishery is much less than it is in the ETP (*e.g.*, 110 WCPO dolphin mortalities in 2010 compared to 1,170 ETP dolphin mortalities in the same year despite the fact that the WCPO has *six times* the number of purse seine vessels operating in it than the ETP does).[78]

39. Mexico's evidence concerning Taiwan also has no bearing on the harm to dolphins caused by fishing activities related to the U.S. tuna product market:

- Mexico asserts that Taiwan vessels use gillnets but does not address the fact that the Form 370 data shows that gillnets produce almost no tuna for the U.S. tuna product market.[79] Indeed, Mexico does not even assert that the Taiwan gillnet fishery is a tuna fishery.[80]

Lanka as the vessel flag, and almost none reported Pakistan or Yemen. *See* NMFS, "Individual Vessel Record Gear Types Since the Inception of the 370 Database: India, Pakistan, Sri Lanka, Yemen" (May 23, 2014) (Exh. US-54).

[76] *See* Mexico's Second Written 21.5 Submission, paras. 36-37, 41.

[77] *See* Mexico's First Written 21.5 Submission, para. 119 (citing N.M. Young & S. Iudicello, *Worldwide Bycatch of Cetaceans*, NOAA Tech. Memo NMFS-OPR-36, at 112 (2007) (Exh. MEX-18) (citing Dolar, M.L.L. "Incidental Bycatch of Small Cetaceans in Fisheries in Palawan, Central Visayas and Northern Mindanao in the Philippines, 15 *Rep. Int'l Whaling Comm.* 355 (1994)); IATTC, EPO Dataset 2009-2013 (Exh. US-26).

[78] WCPFC Cetacean Interactions Paper, at 5, Table 2b (Exh. US-58). Current data indicates that there 1,493 purse seiners operating in the WCPO versus 235 in the ETP. *See* WCPFC, *Tuna Fishery Yearbook 2012*, Table 73 (Exh. US-82); IATTC, Active Purse Seine Vessel Register (updated May 19, 2014) (Exh. US-19).

[79] *See* William Jacobson Witness Statement, Appendix 2 (Exh. US-4).

[80] *See* Mexico's Second Written 21.5 Submission, para. 43.

- Mexico relies on a report describing cetacean bycatch in a large-scale driftnet fishery north of Australian waters that Taiwan vessels operated in during the 1980s,[81] but which *was shut down in 1986*.[82]

- Mexico asserts that the Taiwan longline fleet "kills dolphins."[83] While the United States has never disputed that longline fishing can cause dolphin casualties, we note that the anecdotal data presented in the report Mexico cites is over two decades old,[84] and that up-to-date data concerning the bycatch of Taiwan's longline fleet show that observed cetacean mortalities range from zero to two animals per year from 2004 to 2012.[85] Based on these observer reports, a report on Taiwan's longline fisheries concluded that "cetacean bycatch was rare."[86] (And in any event, under the amended measure, tuna product containing tuna caught where a dolphin was seriously injured or killed would not be eligible for the label.)

- Finally, Mexico quotes the report's estimates of cetacean mortality in Taiwan's near-shore fisheries.[87] The estimates were based on surveys conducted between 1993 and 1995 and on an interview with "one Chengkung driftnetter in 2000."[88] The report's

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[81] *See* Mexico's Second Written 21.5 Submission, para. 43 (quoting Natural Resources Defense Council (NRDC), "Net Loss: The Killing of Marine Mammals in Foreign Fisheries" (January 2014), at 29 (footnotes omitted) (Exh. MEX-103)) (citing M.B. Hardwood and E.D. Hembree, "Incidental Catch of Small Cetaceans in the Offshore Gillnet Fishery in Northern Australian Waters: 1981-1985," at 363-67, *Report of the International Whaling Commission* 37 (1987); Young & Iudicello 2007, at 26 (Exh. MEX-18).

[82] *See* Simon P. Northridge, *Driftnet Fisheries and Their Impacts on Non-Target Species: A Worldwide Review* § 2.3.2, FAO Fisheries Technical Paper No. 320 (1991) (Exh. US-90); Hsiang-Wen Huang, "Bycatch of High Sea Longline Fisheries and Measures Taken by Taiwan: Actions and Challenges," 35 *Mar. Pol'y* 712, 713 (2011) (Exh. US-91).

[83] *See* Mexico's Second Written 21.5 Submission, para. 43.

[84] *See* M. Donoghue, R. Reeves & G. Stone, eds., *Report Of The Workshop On Interactions Between Cetaceans And Longline Fisheries*, New England Aquarium Aquatic Forum Series Report 03-1, at 3-4 (May 2003) (Exh. MEX-65).

[85] *See* WCPFC, Chinese Taipei: Annual Report, at 6, 5th Reg. Sess. Sci. Comm. (2009) (showing zero observed cetacean mortalities from 2004-2007) (Exh. US-92); WCPFC, Chinese Taipei: Annual Report, at 5, 6th Reg. Sess. Sci. Comm. (2010) (Exh. US-93) (reporting zero mortalities for 2008); WCPFC, Chinese Taipei: Annual Report, at 5, 7th Reg. Sess. Sci. Comm. (2011) (Exh. US-94) (reporting 2 mortalities for 2009); WCPFC, Chinese Taipei: Annual Report, at 5, 8th Reg. Sess. Sci. Comm. (2012) (Exh. US-95) (reporting 1 mortality for 2010); WCPFC, Chinese Taipei: Annual Report, at 5, 9th Reg. Sess. Sci. Comm. (2013) (Exh. US-96) (reporting 1 mortality for 2011 and 2 for 2012).

[86] Huang 2011, at 715 (Exh. US-91).

[87] *See* Mexico's Second Written 21.5 Submission, para. 43 (quoting NRDC 2014, at 29 (Exh. MEX-103), citing W.F. Perrin et al., *Report of the Second Workshop on the Biology and Conservation of Small Cetaceans and Dugongs of South-East Asia*, 32-33, CMS Technical Series Publication No. 9 (2002) (Exh. US-97)).

[88] *See* Perrin et al. 2002, at 33 (Exh. US-97).

authors acknowledge that the estimates are "highly provisional," and it is not clear that this is even a tuna fishery.[89]

40. In sum, Mexico fails to prove that the United States does not know the vessel flag and gear type used to produce the tuna and tuna product sold in the United States or that any tuna or tuna product sold on the U.S. market is inaccurately labeled dolphin safe.

III. Legal Argument

A. Mexico Fails To Establish that the Amended Dolphin Safe Labeling Measure Is Inconsistent with Article 2.1 of the TBT Agreement

41. Mexico urged the original panel to find the U.S. dolphin safe labeling requirements inconsistent with Article 2.1 of the TBT Agreement because tuna product containing tuna caught by setting on dolphins was not eligible for the label while tuna products containing tuna caught by other fishing methods was potentially eligible for the label.[90] Mexico lost that claim and appealed to the Appellate Body.[91] The Appellate Body carefully examined the entire record and determined that as a result of the eligibility conditions, the original measure was inconsistent with Article 2.1, but not in the way Mexico had argued. Rather, the Appellate Body rejected Mexico's argument, finding instead that the fact that the original measure conditioned eligibility for the label on whether a dolphin had been killed or seriously injured when the tuna was caught inside the ETP, but not when the tuna was caught outside the ETP, proved the measure discriminatory.[92]

42. The United States carefully studied the Appellate Body's Article 2.1 analysis and issued its measure taken to comply on July 9, 2013 (the 2013 Final Rule).[93] The new rule ***directly addresses*** the Appellate Body's concerns by applying that particular eligibility condition to tuna caught in all fisheries. And Mexico does not appear to contest that the 2013 Final Rule accomplishes its task. In fact, Mexico does not appear to consider the 2013 Final Rule much at all. Under Mexico's approach, the 2013 Final Rule would not be particularly relevant to this proceeding *because* the Appellate Body's Article 2.1 analysis would not be particularly relevant to this proceeding.

43. Mexico presses a different line of argument instead. It argues, in essence, that the Appellate Body got it wrong. For Mexico, the Appellate Body got it wrong by rejecting

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[89] *See* Perrin et al. 2002, at 32-33 (Exh. US-97). The report does not discuss the target catch of these near-shore fisheries but it mentions that the distant water fisheries target tuna.

[90] *See US – Tuna II (Mexico) (Panel)*, paras. 7.253-255 ("Mexico also clarifies that . . . 'the factual basis of Mexico's discrimination claims is the *prohibition* against the use of the dolphin-safe label on most Mexican tuna products denies competitive opportunities to those products compared to like product from the United States and other countries." (citing Mexico's Second Written 21.5 Submission, para. 150).

[91] *See US – Tuna II (Mexico) (AB)*, para. 241 (quoting Mexico's Article 2.1 argument).

[92] *US – Tuna II (Mexico) (AB)*, paras. 289, 292, 297.

[93] 2013 Final Rule, 78 Fed. Reg. at 40,997 (Exh. MEX-7).

Mexico's argument in the first place (and Mexico now reasserts it before the Panel). Moreover, Mexico claims that the Appellate Body got it wrong when it carefully examined the entire record and did *not* find that the provisions as they relate to record-keeping/verification or observer coverage resulted in the measure being inconsistent with Article 2.1, even though all of the relevant facts were on the record (and uncontested).

44. The simple truth is that the original proceeding left Mexico disappointed. What Mexico appears to have wanted was for the WTO to find that the United States must accept that setting on dolphins is a "dolphin safe" fishing method. But not a single sentence in the DSB recommendations and rulings requires the United States to change its law in this way. Nor should the DSB have so found. Setting on dolphins is the *only* fishing method that *targets* dolphins – repeatedly chasing them with speedboats and helicopters. There is nothing wrong with recognizing this fact and drawing a distinction between this "particularly harmful" fishing method and other fishing methods when determining what tuna products can carry the dolphin safe label, and the U.S. measure cannot be characterized as discriminatory for reflecting such a distinction.[94]

45. Mexico's approach in this Article 21.5 proceeding fails to acknowledge the DSB recommendations and rulings. Rather, Mexico seeks, for a second time, to obtain a finding that has no factual or legal basis. Mexico's "appeal" of the DSB recommendations and rulings should be rejected.

46. As discussed in the U.S. first submission, Mexico's Article 2.1 claim fails for four separate, independent reasons:

1) The claim falls outside the Panel's terms of reference because Mexico's claim is premised entirely on elements of the measure that the DSB did not find to be in breach of Article 2.1 and that are unchanged from the original measure;

2) The claim fails on the merits, as the DSB has already rejected the proposition that these three elements prove the measure discriminatory;

3) The claim fails on the merits, as Mexico has failed to prove that any of these three elements are relevant to the analysis; and

4) The claim fails on the merits, as Mexico has failed to prove that any of these three elements are not even-handed.

47. Mexico does not adequately respond to any of these points in its second submission.

1. Mexico's Claim Falls Outside the Panel's Terms of Reference

48. As discussed in the U.S. first written submission, the scope of this compliance proceeding is narrower than the original proceeding, and "there are limitations on the types of claims that

[94] *See US – Tuna II (Mexico) (AB)*, para. 289.

may be raised in Article 21.5 proceedings."[95] As to what kind of claim falls within the terms of reference, the United States agrees with Mexico that it can, consistent with the terms of reference for this Panel:

- reassert a claim where the original panel had exercised judicial economy[96];
- reassert a claim that alleges that the *new* aspects of the amended measure not only fail to bring the measure into compliance with the provisions that were the subject of the DSB recommendations and rulings, but are inconsistent with the covered agreements[97]; and
- make a new claim regarding an unchanged aspect of the measure that it could have brought previously, where that unchanged aspect is an "inseparable" aspect of the measure taken to comply.[98]

49. But Mexico's Article 2.1 claim is none of these things. Neither the original panel nor the Appellate Body exercised judicial economy on Mexico's Article 2.1 claim. Further, Mexico does not appear to even contend that the new aspects of the amended measure, *i.e.*, those aspects included in the 2013 Final Rule, do not directly address the concerns of the Appellate Body or are otherwise inconsistent with the covered agreements. Indeed, this compliance proceeding is highly unusual, at the very least, in that the complainant's *entire claim* is based on provisions of law that were not found to be WTO-inconsistent in the original proceeding and that are *unchanged* from the original measure. Finally, Mexico does not make *new* claims about *unchanged* aspects of the measure that are "inseparable" from the measure taken to comply, as discussed in *US – Zeroing (Article 21.5 – EC)*.[99] Rather, Mexico reasserts its original claim, on the basis of an alternative legal theory, that these entirely independent, unchanged aspects of the measure do, in fact, prove the amended measure WTO-inconsistent. For these reasons, the entirety of Mexico's Article 2.1 claim falls outside the Panel's terms of reference.

50. Mexico disagrees and makes a variety of arguments to support its position. All of these arguments fail.

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[95] U.S. First Written 21.5 Submission, paras. 168-72.

[96] *See US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina) (AB)*, paras. 141, 150-52.

[97] *See EC – Bed Linen (Article 21.5 – India) (AB)*, para. 88.

[98] *See US – Zeroing (Article 21.5 – EC) (AB)*, para. 433.

[99] In this regard the facts of *US – Zeroing (Article 21.5 – EC)* are inapposite for the ones here. In *US – Zeroing (Article 21.5 – EC)*, the new claims at issue concerned reviews made after the original panel was established but before the DSB recommendations and rulings were adopted. All the reviews in question were issued under the same anti-dumping order challenged in the original proceeding and "therefore constituted connected stages . . . involving the imposition, assessment, and collection of duties under the same anti-dumping order." Furthermore, the only aspect of the reviews that the EU challenged was the use of zeroing, which was "the precise subject of the recommendations and rulings of the DSB" and the only aspect of the measure that the United States modified. *See US – Zeroing (Article 21.5 – EC) (AB)*, para. 230.

51. First, Mexico argues that the Panel should focus on the amended measure "as a whole, and not elements comprising that measure."[100] But in determining its own terms of reference, the Panel clearly can look at the specific aspects of the measure that are the subject of Mexico's Article 2.1 claim. To say that the Panel is prevented from doing so ignores past Appellate Body and panel reports that have consistently found that claims against *unchanged* elements of the original measure fall outside the compliance panel's limited terms of reference.[101] Such an approach also ignores the nature of Mexico's own claim, which is premised on the theory that any one of three unchanged aspects of the amended measure proves it discriminatory.[102]

52. Second, Mexico argues that these three aspects of the measure have changed from the original measure,[103] implying that the line of reports cited by the United States is inapplicable to this dispute.[104] Again, Mexico is mistaken. The 2013 Final Rule does not change any of the requirements *in ways that Mexico alleges prove the amended measure discriminatory*.

53. Thus, while the 2013 Final Rule applies the eligibility requirement as to whether a dolphin was killed or seriously injured to all fisheries, the rule does not change what Mexico alleges to be problematic – the denial of eligibility for tuna product containing tuna caught by setting on dolphins in an AIDCP-consistent manner. Similarly, while the 2013 Final Rule

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[100] Mexico's Second Written 21.5 Submission, para. 93; *see also id.* para. 89.

[101] *See* U.S. First Written 21.5 Submission, paras. 170-71 (citing *US – Shrimp (Article 21.5 – Malaysia) (AB)*, paras. 89-96; *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 210; *EC – Bed Linen (Article 21.5 – India) (AB)*, paras. 87-93; *US – Zeroing (Article 21.5 – EC) (AB)*, paras. 415-39; *Mexico – Corn Syrup (Article 21.5 – US) (AB)*, paras. 78-80; *Chile – Price Band System (Article 21.5 – Argentina) (Panel)*, para. 7.138).

[102] *See* Mexico's Second Written 21.5 Submission, paras. 143, 165, 195, 196. Mexico's argument – that the United States confuses Mexico's Article 2.1 claim with "'arguments' in support of the claim" and that the Panel should focus on the "new amended tuna measure" "as a whole" and not on whether particular "aspects" are unchanged – is based on characterizing its Article 2.1 claim at a high level of generality as against the measure overall. *See* Mexico's Second Written 21.5 Submission, paras. 89-92. This is at odds with Mexico's approach in the original proceeding of limiting its Article 2.1 claim to a *particular aspect* of the original measure, namely the setting-on-dolphins eligibility criterion. *See US – Tuna II (Mexico) (Panel)*, paras. 7.255, 7.280. Thus, having made a narrow claim in an attempt to get the exact finding it wanted, Mexico now asserts a broad claim and invites this Panel to reject the findings of the DSB regarding the particular aspect of the measure that Mexico originally challenged. This contradicts the principle that DSB reports shall be "unconditionally accepted by the parties to the dispute" as "final resolution" of an issue. *See US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 97. Furthermore, under a characterization as broad as Mexico's, it is not clear what, if any, claims against an unchanged aspect of the measure could *not* be considered by an Article 21.5 panel, and yet it is well established that parties may not assert "the same claim with respect to an unchanged element of the measure." *See, e.g.*, *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 210. Finally, it matters little whether Mexico's claim is characterized as against three aspects of the measure or as one claim in support of which Mexico advances three arguments. *All three aspects of the U.S. measure that Mexico addresses are essentially unchanged from the original measure*. *See* U.S. First Written 21.5 Submission, paras. 177, 201, 205, 209. Thus, whether it is one large claim or three small claims is immaterial: the DSB has considered the entirety of it before.

[103] *See* Mexico's Second Written 21.5 Submission, para. 95.

[104] *See* U.S. First Written 21.5 Submission, paras. 170-71, 206 (citing *US – Shrimp (Article 21.5 – Malaysia) (AB)*, paras. 89-96; *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 210; *EC – Bed Linen (Article 21.5 – India) (AB)*, para. 87-93; *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, paras. 415-39; *Mexico – Corn Syrup (Article 21.5 – US) (AB)*, para. 78-80; *Chile – Price Band System (Article 21.5 – Argentina) (Panel)*, para. 7.138).

includes certain requirements for vessels to keep dolphin safe tuna separate from non-dolphin safe tuna, it does not change the fundamental fact that the AIDCP parties have agreed to different record-keeping/verification and observer requirements than what the challenged measure requires of tuna caught in other fisheries.

54. Third, Mexico argues that, even if the aspects of the amended measure that it now complains of are unchanged from the original measure, the Panel still has jurisdiction to address Mexico's claim because it has not been resolved on the merits.[105] But that is clearly wrong. The original panel and Appellate Body did reach the merits of Mexico's Article 2.1 claim. And, in doing so, the Appellate Body rejected all three elements of Mexico's Article 2.1 claim, as discussed previously and below.[106]

55. Fourth, Mexico, quoting the Appellate Body in *US – Zeroing (Article 21.5 – EC)*, states that "'new claims against inseparable aspects of a measure taken to comply, which are unchanged from the original measure' are within a panel's terms of reference under Article 21.5, even if such claims could have been raised, but were not raised, in the original proceedings."[107]

56. Although Mexico makes no actual argument that these aspects are "inseparable" from the measure taken to comply, all three aspects of the measure clearly fall outside the Panel's terms of reference. As to the first aspect, Mexico makes no "new" claim at all. This is the same claim Mexico has made all along.[108] As to the other two aspects of the challenged measure, even aside from the fact that Mexico's Article 2.1 claim here is not "new" in the sense that the Appellate Body used that term in *US – Zeroing (Article 21.5 – EC)*, these two aspects are clearly separable from the U.S. measure taken to comply (the 2013 Final Rule).[109] It cannot be said that the requirements added by the 2013 Final Rule depend on the AIDCP verification and observer

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[105] *See* Mexico's Second Written 21.5 Submission, para. 96 (citing *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina) (AB)* and *US – Upland Cotton (Article 21.5 – Brazil) (AB)*).

[106] *See* U.S. First Written 21.5 Submission, paras. 210-21; *infra*, sec. III.A.2.

[107] Mexico's Second Written 21.5 Submission, para. 97 (quoting *US – Zeroing (Article 21.5 – EC)*, para. 433); *see also US – Zeroing (Article 21.5 – EC) (AB)*, para. 438 ("Having reviewed the Panel record, we are of the view that there are insufficient undisputed facts and evidence in the record that would allow us to reach any conclusion as to the precise nature and consequences of such an alleged error, in terms of whether it is separable from the compliance measure or is an integral part thereof. Even assuming *arguendo* that the USDOC extended the duration of the Section 129 proceeding for the sole purpose of considering the allegations concerning the alleged arithmetical error, this does not amount to an admission by the USDOC that an error was committed, nor does it shed light on the nature and content of the alleged error made in the calculation of the margin of dumping. Nor do we consider that the arguments of the European Communities and the calculations made by TKAST of the dumping margin without the alleged arithmetical error are in themselves sufficient to show whether the nature and the effects of the alleged arithmetical error are such that the alleged error is separable from *or incorporated into the re-determination*.") (emphasis added).

[108] *Compare US – Tuna II (Mexico) (AB)*, para. 241 (quoting Mexico's argument), *with* Mexico's Second Written 21.5 Submission, para. 143.

[109] U.S. First Written 21.5 Submission, para. 10 ("The 2013 Final Rule constitutes the measure taken to comply with the DSB recommendations and rulings pursuant to Article 21.5 of the [DSU].").

requirements in any way. Indeed, the requirements added by the 2013 Final Rule only apply to tuna caught *other than by large purse seine vessels inside the ETP*.

57. Finally, Mexico argues that its Article 2.1 claim does not jeopardize the principles of fundamental fairness and due process. The United States disagrees.

58. Mexico urges the Panel to find that, in order for the United States to have come into compliance during the 15 month reasonable period of time (RPT), the United States needed to take the following three actions:

1) change the eligibility conditions such that tuna product containing tuna caught in the ETP by setting on dolphins in an AIDCP-consistent manner is not treated differently from tuna caught by other fishing methods;

2) require record-keeping and verification requirements for tuna caught inside and outside the ETP equivalent to those that the AIDCP requires for tuna caught by large purse seine vessels inside the ETP; and

3) require 100 percent observer coverage for tuna vessels operating inside and outside the ETP equivalent to that which the AIDCP requires for large purse seine vessels operating inside the ETP.

59. Yet Mexico is unable to point to any part of the Appellate Body's analysis – *not even one sentence* – that states that the United States must do any one of these things, much less all three, to come into compliance with Article 2.1. In other words, Mexico does not "unconditionally accept" the Appellate Body report, in accordance with DSU Article 17.14,[110] and seeks to have the Panel fault the United States for failing to come into compliance with an entirely different set of recommendations and rulings from the one the DSB actually adopted. Such an approach deprives the United States of the opportunity to come into compliance with its obligations in accordance with the DSU.

60. Mexico's Article 2.1 claim falls outside the Panel's terms of reference.

2. The Appellate Body Has Already Rejected the Entirety of Mexico's Article 2.1 Claim

61. Aside from the fact that Mexico's Article 2.1 claim falls outside the Panel's terms of reference, it should be rejected on the basis that the Appellate Body has already considered – and rejected – the entirety of the claim.[111]

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[110] *See, e.g.*, *US – Shrimp (Article 21.5 – Malaysia) (AB),* para. 97 ("Thus, Appellate Body Reports that are adopted by the DSB are, as Article 17.14 provides . . . unconditionally accepted by the parties to the dispute, and, therefore, must be treated by the parties to a particular dispute as a final resolution to that dispute. In this regard, we recall, too, that Article 3.3 of the DSU states that the prompt settlement of disputes is essential to the effective functioning of the WTO") (internal quotes omitted).

[111] *See* U.S. First Written 21.5 Submission, paras. 210-21.

62. First, the Appellate Body has already rejected Mexico's Article 2.1 claim as it pertains to the first element Mexico raises – the distinction with respect to eligibility for the dolphin safe label between tuna product containing tuna caught by setting on dolphins in an AIDCP-consistent manner and tuna product containing tuna caught by other fishing methods.[112]

63. Mexico disagrees. It argues that the "labelling conditions and requirements that relate to the qualification and disqualification of the fishing methods" are "different" in this proceeding than they were in the original proceeding.[113] But of course that is wrong. The eligibility condition Mexico complains about here is the same one it complained of previously.[114] The fact that NOAA published a new rule relating to a *different* eligibility condition does not alter that conclusion.

64. The same point holds true for the other two aspects (record-keeping/verification and observer requirements) that Mexico raises as part of its Article 2.1 claim. As discussed in the U.S. first written submission, the AIDCP mandates certain record-keeping/verification and observer requirements for large purse seine vessels operating inside the ETP that other vessels, operating both inside and outside the ETP, are not subject to. This "difference" was *uncontested* in the original proceeding[115] and clearly fell within the Appellate Body's review of the record, which included all uncontested facts as well as all factual findings of the original panel.[116] Yet the Appellate Body did not consider either aspect as rendering the original measure discriminatory.[117]

65. What Mexico urges the Panel to do is accept its arguments without any regard to the DSB recommendations and rulings in the original proceeding. That is wrong. The Panel's analysis must be "done in the light of the evaluation of the consistency of the original measure with a covered agreement undertaken by the original panel and subsequently by the Appellate Body."[118]

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[112] Mexico's First Written 21.5 Submission, para. 236 (first bullet); Mexico's Second Written 21.5 Submission, paras. 112, 117; *see also* U.S. First Written 21.5 Submission, paras. 214-17.

[113] Mexico's Second Written 21.5 Submission, para. 134.

[114] *Compare US – Tuna II (Mexico) (AB)*, paras. 90, 241, *with* Mexico's First Written 21.5 Submission, para. 236 (first bullet) *and* Mexico's Second Written 21.5 Submission, sec. III.B.4.d, and para. 203.

[115] *See US – Tuna II (Mexico) (Panel)*, paras. 2.39-41, 7.331-333, 7.438.

[116] *See US – Tuna II (Mexico) (AB)*, paras. 243-81, in particular, para. 264, which states: "[i]n its analysis, the Panel acknowledged that, due in particular to the AIDCP On-Board Observers Program and the AIDCP System for Tracking and Verifying Tuna, detailed information is available concerning dolphin mortalities resulting from tuna fishing in the ETP, and that, by contrast, evidence relating to dolphin bycatch outside the ETP is contained in a 'limited amount of *ad-hoc* studies.'" (quoting *US – Tuna II (Mexico) (Panel)*, para. 7.519); *see also US – Tuna II (Mexico) (AB)*, para. 174.

[117] *US – Tuna II (Mexico) (AB)*, paras. 289-92, 298.

[118] *US – Shrimp (Article 21.5 – Malaysia) (Panel)*, para. 5.5 ("In other words, although we are entitled to analyse fully the consistency with a covered agreement of measures taken to comply, our examination is not done from a completely fresh start. Rather, it has to be done in the light of the evaluation of the consistency of the original measure with a covered agreement undertaken by the Original Panel and subsequently by the Appellate Body.") (internal quotes omitted).

Such an analysis is not optional, as Mexico's approach seems to imply, but necessary.[119] If this were not true, the Appellate Body's report could not be considered a "final resolution" of Mexico's Article 2.1 claim, which it clearly is.[120]

3. Mexico Fails To Prove that Any of the Three Elements Is Relevant to the Article 2.1 Analysis

66. As discussed in the U.S. first written submission,[121] not every regulatory distinction is relevant to the question of whether "the detrimental impact on imports stems exclusively from a legitimate regulatory distinction."[122] According to the Appellate Body:

> [W]e *only* need to examine the distinction that accounts for the detrimental impact on Mexican tuna products as compared to US tuna products and tuna products originating in other countries.[123]

67. While Mexico appears to agree with this principle,[124] it wrongly insists that the requirements regarding record-keeping/verification and observers are relevant to the Article 2.1 analysis.[125] The source of the parties' differing views on this issue is a disagreement over what the detrimental impact is in this dispute.

68. For the first step of its Article 2.1 analysis, Mexico relies on the Appellate Body's Article 2.1 analysis and contends that the detrimental impact is caused by the denial of "access to this label for most Mexican tuna products."[126] For this point, Mexico relies on paragraph 234 of the

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[119] *US – Shrimp (Article 21.5 – Malaysia) (AB),* para. 107 ("The reasoning in our Report in *United States – Shrimp* on which the Panel relied was not *dicta*; it was essential to our ruling. The Panel was right to use it, and right to rely on it. … The Panel had, *necessarily*, to consider our views on this subject…") (emphasis added).

[120] *US – Shrimp (Article 21.5 – Malaysia) (AB),* para. 97 ("Thus, Appellate Body Reports that are adopted by the DSB are, as Article 17.14 provides . . . unconditionally accepted by the parties to the dispute, and, therefore, must be treated by the parties to a particular dispute as a final resolution to that dispute.") (internal quotes omitted); *see also US – Tuna II (Mexico) (AB)*, para. 300 ("We have already found that the Panel erred in finding that Mexico failed to establish that the measure at issue is inconsistent with the United States' obligations under Article 2.1 of the TBT Agreement. Therefore, *in order to resolve this dispute*, we need not determine whether, in assessing Mexico's claims under that provision, the Panel also failed to satisfy its obligations under Article 11 of the DSU.") (emphasis added).

[121] U.S. First Written 21.5 Submission, para. 222.

[122] *US – Tuna II (Mexico) (AB)*, para. 215.

[123] *US – Tuna II (Mexico) (AB)*, para. 286 (emphasis in original).

[124] *See* Mexico's Second Written 21.5 Submission, para. 115 (quoting *US – Tuna II (Mexico) (AB)*, para. 286).

[125] As discussed in the first submission, the setting-on-dolphins element also does not "account for" the detrimental impact, since it *is* the detrimental impact. *See* U.S. First Written 21.5 Submission, para. 223.

[126] Mexico's First Written 21.5 Submission, paras. 232-33 ("While all like U.S. tuna products and most tuna products of other countries have access to the "dolphin-safe" label, the Amended Tuna Measure *denies access to this label for most Mexican tuna products*. Accordingly, it is clear that the operation of the Amended Tuna Measure in the relevant market has a *de facto* detrimental impact on the group of like imported products. The Amended Tuna Measure modifies the conditions of competition in the relevant market to the detriment of the group

Appellate Body report and three paragraphs from the original panel report that the Appellate Body relied on in paragraph 234, all of which discuss the detrimental impact in terms of the eligibility requirements of the measure and the fishing practices of the U.S. and Mexican fleets. Mexico reasserts this same position in its second submission, arguing that:

> The United States omits the fact that, with respect to the first element of the Appellate Body's test under Article 2.1 – i.e., the detrimental impact on imports – the Appellate Body overturned this finding of the Panel and, instead, found that *the eligibility conditions* deny competitive opportunities to Mexican tuna products."[127]

69. However, for the second step of its Article 2.1 analysis, Mexico changes course and, relying heavily on the original panel's <u>Article 2.2</u> analysis, argues that the "accuracy" of the information is the touchstone of the detrimental impact finding.[128] From this, Mexico concludes that the difference in record-keeping/verification and observer requirements is creating a detrimental impact on imports of Mexican tuna product.[129]

70. The United States disagrees that the detrimental impact on the competitive opportunities can ever be different for the two steps of the Article 2.1 analysis. Such an interpretation renders the analysis meaningless. The entire point of the second step of the analysis is to determine whether the detrimental impact *determined to exist in the first step* "reflects discrimination."[130] Indeed, in discussing the second step of its analysis in this very dispute, the Appellate Body explicitly refers back to its "earlier" finding that the measure caused a detrimental impact.[131]

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of imported products as compared to the group of like domestic products or like products originating in any other Member.") (citing *US – Tuna II (Mexico) (Panel)*, paras. 7.316-317 and 7.533; *US – Tuna II (Mexico) (AB)*, para. 234).

[127] Mexico's Second Written 21.5 Submission, para. 135 (emphasis added) (citing *US – Tuna II (Mexico) (AB)*, para. 235).

[128] Mexico's Second Written 21.5 Submission, paras. 114-15 ("In the *original Panel's analysis of Article 2.2*, the Panel assessed the degree to which the Original Tuna Measure contributed to its objectives, which included factors relating to the accuracy of the information communicated to U.S. consumers.") (emphasis added).

[129] Mexico's Second Written 21.5 Submission, para. 163 ("This regulatory difference [*i.e.*, the difference in record keeping and verification] modifies the conditions of competition in the U.S. market to the detriment of imported Mexican tuna products *vis-à-vis* like tuna products of U.S. origin and like tuna products imported from other countries."); *id.* para. 182 ("Specifically, the captain self-certification regime poses a very real risk that tuna caught in the ETP, which is accurately certified as dolphin-safe by independent observers, will lose competitive opportunities to tuna caught outside the ETP, which has received an inherently unreliable dolphin-safe certification from a self-interested captain."); *see also id*. para. 117 ("[T]he absence of sufficient fishing method qualification, record-keeping/verification and observer requirements for tuna that is used to produce tuna products from the United States and other countries means that Mexican tuna products are losing competitive opportunities to tuna products that may be inaccurately labelled as dolphin-safe. This difference is what is creating the detrimental impact.").

[130] *US – Tuna II (Mexico) (AB)*, para. 340.

[131] *US – Tuna II (Mexico) (AB)*, para. 284 ("In the light of the findings of fact made by the Panel, we concluded *earlier* that the detrimental impact of the measure on Mexican tuna products is caused by the fact that most Mexican tuna products contain tuna caught *by setting on dolphins* in the ETP and are therefore *not eligible* for

71. The Appellate Body's conclusion that the original measure resulted in a detrimental impact on the competitive opportunities of Mexican tuna products in the U.S. market is discussed in paragraphs 233-235 of the report. In paragraph 233, the Appellate Body determined that the label has a commercial value in the U.S. market and that "*access* to the 'dolphin-safe' label constitutes an 'advantage' on the US market."[132] In paragraph 234, the Appellate Body found, based on the eligibility requirements, that "most" Mexican caught tuna "*would not be eligible*" for the label while "most" U.S. caught tuna "*is potentially eligible* for the label."[133] In paragraph 235, the Appellate Body concluded that "the factual findings by the Panel clearly establish 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."[134]

72. The Appellate Body returns to the detrimental impact issue in paragraph 284, confirming that the central point underlying the detrimental impact finding is that the tuna product containing tuna caught by setting on dolphins is not eligible for the label and that most Mexican tuna product contains tuna caught by setting on dolphins:

> In the light of the findings of fact made by the Panel, we concluded earlier that *the detrimental impact* of the measure on Mexican tuna products is caused by the fact that most Mexican tuna products contain tuna *caught by setting on dolphins* in the ETP and are therefore *not eligible* for a 'dolphin-safe' label, whereas most tuna products from the United States and other countries that are sold in the US market

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a 'dolphin-safe' label, whereas most tuna products from the United States and other countries that are sold in the US market contain tuna caught *by other fishing methods* outside the ETP and are therefore *eligible* for a 'dolphin-safe' label.") (emphasis added).

[132] *US – Tuna II (Mexico) (AB)*, para. 233 ("The Panel found that the 'dolphin-safe' label has 'significant commercial value on the US market for tuna products.' The Panel further found that Mexico had presented evidence concerning retailers' and final consumers' preferences regarding tuna products, which, in the Panel's view, confirmed the value of the 'dolphin-safe' label on the US market. On this basis, the Panel agreed with Mexico that *access* to the 'dolphin-safe' label constitutes an 'advantage' on the US market. These findings have not been appealed.") (emphasis added) (citing *US – Tuna II (Mexico) (Panel)*, paras. 7.289-291; Orig. Exh. MEX-58 (BCI)).

[133] Quoting and citing paragraphs 7.310, 7.314, 7.316, 7.317, 7.344, 7.357, and 7.533 from the original panel report, the Appellate Body stated:

> The Panel further found that: (i) the Mexican tuna cannery industry is vertically integrated, and the major Mexican tuna products producers and canneries own their vessels, which operate in the ETP; (ii) at least two thirds of Mexico's purse seine tuna fleet fishes in the ETP by setting on dolphins' and is 'therefore fishing for tuna that *would not be eligible* to be contained in a 'dolphin-safe' tuna product under the US dolphin-safe labelling provisions; (iii) the US fleet currently does not practice setting on dolphins in the ETP; (iv) as the practices of the US and Mexican tuna fleets currently stand, most tuna caught by Mexican vessels, being caught in the ETP by setting on dolphins, *would not be eligible* for inclusion in a dolphin-safe product under the US dolphin-safe labelling provisions, while 'most tuna caught by US vessels is *potentially eligible* for the label. (emphasis added, internal quotes omitted).

US – Tuna II (Mexico) (AB), para. 234.

[134] *US – Tuna II (Mexico) (AB)*, para. 235 (emphasis added).

contain tuna caught by other fishing methods outside the ETP and *are therefore eligible* for a 'dolphin-safe' label.[135]

73. Mexico is thus wrong: accuracy is not the touchstone of the detrimental impact, *access* is. Indeed, the terms "accuracy" or "accurate" *are not even mentioned* in paragraphs 234 and 284 (or in any of the seven paragraphs of the original panel report that the Appellate Body relied on). What these paragraphs *do mention* is the eligibility requirement that the tuna not be caught by setting on dolphins.[136]

74. Accordingly, when the Appellate Body determined in paragraph 284 that the relevant labeling condition was "the *difference in labelling conditions* for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP," the Appellate Body was referring to the different labeling *eligibility* conditions between setting on dolphins and other fishing methods, and Mexico is wrong to urge the Panel to find otherwise.[137]

75. Thus, and as discussed in the U.S. first written submission, the record-keeping/verification and observer requirements are not relevant to this analysis, in that neither aspect accounts for the detrimental impact. Under the amended measure, denial of access to the label (versus the potential eligibility of access to the label) is governed by two relevant regulatory requirements:

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[135] *US – Tuna II (Mexico) (AB)*, para. 284 (emphasis added).

[136] *See US – Tuna II (Mexico) (AB)*, para. 234 (quoted above); *US – Tuna II (Mexico) (Panel)*, para. 7.310 ("[T]he integration of the Mexican tuna industry does not mean that it must use Mexican tuna, or that it could not choose to require such tuna to be caught in conditions that *would make it eligible* for the US label.") (emphasis added); *id.* para. 7.314 ("Based on the above, we note that it is undisputed that at least two thirds of Mexico's purse seine tuna fleet fishes in the ETP *by setting on dolphins* (therefore fishing for tuna that would not be eligible to be contained in a "dolphin safe" tuna product under the US dolphin safe labelling provisions).") (emphasis added); *id.* para. 7.316 ("From these undisputed elements, it appears that the US fleet currently *does not practice setting on dolphins* in the ETP.") (emphasis added); *id.* para. 7.317 ("From the above, it can be inferred that, as the practices of the US and Mexican tuna fleets currently stand, most tuna caught by Mexican vessels, being caught in the ETP by *setting on dolphins*, *would not be eligible* for inclusion in a dolphin safe product under the US dolphin safe labelling provisions. However, most tuna caught by US vessels is *potentially eligible* for the label, provided that it otherwise complies with the requirements of the measures.") (emphasis added); *id.* para. 7.344 ("We recognize that, to the extent that the Mexican fleet would need to modify its fishing techniques, or relocate to other fisheries, in order to comply with the requirements of the US dolphin-safe provisions, this may entail some economic and financial costs, taking into account the fact that *setting on dolphins* is a particularly effective means of fishing for tuna in the ETP.") (emphasis added); *id.* para. 7.357 ("An examination of these import figures, which are not disputed, suggests that the United States imports a considerable proportion of the tuna that it consumes. These figures also suggest that the vast majority of the tuna and tuna products found on the US market is made from tuna caught *without setting on dolphins, that is potentially eligible* for dolphin safe labelling under the US dolphin safe labelling provisions, and that Mexican tuna products represent a very small proportion of the tuna products found on the US market.") (emphasis added); *see also US – Tuna II (Mexico) (AB)*, para. 284 (paraphrasing the analysis conducted in paragraphs 233-235).

[137] *See US – Tuna II (Mexico) (AB)*, para. 284.

- tuna product containing tuna caught by setting on dolphins is ineligible for the label; and
- tuna product containing tuna caught in a set or gear deployment where a dolphin was killed or seriously injured is ineligible for the label.[138]

76. Simply put, the requirements regarding record-keeping/verification and observers do not cause the detrimental impact that was the basis for the DSB recommendations and rulings. Not only does Mexico's argument contradict the DSB recommendations and rulings, but Mexico puts forward *zero* evidence to prove such an assertion. For example, what Mexico appears to be asserting is that its market access would increase if either one of two things happen: 1) the United States eliminates the need for the Form 370 that accompanies Mexican tuna product to list the AIDCP-mandated tracking number and a Mexican government certification that an observer was on board the vessel; or 2) the United States requires all tuna product containing tuna to adhere to AIDCP-equivalent record-keeping/verification and observer coverage requirements.

77. But Mexico puts forward no evidence that more Mexican non-dolphin safe tuna product would be sold in the U.S. market under either scenario.[139] Consumer preferences have not changed in the United States. Consumer demand for non-dolphin safe tuna product remains

[138] *See* U.S. First Written 21.5 Submission, secs. II.A.3.a.i, II.A.3.b.i, III.B.3. As also noted in the U.S. First Written 21.5 Submission, all tuna caught in large-scale driftnets on the high seas is ineligible for the label, regardless of the fishery and nationality of the vessel. *See id.*, sec. II.C.1.a.

[139] Of course, as noted previously, the detrimental impact would not be effected even if the AIDCP parties agreed to eliminate these requirements, as the lack of access stems from the denial of eligibility for the label of tuna product containing tuna caught by setting on dolphins. *See US – Tuna II (Mexico) (AB)*, paras. 234-35.

low.[140] No causal connection exists between these requirements and the denial of "access" to the label that the Appellate Body determined constituted the detrimental impact.[141]

78. Mexico's attempt to "re-imagine" the Appellate Body's detrimental impact analysis is yet another example of Mexico's attempted "appeal" of the DSB recommendations and rulings.

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[140] In the original proceeding, it was "undisputed that US consumers are sensitive to the dolphin-safe issue." *See US – Tuna II (Mexico) (Panel)*, para. 7.288. The original panel also found that following the public airing of camera footage showing the capture and killing of dolphins in dolphin sets tuna processors came under such pressure from consumers and environmental groups that changed their purchasing policies, declining to purchase non-dolphin safe tuna. *See id.* (citing Susan Reed, "A Filmmaker Crusades to Make the Seas Safe for Gentle Dolphins," People (Aug. 6, 1990) and Anthony Ramirez, "Epic Debate Led to Heinz Tuna Plan," *NY Times* (Apr. 16, 1990) (Exh. US-98) (Orig. Exh. Amicus-2) (1990 Dolphin Safe Articles) (quoting the spokesman for Star-Kist tuna explaining that "[T]he film crystallized the issue for consumers. They told us they don't want us to kill dolphins," and reporting how Stark-Kist's officials had changed the company's policy in response to consumer tracking surveys that shows that a growing majority of consumers were aware of the dolphin issue and that the "level of concern" was high and rising)). As the original panel found, this policy "suggests that the producers themselves assume that they would not be able to sell tuna products that do not meet dolphin-safe requirements, or at least not at a price sufficient to warrant their purchase." *See id*. para. 7.289. Public outrage over the harms to dolphins from non-dolphin safe tuna fishing practices also drove the passage of the DPCIA and subsequent amendments. *See* U.S. Response to Orig. Panel Question 40, paras. 97-100 (citing Statement of Rep. Barbara Boxer before the H. Rep., 136 Cong. Rec. H11878-02, 101st Cong. (Oct. 23, 1990) (Exh. US-99) (Orig. Exh. US-70) and quoting then-Representative Boxer, the sponsor of the DPCIA, stating: "Without the letters and phone calls of countless consumers and schoolchildren from across the United States, we would not have gained 183 co-sponsors of the [DPCIA].").

[141] Mexico also errs in arguing that "further support" for the proposition that the detrimental impact exists can be found in the "unilateral application" of the amended measure. Mexico's Second Written 21.5 Submission, para. 106. First, the DSB recommendations and rulings did not find that the detrimental impact is a factor of so-called "unilateral" application. As such, it is unclear why Mexico considers its argument relevant to the dispute and what finding Mexico asks the Panel to make. Second, the argument lacks merit. The DSU recognizes that a measure is of a "Member" – by definition measures are "unilateral." In addition, to the extent Mexico claims that the intent and effect of the amended measure is to "coerce" Mexico to change its fishing practices, Mexico cites to no evidence that the intent of the measure is to accomplish such a goal. Indeed, the Appellate Body has already found that the objective of the original measure is ***not*** to "coerce" Mexico. *US – Tuna II (Mexico) (AB)*, paras. 329, 335-37; *see also US – Tuna II (Mexico) (Panel)*, para. 7.440 ("Moreover, nothing prevents Members from using the incentives created by consumer preferences to encourage or discourage particular behaviours that may have an impact on the protection of animal life or health."). Mexico also points to no evidence that the "effect" of the amended measure has been to change Mexican fishing practices in terms of the number of dolphin sets that Mexican vessels have conducted year in and year out. Second, Mexico claims that the amended measure "undermines the AIDCP regime." Mexico's Second Written 21.5 Submission, para. 108. But again Mexico puts forward no evidence that the functioning of the AIDCP has been harmed in any way. In fact, Mexico argues just the opposite – that the AIDCP is functioning very well. *Id*. para. 110. In any event, it simply cannot be the case that the United States has acted contrary to the WTO Agreement by determining for itself what level of protection is appropriate for the United States. *See* TBT Agreement, sixth preambular recital. Finally, Mexico claims that setting on dolphins does not harm dolphins. Mexico's Second Written 21.5 Submission, para. 107 ("…tuna contained in [Mexican] tuna products is caught in full compliance with the AIDCP regime *and without harm to dolphins . . .*") (emphasis added). *This is simply a false statement*, and one that directly contradicts the science, Mexico's own argument before the Appellate Body, and the DSB recommendations and rulings in this dispute. *See* U.S. First Written 21.5 Submission, paras. 79-101; *US – Tuna II (Mexico) (AB)*, n.513 (quoting the original panel stating that, "setting on dolphins may result in observed and unobserved harmful effects on dolphins," and noting that "[i]n response to questioning at the oral hearing, Mexico indicated that it did not contest this finding by the Panel"); *id*. para. 289 (concluding that "setting on dolphins is particularly harmful to dolphins").

Mexico's argument should be rejected – the record-keeping/verification and observer requirements are not relevant for purposes of the Article 2.1 analysis.[142]

4. Mexico Fails To Prove that the Detrimental Impact Does Not Stem Exclusively from Legitimate Regulatory Distinctions

79. In the second step of the less favorable treatment analysis under Article 2.1, a panel must "analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products."[143] To do so, it may be helpful for the panel to examine whether the regulatory distinctions are "even-handed" with respect to the group of imported products, on the one hand, and the group of like domestic products (or products originating in any other country) on the other.[144]

80. A regulatory distinction will not be found to be even-handed if it disadvantages one group in favor of another without any basis for doing so.[145] This was the finding in this dispute. The Appellate Body faulted the original measure for denying eligibility to tuna product containing tuna caught in the ETP where a dolphin was killed or seriously injured while not similarly denying eligibility to tuna product containing tuna caught outside the ETP, where a dolphin had been killed or seriously injured. The Appellate Body noted that the original panel's findings that the risks to dolphins from other fishing techniques are not "insignificant" meant that those risks may "under some circumstances rise to the same level as the risks from setting on dolphins."[146]

81. The United States responded to these findings and made the appropriate change to the measure in the 2013 Final Rule. The detrimental impact resulting from the amended measure now "stems exclusively from a legitimate regulatory distinction" and the amended measure does not provide less favorable treatment to Mexican tuna product inconsistent with Article 2.1.

82. Mexico disagrees and contends that the amended measure continues to provide less favorable treatment. Specifically, Mexico asserts that at least one of the following aspects of the amended measure is not even-handed: 1) the distinction between the eligibility for the dolphin safe label for tuna product containing tuna caught by setting on dolphins in an AIDCP-consistent manner and tuna caught by other fishing methods; 2) the distinction between the differing

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[142] *See also* U.S. First Written 21.5 Submission, para. 223 (explaining why the same is true for the eligibility criteria aspect that Mexico criticizes).

[143] *US – Tuna II (Mexico) (AB)*, para. 215.

[144] *US – Tuna II (Mexico) (AB)*, paras. 215-16.

[145] U.S. First Written 21.5 Submission, paras. 182-84; *US – Tuna II (Mexico) (AB)*, paras. 289-92, 297 (determining that the detrimental impact did not stem exclusively from legitimate regulatory distinctions because the challenged measure prohibited tuna product from being labeled "dolphin safe" if it contained tuna caught inside the ETP where a dolphin was killed or seriously injured, but allowed tuna product to be so labeled if it contained tuna caught outside the ETP where a dolphin was killed or seriously injured).

[146] *US – Tuna II (Mexico) (AB)*, paras. 289, 292.

record-keeping and verification requirements required for tuna caught inside and outside the ETP; and 3) the distinction between the differing observer requirements for tuna vessels operating inside and outside the ETP.[147] As discussed below, Mexico fails to prove all three assertions.

83. Before discussing the specifics of Mexico's claim, we would note that the parties appear to differ substantially as to what the proper meaning of "even-handed" is. As explained previously, the U.S. view of the term is grounded in the Appellate Body's analysis not only in this dispute, but in *US – Clove Cigarettes* and *US – COOL* as well.[148]

84. But such analysis clearly does not support Mexico's claim, and Mexico is unable to rely on the analyses of any of these disputes to support its Article 2.1 claim. Rather, Mexico attempts to artificially graft the analysis used in the context of the chapeau of Article XX of the GATT 1994 onto Article 2.1 of the TBT Agreement, repeatedly relying on *US – Shrimp*, *Brazil – Retreaded Tyres*, and *EC – Seal Products* to explain what it considers to be the contours of the even-handedness analysis.[149] Mexico claims that this is appropriate "[g]iven the parallel language employed in Article 2.1 and the chapeau to Article XX."[150] But that is surely wrong. The texts of the two provisions are entirely different,[151] and, indeed, the Appellate Body *reversed* the *EC – Seal Products* panel's GATT Article XX chapeau analysis for considering the two analyses to be the same.[152]

85. The United States respectfully requests the Panel to disregard Mexico's proposed approach to the analysis of "even-handedness," which deviates significantly from the Appellate Body's even-handed analysis *in this dispute*.[153]

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[147] Mexico's First Written 21.5 Submission, para. 236; Mexico's Second Written 21.5 Submission, paras. 143, 147-48, 196.

[148] U.S. First Written 21.5 Submission, para. 184.

[149] *See* Mexico's Second Written 21.5 Submission, paras. 124-32.

[150] Mexico's Second Written 21.5 Submission, para. 132.

[151] *EC – Seal Products (AB)*, para. 5.311 ("[T]here are significant differences between the analyses under Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994. First, the legal standards applicable under the two provisions differ. Under Article 2.1 of the TBT Agreement, a panel has to examine whether the detrimental impact that a measure has on imported products stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. Under the chapeau of Article XX, by contrast, the question is whether a measure is applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.").

[152] *EC – Seal Products (AB)*, para. 5.313 ("Given these differences between the inquiries under Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994, *we find that the Panel erred in applying the same legal test to the chapeau of Article XX as it applied under Article 2.1 of the TBT Agreement*, instead of conducting an independent analysis of the consistency of the EU Seal Regime with the specific terms and requirements of the chapeau.") (emphasis added).

[153] *See US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 107 ("The reasoning in our Report in *United States – Shrimp* on which the Panel relied was not *dicta*; it was essential to our ruling. The Panel was right to use it, and right to rely on it. . . . The Panel had, *necessarily*, to consider our views on this subject…") (emphasis added).

a. Mexico Fails To Prove that the Eligibility Conditions Are Not Even-Handed

86. Mexico argued in its first submission that denying eligibility for the label to tuna products containing tuna caught by setting on dolphins while allowing tuna products containing tuna caught by other fishing methods to be potentially eligible for the label is not even-handed, proving the amended measure discriminatory.[154] Mexico further contends that the United States can only come into compliance by eliminating any eligibility criteria regarding the fishing method used or by killing the program entirely. In Mexico's view, "all tuna fishing methods should be either disqualified or qualified."[155]

87. The United States explained in its first submission that Mexico had failed to prove its case. A number of factors confirm that this is so, including: 1) the eligibility requirements are equal for all tuna products and are not subject to any exceptions; 2) numerous findings from the original panel confirm that the eligibility requirements do not disadvantage Mexican producers vis-à-vis the producers of other countries; 3) the science supports the distinctions that are drawn in the measure and directly contradicts Mexico's approach; and 4) the findings in other disputes support the U.S. position and directly undercut Mexico's position.[156]

88. In its second submission, Mexico again fails to establish that the eligibility requirements prove the amended measure inconsistent with Article 2.1.

89. First, although Mexico appears to concede that the eligibility conditions are entirely neutral as to origin and fishery, Mexico nonetheless disagrees that the eligibility conditions are even-handed.[157] As the United States has explained, the eligibility conditions are, in fact, entirely neutral, and thus even-handed:

- *all* tuna product containing tuna caught by setting on dolphins is ineligible for the label, *regardless of the fishery, nationality of the vessel, and nationality of the processor*; and

- *all* tuna product containing tuna caught where a dolphin was killed or seriously injured is ineligible for the label, *regardless of the fishery, gear type, nationality of the vessel, and nationality of the processor*.[158]

90. Mexico counters that the Appellate Body determined that the eligibility conditions result in a detrimental impact on Mexican tuna products.[159] That is, of course, true, but it does not

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[154] *See* Mexico's First Written 21.5 Submission, paras. 236, 224-50.

[155] Mexico's First Written 21.5 Submission, para. 263.

[156] *See* U.S. First Written 21.5 Submission, paras. 228-39.

[157] *See* Mexico's Second Written 21.5 Submission, para. 135.

[158] *See* U.S. First Written 21.5 Submission, paras. 30-37, 196-200.

[159] Mexico's Second Written 21.5 Submission, para. 135.

prove that such eligibility conditions are not even-handed. Indeed, "[t]he existence of such a detrimental effect *is not sufficient* to demonstrate less favorable treatment under Article 2.1."[160] Further, it is clear from the DSB recommendations and rulings that the Appellate Body did not agree that the eligibility condition regarding setting on dolphins was not even-handed, and the fact that the requirement was neutral across all fisheries surely was a key factor in that finding. One only has to look at the Appellate Body's finding that the other eligibility condition, which was *not* neutral across all fisheries, was *not* even-handed.[161]

91. Second, Mexico reasserts its argument that "fishing methods used outside the ETP have adverse effects on dolphins equal to or greater than setting on dolphins in the ETP in an AIDCP-consistent manner."[162] As discussed above, Mexico puts forward no new evidence to support this assertion nor does it respond to the extensive evidence that the United States put forward that proves this assertion to be unfounded. Mexico simply mischaracterizes the record by contending both that "the United States has not filed any scientific evidence to support" the eligibility conditions, and that "the overwhelming evidence is that other ocean regions should be subject to the same or equivalent requirements."[163]

92. The United States has put forward significant evidence on this point, and that evidence establishes that Mexico's assertion is ill founded.[164] In particular, the evidence on the record contradicts Mexico's approach and fully supports the U.S. view that the United States may draw distinctions between fishing methods for purposes of this labeling regime:

- As to purse seine fishing without setting on dolphins and pole and line fishing, which collectively produce the majority of tuna sold in the U.S. tuna product market, Mexico appears to fail to even allege – much less prove – that either method harms dolphins anywhere remotely near the level that setting on dolphins does.[165] As should be obvious, *setting on dolphins is more dangerous to dolphins than not setting on dolphins is*.

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[160] *US – Tuna II (Mexico) (AB)*, para. 215 (emphasis added).

[161] *US – Tuna II (Mexico) (AB)*, paras. 289-97. We would also note that Mexico cannot explain how its measure is consistent with the original panel's analysis of this regulatory distinction, which we consider to be relevant to the analysis of whether the regulatory distinction is even-handed or not. *See* U.S. First Written 21.5 Submission, paras 231-235. We would further note that Mexico appears to completely abandon its argument that the facts in *EC – Seal Products* supports its position. As we noted previously, the challenged measure in that case had significant exceptions to the restriction. U.S. First Written 21.5 Submission, paras. 238-239. Here, there are none – the eligibility requirements are completely neutral.

[162] Mexico's Second Written 21.5 Submission, para. 140.

[163] Mexico's Second Written 21.5 Submission, para. 141.

[164] U.S. First Written 21.5 Submission, paras. 79-84 and 89-97 (concerning the harms of setting on dolphins), 129-34 (concerning purse seine fishing other than by setting on dolphins), 137-45 (concerning longline fishing), and 149 (on pole and line fishing).

[165] U.S. First Written 21.5 Submission, paras. 125-28, 129-34, 149.

- As to longline fishing, the evidence establishes that the fishing method causes only a fraction of the observed harm that occurs due to setting on the dolphins in the ETP (much less the level of harm that is allowed).[166] Moreover, Mexico puts forward *zero* evidence that longline fishing causes the unobserved harms that setting on dolphins does, such as cow-calf separation, muscular damage, and immune and reproductive systems failures, which can occur as a result of the chase itself, even in the absence of direct mortalities.[167]

- As to gillnet fishing and trawl fishing, which collectively produce only a *de minimis* amount of tuna for the U.S. tuna product market, Mexico fails to put forward sufficient evidence to prove that these fishing methods produce the level of observed harm to dolphins that occurs due to setting on dolphins in the ETP (much less the level of harm that is allowed).[168] And, again, Mexico submits *zero* evidence that these methods cause the unobserved harms that setting on dolphins does. This conclusion makes perfect sense, of course, as these fishing methods only capture dolphins by accident, while *the whole point* of setting on dolphins is to capture them in a purse seine net.

93. And, more fundamentally, Mexico is wrong to argue that the United States may not draw distinctions between different fishing methods. The fact is that setting on dolphins is the only fishing method that targets dolphins. Setting on dolphins is *inherently* dangerous to dolphins. The fishing method involves chase after chase and capture after capture of millions of dolphins in the ETP every year.[169] Mexico responds by arguing that this point proves an "absence of a rational connection" between the amended measure's requirements and its objectives.[170] Nothing could be farther from the truth. There is nothing about setting on dolphins that is safe for dolphins, and the measure rightly denies access to the label to tuna products containing tuna caught by this method. Indeed, the science supports the decisions of the Indian Ocean Tuna Commission (IOTC) and WCPFC to ban the practice entirely.[171]

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[166] U.S. First Written 21.5 Submission, paras. 125-28, 137-45.

[167] *See US – Tuna II (Mexico) (Panel)*, para. 7.499; *see also id*. para. 7.738 (stating that the AIDCP standard "fails to address unobserved adverse effects derived from repeated chasing, encircling and deploying purse seine nets on dolphins, such as separation of mothers and their dependent calves, killing of lactating females resulting in higher indirect mortality of dependent calves and reduced reproductive success due to acute stress caused by the use of helicopters and speedboats during the chase").

[168] U.S. First Written 21.5 Submission, paras. 125-28, 154-56, 159-60.

[169] U.S. First Written 21.5 Submission, paras. 73, 166 *see also US – Tuna II (Mexico) (Panel)*, para. 7.504 (recognizing "that such effects would arise as a result of the chase in itself, and would thus exist even if measures are taken in order to avoid the taking and killing of dolphins in the nets, as is the case under the AIDCP").

[170] Mexico's Second Written 21.5 Submission, para. 142.

[171] *See* WCPFC, "Conservation and Management Measure 2011-03" (Mar. 2013) (Exh. US-11) (WCPFC Resolution 2011-03); IOTC, "Resolution 13/04 on the Conservation of Cetaceans" (2013) (Exh. US-12) (IOTC Resolution 13/04).

94. Mexico fails to prove that the eligibility conditions are not even-handed.

b. Mexico Fails To Prove that the Record-Keeping and Verification Requirements Are Not Even-Handed

95. Mexico argued in its first submission that, because the AIDCP mandates certain record-keeping and verification requirements for tuna caught by large purse seine vessels operating inside the ETP and the amended measure does not impose those same requirements on other tuna sold in the U.S. tuna product market, the amended measure is not even-handed, and therefore is discriminatory.[172] Mexico contends that the United States must require all tuna sold in the U.S. tuna product market as dolphin safe to be subject to AIDCP-equivalent record-keeping and verification requirements to bring this aspect of the amended measure into compliance.[173]

96. The United States responded by explaining why Mexico had not proven its case. In particular, the United States explained in its first written submission that: 1) the "difference" that Mexico complained of does not stem from U.S. law at all, but rather from the AIDCP; 2) Mexico had not put forward any evidence that this aspect disadvantages Mexican producers at all, much less disadvantages them without a sound basis; 3) Mexico had failed to submit any evidence to support its assertion that the U.S. Government and its citizens have been defrauded on an industry-wide scale over the past two decades; and 4) Mexico's approach is completely incompatible with a fundamental principle underlying the TBT Agreement.[174]

97. Mexico now reasserts this same allegation in its second submission. For the below reasons, Mexico fails to establish a *prima facie* case that not imposing AIDCP-equivalent record-keeping and verification requirements for all tuna sold in the U.S. tuna product market renders the amended measure discriminatory.

98. First, Mexico argues that its "claim is made in respect of the relevant regulatory distinction in the labelling conditions and requirements of the Amended Tuna Measure, and not the AIDCP."[175] But Mexico provides no reason as to why this is so. What U.S. law requires is that Mexican producers provide Form 370s that list the AIDCP-mandated tracking number.[176] The actual record-keeping and verification requirements Mexico complains of are contained in

[172] *See* Mexico's First Written 21.5 Submission, paras. 266-73.

[173] Mexico's First Written 21.5 Submission, paras. 272-73; *see also id*. para. 295 ("[A] mandatory independent observer requirement for tuna fishing outside the ETP is both appropriate and necessary if this element of the Amended Tuna Measure is to be applied in an even-handed manner."); Mexico's Second Written 21.5 Submission, paras. 145-46.

[174] *See* U.S. First Written 21.5 Submission, paras. 244-51.

[175] Mexico's Second Written 21.5 Submission, para. 158.

[176] U.S. First Written 21.5 Submission, para. 242 (citing 50 C.F.R. § 216.92(a)(1)-(2) (Exh. US-2)). For tuna caught by U.S. large purse seine vessels operating in the ETP, the amended measure requires that that the tuna be accompanied by the actual AIDCP-mandated records. *Id.*

the AIDCP, as Mexico explained in its first submission.[177] And it is because these requirements are *AIDCP* requirements that Mexico argues that the United States can come into compliance only one way – it must impose AIDCP-equivalent requirements on all of its trading partners.[178] Indeed, if the United States eliminated the requirement that Mexican-caught tuna list the AIDCP verification reference number on the Form 370, the "difference" that Mexico complains about *would still exist*. In light of these facts, Mexico cannot prove that there is a genuine relationship between the difference it complains of and the amended measure.[179] Thus it cannot be the case that *the amended measure* disadvantages Mexican producers in a manner that could be considered not to be even-handed.

99. Second, Mexico disagrees with the United States that this aspect of its claim fails for lack of evidence based on Mexico's theory of its burden of proof. In Mexico's view, a complainant is not required to prove that this element is not even-handed. Rather, relying on the Appellate Body's GATT Article XX analysis in *EC – Seal Products* (where the respondent has the burden of proof), Mexico contends that it needs no evidence – all that is required to establish a *prima facie* case of inconsistency is for Mexico to assert that: "tuna products containing non-dolphin-safe tuna caught outside the ETP *could potentially* enter the U.S. market inaccurately labeled as dolphin-safe."[180]

100. The burden of proof is not what Mexico describes. In this dispute the Appellate Body made clear that nothing in its Article 2.1 analysis alters the traditional notions of burden of proof,[181] whereby a complainant, in the first instance, must establish a "*prima facie* case ... based *on evidence* and legal argument."[182] More generally, the Appellate Body has also emphasized *in this very dispute* that "the party that asserts a fact is responsible for providing proof thereof."[183] Mexico does not explain how its unique theory of its own burden of proof is consistent with the Appellate Body's report, and it is incorrect for Mexico to urge the Panel to ignore the Appellate Body's guidance in the original proceeding.[184] Mexico's claim fails because Mexico has not provided any evidence of such fraud.

101. And it is clear that Mexico has put forward no evidence to prove there is a "difference" in the accuracy of the labeling of tuna product depending on the source of the tuna. Mexico appears to ground its allegation on the assertion that it is "highly likely if not certain" that tuna product containing tuna caught outside the ETP "under non-dolphin-safe circumstances" will be

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[177] *See* Mexico's First Written 21.5 Submission, paras. 89-93. As far as the United States is aware, the AIDCP record-keeping and verification requirements are unique and no other Member or RFMO has established equivalent requirements for this same purpose.

[178] Mexico's First Written 21.5 Submission, paras. 272-73, 295.

[179] *See US – Tuna II (Mexico) (AB)*, paras. 236-39.

[180] Mexico's Second Written 21.5 Submission, para. 150 (emphasis in original).

[181] *US – Tuna II (Mexico) (AB)*, para. 216; *see also US – COOL (AB)*, para. 272.

[182] *US – Gambling (AB)*, para. 140 (quoting *US – Wool Shirts and Blouses (AB)*, at 16) (emphasis added).

[183] *US – Tuna II (Mexico) (AB)*, para. 283 (quoting *Japan – Apples (AB)*, para. 157).

[184] *US – Shrimp (Article 21.5 – Malaysia) (AB),* para. 107.

wrongly (and illegally) labeled as "dolphin safe."[185] What Mexico apparently means by this statement is that tuna is being certified as "dolphin safe" even though it does not meet the eligibility requirements. In this regard, Mexico appears to be making several different assertions about tuna caught outside the ETP on trips that started both before and after July 13, 2013.

102. For tuna caught on trips that started before July 13, 2013 (and therefore not subject to the 2013 Final Rule), what Mexico appears to be asserting is that there was widespread setting on dolphins outside the ETP and that tuna that was produced from these dolphin sets was routinely sold on the U.S. tuna product market as "dolphin safe." Mexico puts forward no evidence to prove either part. As to the first part, the original panel already found that there is no evidence of this harmful fishing practice being conducted on a widespread commercial basis in any other fishery other than the ETP.[186] Mexico does not put forward any evidence that suggests the original panel's finding was incorrect. As to the second part, Mexico merely states that it is impossible to make such a showing because non-dolphin safe tuna looks the same as dolphin safe tuna.[187] But physical inspection is not the only way for a complainant to prove its claim. And, in any event, Mexico does not relieve itself of its own burden of proof simply because it has made assertions that are difficult to prove. As the Appellate Body has stated: "the complainant must prove its claim" regardless of the "degree of difficulty" of doing so.[188]

103. For tuna caught on fishing trips beginning on or after July 13, 2013, Mexico appears to make the same argument regarding the widespread use of setting on dolphins outside the ETP, which fails for the same reasons. Indeed, it would appear even less likely to be true given that both the IOTC and the WCPFC have now prohibited the setting on cetaceans to harvest fish in the Indian and Western Central Pacific Oceans. (U.S. law has long prohibited U.S. commercial vessels from setting on marine mammals except in the ETP in a manner consistent with the AIDCP.)[189]

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[185] Mexico's Second Written 21.5 Submission, para. 154.

[186] *See US – Tuna II (Mexico) (Panel)*, para. 7.520.

[187] See Mexico's Second Written 21.5 Submission, para. 149.

[188] *EC – Sardines (AB)*, para. 281 ("The *degree of difficulty* in substantiating a claim or a defence may vary according to the facts of the case and the provision at issue. For example, on the one hand, it may be relatively straightforward for a complainant to show that a particular measure has a text that establishes an explicit and formal discrimination between like products and is, therefore, inconsistent with the national treatment obligation in Article III of the GATT 1994. On the other hand, it may be more difficult for a complainant to substantiate a claim of a violation of Article III of the GATT 1994 if the discrimination does not flow from the letter of the legal text of the measure, but rather is a result of the administrative practice of the domestic authorities of the respondent in applying that measure. *But, in both of those situations, the complainant must prove its claim*. There is nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison between the respective difficulties that may possibly be encountered by the complainant and the respondent in collecting information to prove a case.") (emphasis added).

[189] Implicit in Mexico's argument is also the assertion that it is impossible that tuna product containing tuna caught ***inside the ETP*** is being inaccurately labeled. But it is surely "potentially" true that AIDCP observer certifications are being submitted that inaccurately state that a dolphin was not killed or seriously injured (when it was) or a set was not done intentionally on dolphins (when it was) either through error or malfeasance. Indeed, we know that cases where observers have reported attempts to bribe or intimidate them into making false certifications

104. For tuna caught on fishing trips beginning on or after July 13, 2013, Mexico also appears to assert that there is widespread killing of dolphins outside the ETP and that tuna caught in gear deployments with dolphin mortality is routinely being sold in the U.S. tuna product market as "dolphin safe." Again, Mexico is incapable of proving either part of its own assertion. As to the first part, there is no evidence of widespread killing of dolphins in the fisheries that produce nearly all the tuna for the U.S. tuna product market (purse seine, longline, pole and line fisheries in the Western Central Pacific). For example, in 2010, in the purse seine fishery in the WCPO, an estimated 2.64 dolphin mortalities occurred per 1,000 sets for a total of 110 animals (compared to 1,170 animals in the ETP, or 53.4 dolphins per 1,000 sets).[190] U.S. observer data from the Hawaii deep-set longline fishery for tuna shows that the vast majority of longline sets (approximately 96.3-98.1 percent) occur without any cetacean interactions at all and that dolphin mortality in this fishery amounts to only 25-41 animals per year.[191] And Mexico appears to concede that pole and line fishing is not associated with cetacean bycatch.[192]

105. Next, Mexico fails to explain how its approach is not inconsistent with the fundamental principle underlying the TBT Agreement that "a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives '*at the levels it considers appropriate*.'"[193] By contending that the United States must impose AIDCP-equivalent requirements on all its trading partners, Mexico urges this Panel to adopt an approach whereby whatever Mexico commits to in an international agreement, the United States must require of itself and all its other trading partners, irrespective of the science or any other consideration. In other words, Mexico sets the U.S. level of protection, not the United States. Mexico's approach is thus incompatible with the sixth preambular recital and, as such, cannot establish that the amended measure is inconsistent with Article 2.1.[194]

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have been brought to the attention of the International Review Panel (IRP). *See* IDCP IRP, *Summary of Pending Special Cases Monitored by the IRP*, Doc. IRP-45-09b (June 17, 2008) (Exh. US-100); IDCP IRP, *Summary of Pending Special Cases Monitored by the IRP*, Doc. IRP-54-08b (Oct. 17, 2013) (Exh. US-101). The United States does not maintain that these isolated incidents of misbehavior demonstrate there is a widespread phenomenon of false observer certifications. Indeed, we believe that if such incompetence or wrongdoing was occurring on a widespread basis there would be other indicators that this was happening, such as whistleblowers or other red flags leading to government or IATTC investigations, press reports, NGO exposés, etc. We are not aware that such indicators exist and, as such, do not consider that there is a basis to question the general veracity of the AIDCP observer certifications. But the same point holds true for tuna caught <u>*outside the ETP*</u>, where these indicators similarly do not exist, and Mexico can only cite to isolated incidents such as the *Freitas* case. As such, the United States does not consider that there is a basis to question the general veracity of the captain's statements from vessels operating outside the ETP.

[190] WCPFC Cetacean Interactions Paper, at 6, Table 2b (Exh. US-58).

[191] *See* NMFS PIROP, "Deep Set 2012 Annual Status Report" (US-83); NMFS PIROP, "Deep Set 2013 Annual Status Report (2014) (US-84); "U.S. National Bycatch Report First Edition Update," Table 8.3 (Exh. US-67); "U.S. National Bycatch Report First Edition Update," Table 8.4 (Exh. US-68).

[192] Gilman & Lundin 2009, at 3 (Exh. US-69).

[193] *US – Tuna II (Mexico) (AB)*, para. 316 (quoting the sixth preambular recital) (emphasis added); *US – COOL (AB)*, para. 373 (quoting same).

[194] We would further note that Mexico fails to explain the stark internal inconsistency of Mexico's argument. Mexico repeatedly argues that the amended measure is a "unilateral" measure whose intent is to "coerce"

106. Finally, Mexico ignores the history of why the AIDCP was agreed to in the first place. The IATTC Members agreed to *different* requirements regarding record-keeping/verification and observer coverage than other Members have agreed to in other fisheries because the ETP *is different*. Nowhere else in the world is there a regular and significant tuna-dolphin association that is exploited on a wide scale commercial basis.[195] And, of course, nowhere else in the world has a tuna fishery caused the harm to dolphins that large purse seine vessels have caused in the ETP. Again, it is estimated that 350,000-650,000 dolphins were killed *each year* in the ETP purse seine fishery between 1959 and 1972, and that large purse seine vessels were killing tens of thousands of dolphins annually through 1992.[196] That is why the AIDCP parties have imposed requirements on the operations of large purse seine vessels operating in the ETP (and their purchasers). While Mexico claims that tuna fisherman are harming dolphins worldwide, not even Mexico claims that there is (or has ever been) a single tuna fishery (other than the ETP) that *killed hundreds of thousands of dolphins every year*. Accordingly, it is no surprise that tuna caught by large purse seine vessels in the ETP is now subject to different rules than tuna caught elsewhere. The ETP *is different*, and the fishing method used in the ETP *is different*. And the fact that the amended measure requires the AIDCP reference number to be included on the Form 370 is not illegitimate.

107. Mexico fails to prove its allegation with regard to this aspect of the measure.

c. Mexico Fails To Prove that the Requirement for an Observer Certification Is Not Even-Handed

108. Mexico argued in its first submission that, because the AIDCP mandates all large purse seine vessels operating in the ETP to carry observers and the amended measure does not require other vessels to carry observers, the amended measure is not even-handed and, therefore, is discriminatory.[197] Mexico claims that the United States can only bring this aspect of the challenged measure into compliance one way – requiring the adoption of an AIDCP-equivalent

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Mexican vessels to fish in a particular way by requiring "a rigid and unbending standard" for Mexican producers. Mexico's Second Written 21.5 Submission, paras. 106-10. But the fault that Mexico finds with the amended measure is exactly what it argues that the United States must require of all its trading partners – Mexico asserts that the United States must impose specific record-keeping and verification requirements on all of its trading partners, regardless of the science or any other consideration.

[195] *U.S. – Tuna II (Mexico) (Panel)*, para. 7.520.

[196] U.S. First Written 21.5 Submission, para. 79 (citing Michael L. Gosliner, "The Tuna Dolphin Controversy," in Twiss & Reeves (eds.) *Conservation and Management of Marine Mammals* (1999) (Exh. US-34); 2009 IATTC Annual Report, at 71, Table 8 (Exh. US-35).

[197] *See* Mexico's Second Written 21.5 Submission, para. 166 (arguing that "the absence of a mandatory independent observer requirement for tuna fishing outside the ETP meant that the detrimental impact of the Amended Tuna Measure on imports of Mexican tuna products did not stem exclusively from a legitimate regulatory distinction and, instead, reflects discrimination against a group of imported products"); Mexico's First Written 21.5 Submission, paras. 284-85.

observer program on all vessels, operating anywhere in the world, that produce tuna for the U.S. tuna product market.[198]

109. The United States explained in its first written submission that: 1) the "difference" that Mexico complained of does not stem from U.S. law at all, but rather from the AIDCP; 2) Mexico fails to prove that this aspect of the amended measure is arbitrary; 3) Mexico had not put forward any evidence that this aspect disadvantages Mexican producers at all, much less disadvantages them without a sound basis; 3) Mexico's approach is impractical and thus highly trade restrictive; and 4) Mexico's approach is completely incompatible with a fundamental principle underlying the TBT Agreement.[199]

110. While Mexico now reasserts this same allegation in its second submission, it again fails to establish a *prima facie* case that not imposing AIDCP-equivalent observer coverage on the rest of the world renders the amended measure discriminatory.

111. For Mexican large purse seine vessels operating in the ETP, any tuna sold as dolphin safe must be accompanied by a Form 370 and valid documentation signed by a representative of the Government of Mexico that certifies, among other things, that there was an IDCP-approved observer on board for the entire trip.[200] For tuna caught in other fisheries, the tuna must be accompanied 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"; and, for tuna caught by purse seine vessel, "no purse seine net was intentionally deployed on or used to encircle dolphins" during the fishing trip.[201]

112. The specific requirements regarding the AIDCP observer program are contained in the AIDCP and related documents.[202] Such requirements are not repeated in U.S. law.[203] As far as the United States is aware, the AIDCP observer program is unique and no regional fisheries

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[198] Mexico's First Written 21.5 Submission, para. 295 ("[A] mandatory independent observer requirement for tuna fishing outside the ETP is both appropriate and necessary if this element of the Amended Tuna Measure is to be applied in an even-handed manner."); *see also* Mexico's Second Written 21.5 Submission, para. 167 ("Mexico explained that it is both appropriate and necessary to have an independent observer requirement for tuna fishing outside the ETP."); *id.* para. 184 ("The most obvious, effective and available safeguard would be to require that dolphin-safe certification be conducted by an independent, trained and qualified observer on board the fishing vessel [operating outside the ETP].").

[199] *See* U.S. First Written 21.5 Submission, paras. 252-75.

[200] *See* U.S. First Written 21.5 Submission, para. 42 (citing 50 C.F.R. §§ 216.92(b)(2), 216.24(f)(2) (Exh. US-2); NOAA Form 370, at 5(B)(5) (Exh. MEX-22)). For U.S.-flagged large purse seine vessels operating in the ETP, the amended measure requires that the tuna caught by those vessels must be accompanied by the AIDCP-mandated TTF which has been certified by the AIDCP-mandated observer (as well as the captain). *See* 50 C.F.R. § 216.92(a) (Exh. US-2).

[201] *See* 50 C.F.R. §§ 216.91(a)(2)(i)-(iii), (a)(4)(i) (Exh. US-2); *see also* NOAA Form 370 (Exh. MEX-22).

[202] *See* AIDCP, as amended Oct. 2009, Annex II (Exh. MEX-30); IATTC, Quarterly Report (April-June 2013), at 14 (Exh. MEX-29); *see also* Mexico's First Written 21.5 Submission, paras. 70-72.

[203] *See generally* 50 C.F.R. §§ 216.91, 216.92 (Exh. US-2); *see also* U.S. First Written 21.5 Submission, paras. 39-43.

management organizations (RFMOs) or Members (other than AIDCP parties operating affiliated national programs) operate an equivalent program in terms of coverage and purpose.

113. As noted previously,[204] the Appellate Body was well aware that large purse seine vessels operating in the ETP carry observers while other vessels do not, noting that the eligibility certifications "are to be provided: (1) by the captain of the vessel; or (2) by the captain of the vessel *and an observer*."[205] Indeed, the Appellate Body directly addressed the relevance of this issue to Mexico's Article 2.1 claim:

> [W]e note that nowhere in its reasoning did the Panel state that imposing a requirement that an independent observer certify that no dolphins were killed or seriously injured in the course of the fishing operations in which the tuna was caught would be the *only* way for the United States to calibrate its 'dolphin safe' labeling provisions . . . . We note, in this regard, that the measure at issue itself contemplates the possibility that only the captain provide such a certification under certain circumstances.[206]

114. Consistent with this approach, the Appellate Body did not find the aspect regarding observers and captain statements to be not even-handed. Rather, the Appellate Body specifically recognized that the original measure "*fully* addresses the adverse effects on dolphins resulting from setting on dolphins" – both inside and *outside the ETP* – even though a captain statement was the certification required for tuna caught outside the ETP.[207]

115. Mexico now seeks to "appeal" this finding and urges this Panel to declare that the challenged measure's requirement regarding the captain statements "is inherently flawed, in that it creates a very real risk, if not a certainty, that inaccurate dolphin-safe certifications will be

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[204] See U.S. First Written 21.5 Submission, para. 258.

[205] *US – Tuna II (Mexico) (AB)*, para. 174 (emphasis added); *see also id.* para. 264 ("In its analysis, the Panel acknowledged that, due in particular to the AIDCP On-Board Observers Program and the AIDCP System for Tracking and Verifying Tuna, detailed information is available concerning dolphin mortalities resulting from tuna fishing in the ETP, and that, by contrast, evidence relating to dolphin bycatch outside the ETP is contained in a 'limited amount of *ad-hoc* studies.'") (quoting *US – Tuna II (Mexico) (Panel)*, para. 7.519).

[206] *US – Tuna II (Mexico) (AB)*, para. 296.

[207] *US – Tuna II (Mexico) (AB)*, para. 297 ("We note, in particular, that the US measure *fully* addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas *it does not address mortality* (observed or unobserved) arising from fishing methods *other than setting on dolphins outside the ETP*. In these circumstances, we are not persuaded that the United States has demonstrated that the measure is even-handed in the relevant respects, even accepting that the fishing technique of setting on dolphins is particularly harmful to dolphins.") (emphasis in original and added, internal quotes omitted). This finding now applies equally to the eligibility requirement for tuna caught outside the ETP that the 2013 Final Rule adds.

granted outside the ETP."[208] For the reasons explained above, Mexico's unfounded approach to overturn the DSB recommendations and rulings should be rejected.[209]

116. In addition, Mexico reasserts a number of arguments that it made in its first written submission, all of which fail.

117. First, Mexico argues that its approach is consistent with the approach adopted by the Appellate Body.[210] As discussed above, this is incorrect. Mexico's approach directly contradicts the Appellate Body's statement in paragraphs 296-297 (quoted above). Mexico's only alleged basis for such "consistency" is that it claims to have proved that "dolphins outside the ETP face *higher* risks of mortality or serious injury than dolphins within the ETP when tuna is being fished in an AIDCP-compliant manner."[211] Mexico cites to no evidence to prove this extreme assertion, and it is surely untrue. Indeed, as the United States has established, Mexico has utterly failed to prove that other fishing methods "have adverse effects on dolphins that are equal to or greater than" setting on dolphins in an AIDCP-compliant manner does.[212]

118. Second, Mexico argues that this "difference" "lacks impartiality" and is "inherently unfair."[213] But as the United States explained previously, Mexico's grievance is not with the amended measure, but with the diversity of rules for fishing that exist throughout the world. The requirement for a large purse seine vessel operating in the ETP to carry an observer *stems from the AIDCP*, not U.S. law. Indeed, if the United States eliminated all references to the AIDCP-mandated observer requirement from the amended measure, the "difference" that Mexico

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[208] Mexico's Second Written 21.5 Submission, para. 175; *id*. para. 183 ("Importantly, there are no safeguards in place in relation to the administration of the dolphin-safe certification requirements for tuna caught outside the ETP.") (emphasis in original); *see also* Mexico's First Written 21.5 Submission, para. 295 (arguing that the Panel should ignore the Appellate Body's analysis in this regard because "neither the Panel nor the Appellate Body had before it the facts regarding adverse effects on dolphins set out in section III of this submission or the facts regarding the unreliability of captain certifications . . .").

[209] *See supra*, sec. III.A.2; U.S. First Written 21.5 Submission, paras. 218-21.

[210] *See* Mexico's Second Written 21.5 Submission, para. 170.

[211] Mexico's Second Written 21.5 Submission, para. 170 (emphasis added).

[212] *See supra*, sec. II; U.S. First Written 21.5 Submission, paras. 89-101, 110-66. As we noted in footnote 489 of the U.S. First Written 21.5 Submission, Mexico appears to misunderstand the Appellate Body's statement that requiring observers "may be appropriate in circumstances in which dolphins face higher risks of mortality or serious injury," *US – Tuna II (Mexico) (AB)*, n.612, to mean that it may be "appropriate *and necessary*" for the United States to unilaterally impose an observer certification on other Members to be consistent with its WTO obligations. Mexico's First Written 21.5 Submission, para. 295 (emphasis added); Mexico's Second Written 21.5 Submission, para. 167 ("Mexico explained that it is both appropriate *and necessary* to have an independent observer requirement for tuna fishing outside the ETP.") (emphasis added). In footnote 612, the Appellate Body merely recognized that there may be circumstances where a Member *could* unilaterally impose an observer requirement on the vessels of certain Members (and not other Members) consistent with Article 2.1. At no time did the Appellate Body ever suggest what Mexico claims it did – that there are circumstances where a Member *must* unilaterally impose an observer requirement on the vessels of certain Members *in order to be consistent with Article 2.1*. Mexico fails to address its mischaracterization of the Appellate Body's report in its Second Written 21.5 Submission.

[213] Mexico's Second Written 21.5 Submission, para. 176.

criticizes *would still exist*. In light of these circumstances, it cannot be said that there exists a *genuine relationship* between the amended measure and any disadvantage that Mexico perceives its tuna product industry is operating under vis-à-vis other Members that are selling tuna or tuna product in the U.S. tuna product market.[214] Mexico's claim as to this aspect of the amended measure fails here.

119. Third, Mexico contends that captain statements are "inherently unreliable" and that the amended measure is "designed and applied in a manner that creates the likelihood, if not the certainty, that non-conforming tuna will be improperly certified as dolphin safe."[215] In fact, Mexico claims that because the fraud outside the ETP is so widespread (and the fraud inside the ETP is non-existent) that Mexican tuna producers "will lose competitive opportunities to tuna caught outside the ETP."[216] In this connection, Mexico argues that the Appellate Body's GATT Article XX analysis in *EC – Seal Products* establishes that Mexico need not provide any evidence to prove its TBT Article 2.1 claim.[217]

120. But Mexico does not establish a *prima facie* case that the amended measure is inconsistent with Article 2.1 based on mere assertions.[218]

121. As discussed above, Mexico appears to be making several different assertions here, and there is no evidence on the record that proves any of these assertions. Mexico puts forward no evidence that tuna fishing vessels that produce significant amounts of tuna for the U.S. tuna product market (*i.e.*, purse seiners, longliners, and pole and line fishermen operating in the Western Central Pacific) are routinely fishing in a manner contrary to the eligibility requirements in place under the original measure or the amended measure.[219] Moreover, Mexico puts forward no evidence that any tuna that is ineligible for the label is being illegally labeled as "dolphin safe" either before the 2013 Final Rule came into force or after.

122. In lieu of actual evidence, Mexico alleges that captains have a "vested commercial and financial interest" in whether the tuna caught is eligible for the dolphin safe label if sold in the U.S. tuna product market. To the extent that is true, it is certainly true for *all* captains, including captains operating in the ETP. Mexico's argument *assumes* that captains operating outside the ETP are fraudulently certifying tuna as dolphin safe when it is not, while *assuming* that captains

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[214] *See US – Tuna II (Mexico) (AB)*, paras. 236-39.

[215] Mexico's Second Written 21.5 Submission, para. 189.

[216] Mexico's Second Written 21.5 Submission, para. 182 ("[T]he captain self-certification regime poses a very real risk that tuna caught in the ETP, which is accurately certified as dolphin-safe by independent observers, will lose competitive opportunities to tuna caught outside the ETP, which has received an inherently unreliable dolphin-safe certification from a self-interested captain.").

[217] Mexico's Second Written 21.5 Submission, para. 190.

[218] *See supra*, sec. III.A.4.b (citing *US – Tuna II (Mexico) (AB)*, para. 283 (quoting *Japan – Apples (AB)*, para. 157)). As was the case with regard to the record-keeping and verification aspect, the fact that Mexico finds it difficult to prove its claim does not relieve itself of its burden of proof. *See supra*, sec. III.A.4.b (citing *EC – Sardines (AB)*, para. 281).

[219] *See supra*, sec. II.C.

are not finding ways to get AIDCP observers to fraudulently certify tuna as being caught consistent with the AIDCP requirements when it is not. Again, the United States does not take the position that the latter is true or that the isolated incidents of attempted observer bribery and intimidation evince a widespread problem.[220] And the same holds true for the former. Mexico cannot hope to prove its claim based simply on its insistence – without more – that certifications by captains operating outside the ETP are inherently unreliable.

123. Mexico's position ignores the fact that this is a closely watched industry. As discussed in the U.S. first written submission, NOAA conducts extensive verification of U.S. canneries, which process both U.S. and foreign tuna, through inspections, audits, and spot checks.[221] Moreover, as is well understood, numerous environmental NGOs are extremely focused on whether the industry is operating consistent with U.S. law, and do not hesitate to launch a public awareness campaigns against companies that they believe are selling non-dolphin safe tuna. The sum result is that the tuna product industry is very risk adverse. Indeed, Mexico's detrimental impact analysis is premised on just this point. It is not that Mexican producers are prohibited from shipping non-dolphin safe tuna product to the United States, it is that large U.S. food retailers refuse to buy Mexico's non-dolphin safe tuna product.

124. We would further note that although Mexico appears to consider that the maximum penalty of US$11,000 per count for illegally setting purse seine nets on dolphins is inadequate, that is but just one of the penalties available. For example, the DPCIA provides for a civil judicial penalty of up to US$130,000 for "knowingly and willfully" making a false statement on the captain's statement.[222] In addition, making a false statement to a federal agent is a criminal offense, punishable by imprisonment.[223] Finally, the U.S. Government may seize the tuna unlawfully imported or landed pursuant to Section 107 of the MMPA.[224]

125. Fourth, Mexico argues that this aspect of the measure is not even-handed because it is "entirely inconsistent with the objective" of the amended measure.[225] Mexico does not cite the Appellate Body report in *US – Tuna II (Mexico)* for this point, and nor could it. The Appellate Body has never mentioned this inquiry as an element of the analysis in either this dispute or the other two TBT disputes, *US – Clove Cigarettes* or *US – COOL*. Rather, Mexico can only find

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[220] *See supra*, secs. II.C-E.

[221] U.S. First Written 21.5 Submission, paras. 44-54.

[222] 16 U.S.C. § 1385(e) (referencing 16 U.S.C. § 1385(d)(2)(B) (Exh. MEX-8)); *Civil Monetary Penalties; Adjustment for Inflation*, 77 Fed. Reg. 72,915, 72,916 (Dec. 7, 2012) (Exh. US-102).

[223] 18 U.S.C. § 1001 (Exh. US-103).

[224] *See* 16 U.S.C. § 1377(e) (Exh. US-104); 16 U.S.C. § 3374(a)(1) (Exh. US-105); 18 U.S.C. § 545 (Exh. US-106). While Mexico appears to criticize the United States for not applying its laws to foreign persons falling outside U.S. jurisdiction, Mexico's Second Written 21.5 Submission, para. 185, it is difficult to understand why Mexico considers such criticism to be relevant to whether the amended measure is even-handed as only those persons falling within U.S. jurisdiction are subject to these penalties while other persons outside U.S. jurisdiction, notably Mexican nationals and companies, are not subject to such penalties.

[225] Mexico's Second Written 21.5 Submission, para. 193.

support in the analysis of the Article XX chapeau.[226] But that inquiry seems wholly incompatible with the Article 2.1 analysis that the Panel must conduct here. As even Mexico concedes, the part of the Article XX analysis that it relies on asks "'whether *the discrimination* can be reconciled with, or is rationally related to' the relevant policy objective."[227] But the question here is *whether* discrimination has occurred or not.[228] Moreover, the Appellate Body has made clear that analyses are different under TBT Article 2.1 and the chapeau of GATT Article XX, a point that Mexico wholly ignores.[229] Therefore, this issue is not relevant to the analysis. We do, however, respond to Mexico's argument below in our discussion of why the amended measure is justified under GATT Article XX.[230]

126. Fifth, Mexico's argument fails simply because of what it asks the Panel to accept. Again, Mexico argues that because it has made an internationally binding legal commitment that its large purse seine vessels operating in the ETP will carry AIDCP observers, the United States must now require all vessels, operating anywhere in the world, to carry an AIDCP-equivalent observer.[231] Mexico's approach simply cannot succeed for a whole variety of reasons.

- Mexico's approach ignores why the AIDCP was agreed to in the first place. As noted previously,[232] the IATTC Members agreed to *different* requirements regarding record-keeping/verification and observer coverage because the ETP *is different* – nowhere else in the world has a tuna fishery caused the harm to dolphins that large purse seine vessels have caused in the ETP, with 350,000-650,000 dolphins being killed *each year* between 1959 and 1972 and tens of thousands being killed annually through 1992.[233] In light of this *unique* history, the AIDCP parties agreed to *unique* requirements, including the AIDCP observer program. While Mexico describes this situation as "inherently unfair,"[234] it is not. Millions and millions of dolphins died because ETP

[226] Mexico's Second Written 21.5 Submission, para. 191 (relying on the Article XX analyses conducted by the Appellate Body in *EC – Seal Products*, *Brazil – Retreaded Tyres*, and *US – Shrimp*).

[227] Mexico's Second Written 21.5 Submission, para. 191 (quoting *EC – Seal Products (AB)*, para. 5.306 (emphasis added)).

[228] *US – Tuna II (Mexico) (AB)*, para. 340.

[229] *EC – Seal Products (AB)*, paras. 5.311-313.

[230] *See, e.g.*, *infra*, sec. III.D.4.b (explaining why Mexico is wrong to argue that this aspect of the amended measure undermines the objective of the amended measure).

[231] Mexico's Second Written 21.5 Submission, para. 167 ("Mexico explained that it is both appropriate and necessary to have an independent observer requirement for tuna fishing outside the ETP."); *id.* para. 184 ("The most obvious, effective and available safeguard would be to require that dolphin-safe certification be conducted by an independent, trained and qualified observer on board the fishing vessel [operating outside the ETP]."); Mexico's First Written 21.5 Submission, para. 295 ("[A] mandatory independent observer requirement for tuna fishing outside the ETP is both appropriate and necessary if this element of the Amended Tuna Measure is to be applied in an even-handed manner.").

[232] *See supra*, sec. III.A.4.b.

[233] U.S. First Written 21.5 Submission, para. 79 (citing Gosliner 1999 (Exh. US-34); 2009 IATTC Annual Report, at 71, Table 8 (Exh. US-35)).

[234] Mexico's Second Written 21.5 Submission, para. 176.

fishing nations, including the United States and Mexico, took advantage of the unique association between dolphins and tuna in the ETP, and repeatedly chased, captured, *and killed* dolphins to capture the tuna swimming beneath them. And Mexico is wrong to urge the Panel to ignore that history when evaluating whether the amended measure is discriminatory.

- Mexico's approach ignores the current harm. As discussed above, even taking account the special requirements (including 100 percent observer coverage) that are applicable to large purse seine vessels operating in the ETP, Mexico cannot prove that the other fishing methods cause an equal or greater amount of harm to dolphins than setting on dolphins in an AIDCP-consistent manner.[235]

- Mexico's approach ignores the trade consequences of requiring 100 percent observer coverage. Indeed, as discussed in the U.S. first written submission,[236] Mexico's approach would appear to be entirely unworkable for many Members given the expense of administering an observer program, particularly without the support of the RFMO, which Mexico and the other AIDCP parties benefit from.[237] This blanket requirement that Mexico proposes, untethered to any harm to dolphins, would mean that certain Members would lose the ability for their product to carry the label, regardless of whether the tuna product meets the eligibility requirements in the amended measure.[238] As noted previously, mandating an observer requirement in

[235] *See supra* secs. II.B-D; *see also* U.S. First Written 21.5 Submission, secs. II.C.1.b, II.C.2.

[236] *See* U.S. First Written 21.5 Submission, para. 274.

[237] As noted previously, self-reporting is an important tool for many Members where the fish is produced on the high seas or in the territorial waters of other Members and an importing Member cannot independently verify every action taking place (or not taking place) on every vessel that may produce fish for the domestic market. The United States is no different and relies on self-reporting for a number of its measures, including the MMPA. U.S. First Written 21.5 Submission, para. 266; *see, e.g.*, 50 C.F.R. § 300.17 (Exh. US-107); 50 C.F.R. § 300.22 (Exh. US-108); 50 C.F.R. §§ 300.174-175 (Exh. US-109); 50 C.F.R. § 300.218 (Exh. US-110); 50 C.F.R. § 660.708 (Exh. US-111). We would further note that while Mexico tries to avoid this argument by (correctly) noting that the FAO *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (Port State Measures Agreement) has yet to take effect, Mexico's Second Written 21.5 Submission, para. 61, Mexico fails to note that binding instruments based on this agreement that require vessels to report fishing-related information to the port state in advance of arrival in port have been adopted by different RFMOs, including the ICCAT, to which both the United States and Mexico are parties. *See* U.S. First Written 21.5 Submission, para. 266 (citing ICCAT, "Recommendation 12-07 by ICCAT for an ICCAT Scheme for Minimum Standards for Inspection in Port," para. 11 (2012) (Exh. US-77).

[238] As the United States noted previously, the IATTC Secretariat administers the AIDCP observer program and the IATTC funds 30 percent of the program's budget. U.S. First Written 21.5 Submission, para. 274 (citing to IATTC, Doc. CAF-01-05, *Program and Budget for Fiscal Years 2014 and 2015*, at 1, 1st Meeting of the Comm. on Admin. & Finance, Veracruz, Mexico (June 5, 2013) (Exh. US-23)). Despite funding raised from the IATTC members and vessel assessment, however, the AIDCP had a cumulative deficit of US$770,913. Even with a proposed 18% increase in vessel assessments, the AIDCP is projected to still have a deficit of $278,245 in 2018. *See* AIDCP Budget, Doc. MOP-29-06, 29th Mtg. of the Parties, Lima, Peru (July 8, 2014) (Exh. US-112).

fisheries where there is little to no interaction between tuna and dolphins raises additional legal concerns.[239]

- Mexico's approach ignores the fundamental principle underlying the TBT Agreement that "a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives '*at the levels it considers appropriate*.'"[240] Rather, Mexico appears to take the view that the United States must impose a regulatory requirement on itself and all of its trading partners simply because Mexico has agreed to abide by such a requirement in one fishery. As explained previously and above, Mexico's approach is simply wrong in this regard.

- Mexico's approach appears to ignore its own argument. As noted above,[241] Mexico repeatedly argues that the amended measure is a "unilateral" measure whose intent is to "coerce" Mexican vessels to fish in particular way by requiring "a rigid and unbending standard" on Mexican producers.[242] But the fault that Mexico finds with the amended measure is exactly what it argues that the United States *must* require of all its trading partners. In Mexico's view, the United States must impose "a rigid and unbending" observer requirement on all of its trading partners, regardless of whether it is needed in light of harm to dolphins in that particular fishery or feasible given the expense of the program.

127. Finally, Mexico appears to consider it "critical[]" that NMFS had not yet made a determination as to whether any observers participating in observer programs are "qualified and authorized" to make an observer statement regarding the applicable eligibility conditions of the amended measure. The United States disagrees. For all of the above reasons, this aspect of the amended measure is even-handed. Therefore, not only does the United States not consider this NMFS determination to be critical to this dispute, we do not even consider it relevant.

128. Nevertheless, the United States recognizes that observers are important in the collection of data, including data related to harms caused to dolphins by fishing. Accordingly, on July 14, 2014, NMFS published criteria for what an observer program would need to satisfy in order to be considered "qualified and authorized" to issue observer statements for purposes of the dolphin-safe labeling program under the DPCIA.[243] In this same notice NMFS has determined that the

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[239] As noted previously, Mexico's approach may put the United States in the position of having to face accusations that it has acted inconsistently with TBT Article 2.2 by imposing the uniform requirement that, to qualify for the dolphin safe label, all tuna product be accompanied by an observer certification, even though the interaction between tuna and dolphins may be very low in the particular fishery in which the tuna was caught. *See* U.S. First Written 21.5 Submission, para. 274 n.518.

[240] *US – Tuna II (Mexico) (AB)*, para. 316 (quoting the sixth preambular recital) (emphasis added); *US – COOL (AB)*, para. 373 (quoting same).

[241] *See supra*, sec. III.A.4.b.

[242] Mexico's Second Written 21.5 Submission, paras. 106-10.

[243] Determination of Observer Programs as Qualified and Authorized by the Assistant Administrator for Fisheries, 79 Fed. Reg. 40,718 (July 14, 2014) (Exh. US-113). Observer statements will certify that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught and, in purse

observers participating in observer programs for all seven domestic fisheries where tuna is regularly harvested satisfy the criteria.[244] As a result, an observer statement will be required, in addition to the captain's statement required under 50 C.F.R. § 216.91(a)(2)(i), (2)(iii)(A), and (4)(i), where an observer is on board the vessel. Where no observer is onboard, a captain's statement is still required for tuna to be labeled dolphin safe.[245]

5. Conclusion on Article 2.1

129. For the above reasons, Mexico's Article 2.1 claim fails.

B. Mexico Fails To Establish that the Amended Dolphin Safe Labelling Measure Is Inconsistent with Article I:1 of the GATT 1994

130. Mexico asserts that the amended measure is inconsistent with Article I:1 of the GATT 1994 because it grants the advantage of access to the dolphin safe label to tuna product originating in some Members but does not "immediately and unconditionally" accord the same advantage to Mexican tuna product.[246]

131. As a threshold matter, we note that Mexico relies entirely on the Appellate Body's conclusion in paragraphs 233-235 of its report that the amended measure causes a detrimental impact on Mexican tuna product containing tuna caught by setting on dolphins to prove its Article I:1 claim.[247] As is clear, the Appellate Body's finding of detrimental impact, as well as the original panel's factual findings that underlie the Appellate Body's conclusion, is limited to the ineligibility for the label of tuna product containing tuna caught by setting on dolphins and

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seine fisheries, that the net was not intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna were caught.

[244] The seven domestic fisheries are: the American Samoa Pelagic Longline Fishery; the Atlantic Bluefin Tuna Purse Seine Fishery; the Atlantic Highly Migratory Species Pelagic Longline Fishery; the California Deep-set Pelagic Longline Fishery; the California Large-mesh Drift Gillnet Fishery; the Hawaii Deep-set Longline Fishery; and the Hawaii Shallow-set Longline Fishery. *See* 79 Fed. Reg. at 40,720 (Exh. US-113).

[245] Each of these seven U.S. observer programs has a certain level of observer coverage (ranging from approximately 8 to 100 percent), although the exact coverage for any one of these fisheries can vary depending on the availability of funds and other considerations. This notice does not affect the level of observer coverage in any one of these seven fisheries. *See* NMFS, *National Observer Program FY 2012 Annual Report*, at 29-38 (2013) (Exh. US-114).

[246] *See* Mexico's Second Written 21.5 Submission, para. 197.

[247] Mexico's Second Written 21.5 Submission, para. 203 ("In the original proceedings, the Appellate Body found that *the lack of access* to the advantage of the dolphin-safe label for tuna products containing tuna caught by *setting on dolphins* had a detrimental impact on the competitive opportunities of Mexican tuna products in the U.S. market.") (emphasis added) (citing *US – Tuna II (Mexico) (AB)*, paras. 233, 235); Mexico's First Written 21.5 Submission, n.313 ("In the original proceedings, the Panel agreed with Mexico that *access* to the "dolphin-safe" label constitutes an "advantage" on the US market. This finding was not appealed. The Appellate Body found that the factual findings by the Panel clearly establish 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.") (emphasis added) (citing *US – Tuna II (Mexico) (AB)*, paras. 233-35); *see also id.* para. 313 ("The advantage granted by the Amended Tuna Measure is the authorization to use "dolphin-safe" labelling in the United States on tuna products.").

the potential eligibility of tuna product containing tuna caught by other methods.[248] Mexico *neither claims nor proves* that any other aspect of the amended measure, including the requirements related to record-keeping/verification and observer coverage, are inconsistent with Article I:1.

132. As discussed in the U.S. first written submission, Mexico has failed to meet its burden of demonstrating that the amended measure is inconsistent with Article I:1.[249] The United States considers that the "advantage" accorded by the U.S. measure is access to the dolphin safe label.[250] No member has a *right* to use the label; instead, access is conditioned on meeting the two eligibility conditions of the amended measure. As the Appellate Body has noted, Article I:1 does not prohibit a Member from attaching origin-neutral conditions to the granting of an advantage,[251] and the original panel correctly determined that the measure distinguishes among tuna products based on fishing methods, which are "not inherently tied to the 'national' origin" of the tuna or tuna product.[252] Nothing prevents Mexican canneries or Mexican vessels from producing tuna product that would be eligible for the dolphin safe label and, indeed, other

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[248] *See US – Tuna II (Mexico) (AB)*, paras. 233-35, in particular para. 235: "In our view, the factual findings by the Panel clearly establish 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." (emphasis added); *see also id.* para. 284 ("[W]e concluded earlier that *the detrimental impact* of the measure on Mexican tuna products is caused by the fact that most Mexican tuna products contain tuna caught by *setting on dolphins* in the ETP and are therefore *not eligible for a 'dolphin-safe' label*, whereas most tuna products from the United States and other countries that are sold in the US market contain tuna caught by other fishing methods outside the ETP and are therefore eligible for a 'dolphin-safe' label.") (emphasis added); *see also supra*, sec. III.A.3 (discussing the original panel's findings in this regard).

[249] *See* U.S. First Written 21.5 Submission, paras. 277-90.

[250] U.S. First Written 21.5 Submission, para. 280. As discussed in the original proceeding, the issue of whether the U.S. provisions fail to accord such an advantage was heard and decided two decades ago when a 1991 panel under the GATT 1947 rejected Mexico's claims that the U.S. dolphin safe labeling provisions were inconsistent with Article I:1 of the GATT 1993. In particular, the *US – Tuna (Mexico)* panel found at para. 5.43:

> By imposing the requirement to provide evidence that this fishing technique had not been used in respect of tuna caught in the ETP the United States therefore did not discriminate against countries fishing in this area. The Panel noted that, under United States customs law, the country of origin of fish was determined by the country of registry of the vessel that had caught the fish; the geographical area where the fish was caught was irrelevant for the determination of origin. The labelling regulations governing tuna caught in the ETP thus the U.S. provisions "applied to all countries whose vessels fished in the [ETP] and thus did not distinguish between products originating in Mexico and products originating in other countries.

[251] *See EC – Seal Products (AB)*, para. 5.88 (stating that Article I:1 does not "prohibit a Member from attaching *any* conditions to the granting of an 'advantage' within the meaning of Article I:1. Instead, it prohibits those conditions that have a detrimental impact on the competitive opportunities for like imported products from *any* Member."); *see also Canada – Autos (Panel)*, para. 10.40 ("[W]e do not contest the validity of the proposition that Article I:1 does not prohibit the imposition of origin-neutral terms and conditions on importation that apply to importers."); *id.* para. 10.30 (stating that the test is "whether [the] condition[] amounts to discrimination between like products of different origins."); *US – Poultry (China)*, para. 7.437 ("[C]onditions attached to an advantage granted in connection with the importation of a product will violate Article I:1 of the GATT 1994 only when such conditions discriminate with respect to the origin of the products.").

[252] *US – Tuna II (Mexico) (Panel)*, para. 7.305

countries that fish in the ETP, and that were in the same position as Mexico when the DPCIA was passed, have chosen to do so.[253] Thus, Mexico fails to prove that the advantage of access to the label, subject to origin neutral conditions, is not immediately and unconditionally accorded to Mexican products.

133. Mexico asserts that the Appellate Body has "effectively rejected the line of reasoning" on which the U.S. argument relies.[254] We disagree. The Appellate Body did not reject the original panel's characterization of the U.S. measure but, rather, what it perceived as the original panel's assumption that regulatory distinctions not based on "national origin *per se* cannot be relevant in assessing the consistency of a particular measure with Article 2.1 of the TBT Agreement."[255] Article 2.1 has different language from Article I:1 and requires a distinct inquiry that, in particular, "does not hinge on whether the imported products could somehow get access to an advantage, for example, by complying with all applicable conditions."[256] The original panel made no findings under Article I:1,[257] and, therefore, one should now undertake an "objective assessment of the matter," namely the facts of the dispute and the relevant provisions.[258]

134. Mexico also asserts that "the consequences of the United States' unilateral action" in applying the amended measure "provide further support for the *de facto* detrimental impact" on the competitive opportunities of Mexican tuna products.[259] This argument certainly fails.

135. First, the DSB recommendations and rulings did not find that the "detrimental impact" is a factor of so-called "unilateral" application. As such, it is unclear why Mexico considers its argument relevant to the dispute and what finding Mexico asks the Panel to make. Indeed, the DSU recognizes that a measure is of a "Member" – by definition measures are "unilateral."

136. Second, Mexico's characterization of the measure as "intentional[ly] exerting pressure on Mexico to change its tuna fishing practices" is incorrect.[260] As the DSB recommendations and rulings indicate, one of the objectives of the U.S. measure is to ensure that "the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins."[261] In any event, the original panel has already correctly concluded that "nothing prevents Members

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[253] *See US – Tuna II (Mexico) (Panel)*, paras. 7.324-330 (describing how the practices of different fleets that fished in the ETP by setting on dolphins in the 1980s and early 1990s evolved in the mid-1990s).

[254] *See* Mexico's Second 21.5 Submission, para. 205.

[255] *See US – Tuna II (Mexico) (AB)*, para. 225.

[256] *US – Tuna II (Mexico) (AB)*, para. 221; *see also EC – Seal Products (AB)*, para. 5.94 (affirming the panel's finding that "the legal standard for the non-discrimination obligations under Article 2.1 of the TBT Agreement does not apply equally to claims under Article I:1 of the GATT 1994.").

[257] *See US – Tuna II (Mexico) (AB)*, paras. 405-06.

[258] *See US – Tuna II (Mexico) (AB)*, para. 253.

[259] Mexico's Second Written 21.5 Submission, para. 208.

[260] *See* Mexico's Second Written 21.5 Submission, para. 208.

[261] *See US – Tuna II (Mexico) (AB)*, para. 242 (citing *US – Tuna II (Mexico) (Panel)*, para. 7.401) (emphasis added).

from using the incentives created by consumer preferences to encourage or discourage particular behaviours that may have an impact on the protection of animal life or health."[262]

137. Third, Mexico's reliance on *US – Shrimp* is misplaced for a number of reasons, including that it concerned Article XX, which sets out a different standard than Article I:1.[263]

138. Fourth, while the United States is a party to, and has fully implemented, the AIDCP, that does not means that the AIDCP is sufficient to fulfill the U.S. objective at the level the United States considers appropriate.[264] Mexico argues, in essence, that the United States must accept the AIDCP regime as both a "floor" and a "ceiling" on the level at which the U.S. dolphin safe labeling program achieves its objective. As discussed previously, there is simply no support for such an approach.[265] The DSB recommendations and rulings already state that the AIDCP label does not fulfill the objectives of the U.S. measure at the level the United States considers appropriate.

C. Mexico Fails To Establish that the Amended Dolphin Safe Labelling Measure Is Inconsistent with Article III:4 of the GATT 1994

139. Similar to its Article I:1 claim, Mexico relies entirely on paragraphs 233-235 of the Appellate Body report to argue that the amended measure provides less favorable treatment to Mexican tuna product, inconsistently with Article III:4, because the amended measure causes a

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[262] *US – Tuna II (Mexico) (Panel)*, para. 7.440 ("Moreover, nothing prevents Members from using the incentives created by consumer preferences to encourage or discourage particular behaviours that may have an impact on the protection of animal life or health. Hence, the Panel considers that regulating the information that appears on a label to ensure that consumers may safely exercise their preference is a legitimate mechanism to ensure this purpose. Consequently, we find the objective of contributing to the protection of dolphins by ensuring that the US market is not used to encourage fishing methods that adversely affect dolphins to be legitimate.").

[263] The measure in *US – Shrimp* banned shrimp imports caught by vessels of any country unless that country had adopted, implemented, and enforced a requirement to use an approved type of turtle excluder device (TED). *See US – Shrimp (AB)*, paras. 163-64. A program of comparable effectiveness was not sufficient, and the products from vessels flagged to uncertified countries were banned even if the vessel was equipped with a TED. *See id.* paras. 163, 165. In this dispute, the United States makes *one* method of fishing for tuna ineligible for a voluntary label and continues to allow Mexican tuna caught by that method to be sold. Furthermore, Mexico has not shown that the AIDCP label is comparably effective at achieving the U.S. objective, and, in fact, the DSB found that it *is not*. *See US – Tuna II (Mexico) (AB)*, para. 330. Of course, Mexican vessels and canneries, at any time, could choose to catch and produce tuna and tuna product eligible for the dolphin safe label. *See US – Tuna II (Mexico) (Panel)*, para. 7.378. Finally, the challenged measure in *US – Shrimp* was eventually upheld in the Article 21.5 proceeding even though it was designed to ensure that the U.S. market was not used to encourage the loss of turtles, confirming that *US – Shrimp* directly undermines Mexico's argument. *See also US – Tuna II (Mexico) (Panel)*, para. 7.440.

[264] *See US – Tuna II (Mexico) (AB)*, para. 316 (quoting the sixth premabular recital of the *TBT Agreement*) (emphasis added); *US – COOL (AB)*, para. 373 (quoting same).

[265] *See US – Tuna II (Mexico) (Panel)*, para. 7.738 (concluding that by not allowing consumers to be informed that tuna was caught by setting on dolphins, the AIDCP standard "fails to address unobserved adverse effects from repeated chasing, encircling and deploying purse seine nets on dolphins" that are addressed by the U.S. measure); *US – Tuna II (Mexico) (AB)*, para. 330 (finding, for purposes of Article 2.2, that Mexico's proposed alternative did not achieve the U.S. objectives "to the same extent" as the challenged measure does).

detrimental impact on Mexican tuna product containing tuna caught by setting on dolphins.[266] As discussed above, the Appellate Body's findings concerning detrimental impact, as well as the underlying findings by the original panel, are limited to the ineligibility for the label of tuna product containing tuna caught by setting on dolphins and the eligibility of tuna product containing tuna caught by other methods.[267] Mexico *neither claims nor proves* that any other aspect of the amended measure, including the record-keeping/verification and observer coverage requirements, are inconsistent with Article III:4.

140. Further, Mexico fails to prove that the amended measure accords less favorable treatment to Mexican tuna products. As discussed previously, the original panel, in conducting its discrimination analysis, found that the "requirement of not setting on dolphins is based on a fishing method that may be used by vessels of *any nationality*" and that "tuna of any nationality, including US and Mexican . . . could potentially meet (or not meet) the requirements" for the label.[268] The original panel was not persuaded that "any current discrepancy" in the situations of U.S. and Mexican products "is a result of the measures rather than the result of their own choices."[269] Further, when the DPCIA was first enacted, the U.S. and Mexican fleets were in comparable positions with regard to fishing practices in the ETP, but they subsequently elected to follow different approaches.[270] Thus Mexico's assertion is that a neutral measure that affected

[266] Mexico's Second Written 21.5 Submission, paras. 220-21 (citing *US – Tuna II (Mexico) (AB)*, paras. 235, 284, and stating, "[a]s a consequence, for the same reasons stated by the Appellate Body in the original proceedings, most Mexican tuna products that contain tuna caught by *setting on dolphins* in the ETP continue *to be ineligible* for a dolphin-safe label in the U.S. market, while most tuna products from the United States and other countries that contain tuna caught by other fishing methods outside the ETP continue to be eligible for a dolphin-safe label. Consequently, the regulatory difference imposed under the Amended Tuna Measure continues to have *the same detrimental impact* on competitive opportunities for imported Mexican tuna products *vis-à-vis* domestic tuna products (as well as tuna products originating in other countries) in the U.S. market.") (emphasis added); Mexico's First Written 21.5 Submission, para. 329 ("[I]n the original proceedings, the Appellate Body found that access to the 'dolphin-safe' label constitutes an 'advantage' on the US market, *lack of access to the 'dolphin-safe' label has a detrimental impact* on the competitive opportunities in the US market . . . Moreover, the Panel and Appellate Body found that most tuna caught by Mexican vessels, being caught in the ETP by *setting on dolphins*, would not be eligible for inclusion in a dolphin-safe product under the US dolphin-safe labelling provisions, while most tuna caught by US vessels is potentially eligible for the label.") (emphasis added) (citing *US – Tuna II (Mexico) (AB)*, paras. 234-35).

[267] *See US – Tuna II (Mexico) (AB)*, paras. 233-35, in particular para. 235: "In our view, the factual findings by the Panel clearly establish 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." (emphasis added); *see also id.* para. 284 ("[W]e concluded earlier that *the detrimental impact* of the measure on Mexican tuna products is caused by the fact that most Mexican tuna products contain tuna caught by *setting on dolphins* in the ETP and are therefore *not eligible for a 'dolphin-safe' label*, whereas most tuna products from the United States and other countries that are sold in the US market contain tuna caught by other fishing methods outside the ETP and are therefore eligible for a 'dolphin-safe' label.") (emphasis added); *see also supra*, sec. III.A.3 (discussing the original panel's findings in this regard).

[268] *See* U.S. First Written 21.5 Submission, para. 299 (citing *US – Tuna II (Mexico) (Panel)*, para. 7.309).

[269] *See US – Tuna II (Mexico) (Panel)*, para. 7.334.

[270] *US – Tuna II (Mexico) (Panel)*, paras. 7.324-34 (stating: "[T]he United States and Mexico were in a comparable position with regard to their fishing practices in the ETP, in that both of them had the majority of their fleet operating in the ETP composed of purse seine vessels potentially setting on dolphins" and describing how, in response to the AIDCP regime and the attitude of U.S. consumers toward tuna caught by setting on dolphins, "the

U.S. and Mexican tuna products identically when it was enacted can have *become* discriminatory due to the independent choices of private actors.

141. The United States disagrees with Mexico that the original panel's analysis of the measure is "irrelevant" to this proceeding.[271] As discussed above in the context of Article I:1, the Appellate Body did not reject the panel's *description* of the measure or make any findings under the GATT 1994.[272] Mexico relies heavily on the Appellate Body's statement in *EC – Seal Products* that, under Article III:4, a panel is not "required to examine whether the detrimental impact of a measure . . . stems exclusively from a legitimate regulatory distinction,"[273] yet the analogy to this dispute is flawed. There, the measure at issue was a prohibition that contained certain exceptions. That panel found that the ban and exceptions had the effect of excluding the complainants' products from the EU market while granting access to domestic products.[274] In addition, the conditions for one of the exceptions were based on immutable characteristics, not on the uncompelled choices of private actors, and the vast majority of complainants' products were *intrinsically* unqualified.[275]

142. Furthermore, Mexico's approach – eliminating any examination of the purpose and nature of the measure at issue from the Article III:4 analysis – would doom many legitimate and genuinely non-discriminatory measures.[276] All voluntary labeling regimes – organics regimes or regimes certifying responsible business practices, for example – would be vulnerable under Mexico's approach, even if the requirements were based in science and not intended to help or

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various fleets operating in the ETP by setting on dolphins" chose different fishing techniques, with some countries, like the United States and Ecuador, choosing to discontinue setting on dolphins and other countries, including Mexico, choosing to continue doing so.)

[271] *See* Mexico's Second Written 21.5 Submission, para. 215.

[272] *See US – Tuna II (Mexico) (AB)*, paras. 225, 406.

[273] *See* Mexico's Second Written 21.5 Submission, paras. 217, 219 (citing *EC – Seal Products (AB)*, paras. 5.104, 5.117).

[274] *See EC – Seal Products (AB)*, para. 5.329; *EC – Seal Products (Panel)*, paras. 7.317-318 (finding that "the text of the [Indigenous Communities] exception, its legislative history, and the actual application of the IC exception" suggested that the exception "was *not* designed or applied in an even-handed manner so as to make the benefits of the exception available for all potential beneficiaries), 7.351 (finding that the legislative history of the EU Seal Regime "suggests that the [Marine Resource Management] exception was designed with the situation of the EU member States in mind").

[275] *EC – Seal Products (Panel)*, para. 7.161. As discussed above, the facts of this dispute are just the opposite. *See US – Tuna II (Mexico) (Panel)*, paras. 7.309, 7.378. And it is well established that a panel must make a thorough "objective assessment of the matter before it, including an objective assessment of the facts of the case." *See US – Tuna II (Mexico) (AB)*, para. 253. Indeed, the one Appellate Body report that *is* binding on the Panel is the one in the original dispute, which Mexico repeatedly urges the Panel to ignore. *See, e.g.*, Mexico's Second Written Submission, paras. 268-69.

[276] *See* U.S. First Written 21.5 Submission, para. 309 (citing "Members TBT Notifications of Various Technical Regulations" (Exh. US-79) (summarizing 68 different TBT Committee notifications of standards or technical regulations that consumer information; prevent deceptive, misleading, and fraudulent practices; and ensure the compatibility and efficiency of telecommunication goods)).

hurt any Member's producers.[277] And measures could *become* inconsistent with Article III:4 based entirely on the private choices made by different Members' industries.[278] Such a theory ignores the realities of international trade and holds Members to an impossible standard in order to avoid being inconsistent with their WTO obligations.[279]

143. Mexico also argues that the "intended extraterritorial effects" resulting from the way the measure is "unilaterally designed and applied" provide "further support" for the detrimental impact on Mexican tuna products.[280] This argument is not relevant and fails for reasons discussed above in the context of Article I:1,[281] namely: 1) Mexico does not identify any "further" detrimental impact or explanation for the detrimental impact that the DSB found; 2) the assertion that the measure "intentionally" pressures Mexico contradicts the findings of the DSB; and 3) the *US – Shrimp* Article XX analysis is inapplicable to establish an Article III:4 violation.[282]

D. The Amended Dolphin Safe Labeling Measure Is Justified Under Article XX of the GATT 1994

144. Even aside from the fact that the amended measure is consistent with Articles I:1 and III:4, the amended measure is also justified under Article XX.

145. The application of Article XX to the facts of this dispute is straightforward. First, the original panel has already determined (and the Appellate Body has already affirmed) that one of the two objectives of the original measure was 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."[283] Such an objective certainly falls within the scopes of subparagraphs (b) and (g), which, for purposes here, relate to the "protection" and "conservation" of dolphins, respectively. Moreover, the DSB recommendations and rulings in the original proceeding demonstrate that the amended measure easily satisfies both the

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[277] *See* U.S. First Written 21.5 Submission, para. 309.

[278] For example, suppose a Member had a voluntary "contributes to charities stopping water-borne diseases" label for electronics that conferred an advantage in that Member's market. The electronics industries in all of the Member's trading partners and in the Member itself complied with the eligibility requirements, or declined to do so, in similar proportions. Then, producers in one Member thought that they could gain a larger market share if the labeling regime did not exist. They stopped complying with the label's eligibility requirements and initiated a WTO dispute. Under Mexico's theory, the panel *would be precluded* from considering the history or purpose of the measure or the motives of the exporters.

[279] *See* U.S. First Written 21.5 Submission, paras. 305-08.

[280] *See* Mexico's Second Written 21.5 Submission, paras. 223-24.

[281] *See supra*, sec. III.B.

[282] Mexico's statement that "the vast majority of its tuna products are prohibited from using the dolphin-safe label in the U.S. market, *even though such products are entirely qualified to use the AIDCP dolphin-safe label*" demonstrates that Mexico's argument is based on the assumption that the AIDCP label achieves the objectives of the U.S. labeling measure, ignoring the findings of the DSB that it does not. *See US – Tuna II (AB)*, para. 330; *US – Tuna II (Mexico) (Panel)*, para. 7.740.

[283] *US – Tuna II (Mexico) (AB)*, para. 325 (citing *US – Tuna II (Mexico) (Panel)*, paras. 7.425 and 7.401).

"necessary" and "relating to" standards. Second, the amended measure does not "discriminate," as that term is used in the chapeau, and even if it does, it does not do so in an arbitrary or unjustifiable manner. Rather, the science fully supports the distinction drawn in the amended measure between setting on dolphins and other fishing methods.

1. The Scope of the Analysis

146. As a threshold matter, we note that Mexico urges the Panel to engage in an inquiry that goes well beyond the scope of the subparagraphs (b) and (g) analyses, as set out by the Appellate Body in a number of previous reports, including *US – Gasoline*, *Thailand – Cigarettes (Philippines)*, and *EC – Seal Products*.

147. As discussed above, Mexico relies exclusively on paragraphs 233-235 of the Appellate Body report when it alleges that the amended measure is inconsistent with Article I:1[284] and Article III:4,[285] under the theory that the amended measure denies "access" to the label to Mexican tuna product containing tuna caught by setting on dolphins while tuna product containing tuna caught by other means continues to have "access" to the label. This is the sum total of Mexico's affirmative argument. It *neither claims nor proves* that any other aspect of the amended measure, including the record-keeping/verification and observer coverage requirements, are GATT-inconsistent. However, in its consideration of subparagraphs (b) and (g), Mexico suddenly changes direction and argues that, because "there are no effective record-keeping, tracking and verification requirements or procedures in relation to tuna caught by

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[284] *See supra*, sec. III.B (citing Mexico's Second Written 21.5 Submission, para. 203 ("In the original proceedings, the Appellate Body found that *the lack of access* to the advantage of the dolphin-safe label for tuna products containing tuna caught by *setting on dolphins* had a detrimental impact on the competitive opportunities of Mexican tuna products in the U.S. market.") (emphasis added) (citing *US – Tuna II (Mexico) (AB)*, paras. 233, 235); Mexico's First Written 21.5 Submission, n.313 ("In the original proceedings, the Panel agreed with Mexico that *access* to the "dolphin-safe" label constitutes an "advantage" on the US market. This finding was not appealed. The Appellate Body found that the factual findings by the Panel clearly establish 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.") (emphasis added) (citing *US – Tuna II (Mexico) (AB)*, paras. 233-35); *see also id.* para. 313 ("The advantage granted by the Amended Tuna Measure is the authorization to use "dolphin-safe" labelling in the United States on tuna products.").

[285] *See supra*, sec. III.C (citing Mexico's Second Written 21.5 Submission, paras. 220-221 (citing *US – Tuna II (Mexico)*, paras. 235, 284, and stating, "[a]s a consequence, for the same reasons stated by the Appellate Body in the original proceedings, most Mexican tuna products that contain tuna caught by *setting on dolphins* in the ETP continue *to be ineligible* for a dolphin-safe label in the U.S. market, while most tuna products from the United States and other countries that contain tuna caught by other fishing methods outside the ETP continue to be eligible for a dolphin-safe label. Consequently, the regulatory difference imposed under the Amended Tuna Measure continues to have *the same detrimental impact* on competitive opportunities for imported Mexican tuna products *vis-à-vis* domestic tuna products (as well as tuna products originating in other countries) in the U.S. market.") (emphasis added); Mexico's First Written 21.5 Submission, para. 329 ("[I]n the original proceedings, the Appellate Body found that access to the 'dolphin-safe' label constitutes an 'advantage' on the US market, *lack of access to the 'dolphin-safe' label has a detrimental impact* on the competitive opportunities in the US market . . . Moreover, the Panel and Appellate Body found that most tuna caught by Mexican vessels, *being caught in the ETP by setting on dolphins*, would not be eligible for inclusion in a dolphin-safe product under the US dolphin-safe labelling provisions, while most tuna caught by US vessels is potentially eligible for the label.") (emphasis added) (citing *US – Tuna II (Mexico) (AB)*, paras. 234-35).

fishing vessels outside the ETP," the amended measure does not protect animal health and life for purposes of subparagraph (b),[286] nor does it "relate to" the conservation of dolphins for purposes of subparagraph (g).[287] This is improper.

148. The Appellate Body has made clear that "the aspects of a measure to be justified under the subparagraphs of Article XX are those that give rise to the finding of inconsistency under the GATT 1994."[288] The United States is only obligated to justify under the subparagraphs of Article XX the requirements that are found to cause the inconsistency with the particular GATT 1994 provision. The United States need not prove that any other aspect of the challenged measure is so justified.[289] As such, the United States need only justify the regulatory distinctions between tuna product containing tuna caught by setting on dolphins and tuna product containing tuna caught by other fishing methods, in light of how Mexico has framed (and attempted to prove) its GATT claims. The portions of Mexico's Article XX response that address the record-keeping/verification and observer requirements are simply irrelevant to this analysis.[290]

149. The United States respectfully requests the Panel to reject Mexico's attempt to expand inappropriately the scope of this analysis.

2. The Amended Dolphin Safe Labeling Measure Satisfies the Conditions of Article XX(b)

150. As discussed in the U.S. first written submission, the amended measure satisfies both elements of Article XX(b), namely: 1) its objective is "to protect human, animals or plant life or health"; and 2) it is "necessary" to the achievement of this objective.[291]

a. The Amended Dolphin Safe Labelling Measure Has a Sufficient Nexus with an Interest Covered by Article XX(b)

151. The Appellate Body determined that the original measure had two objectives:

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[286] *See* Mexico's Second Written 21.5 Submission, para. 250.

[287] *See* Mexico's Second Written 21.5 Submission, para. 304.

[288] *EC – Seal Products (AB)*, para. 5.185 ("In *US – Gasoline*, the Appellate Body clarified that it is not a panel's legal conclusions of GATT-inconsistency that must be justified under Article XX, but rather the provisions of a measure that are infringing the GATT 1994. Similarly, in *Thailand – Cigarettes (Philippines)*, the Appellate Body observed that the analysis of the Article XX(d) defence in that case should focus on the 'difference in the regulation of imports of like domestic products' giving rise to the finding of less favourable treatment under Article III:4. Thus the aspects of a measure to be justified under the subparagraphs of Article XX are those that give rise to the finding of inconsistency under the GATT 1994.").

[289] *See EC – Seal Products (AB)*, para. 5.185 (quoting *US – Gasoline (AB)*, at 13-14; *Thailand – Cigarettes (Philippines) (AB)*, para. 177); *see also EC – Seal Products (AB)*, paras. 5.188-190 (upholding the panel's findings because the panel "made clear" that it analyzed only "the components of the measure embodying the 'ban' and the 'exceptions,'" which had been found to cause the GATT 1994 inconsistency).

[290] *See, e.g.*, Mexico's Second Written 21.5 Submission, paras. 269, 273, and 280-83.

[291] U.S. First Written 21.5 Submission, paras. 315-24.

(a) ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins (the "consumer information objective"); and

(b) contributing 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 (the "dolphin protection objective").[292]

152. The amended measure has the same two objectives, a point that Mexico appears to accept.[293] However, as a threshold matter, Mexico appears to consider it advantageous to frame the second objective as subservient to the first, referring to the "consumer information objective" as "the primary objective" and the "dolphin protection objective" as the "secondary objective." These are characterizations of Mexico's own making. Neither the original panel nor the Appellate Body used "secondary" and "primary" to refer to the measure's objectives, and neither suggested that the dolphin protection objective was less important than the consumer information objective.[294] To the contrary, the original panel concluded that the findings section of the DPCIA showed "a preoccupation on the part of the US legislator with the protection of dolphins" and suggested "a direct link between the enactment of the US dolphin-safe provisions and the US Congress' desire to protect dolphins."[295] As such, we will refer to the objectives in the same manner as the DSB recommendations and rulings, and proceed on that basis.

153. The DSB recommendations and rulings demonstrate that there is "a sufficient nexus" between the amended measure's dolphin protection objective and the protection of animal life or health.[296] In this regard, the original panel found, and the Appellate Body affirmed, that the original measure "relate[d] to genuine concerns in relation to the protection of the life or health

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[292] *US – Tuna II (Mexico) (AB)*, para. 302 (citing *US – Tuna II (Panel)*, paras. 7.401, 7.413, 7.425).

[293] Mexico's Second Written 21.5 Submission, para. 231 ("Because the objectives remain the same, the findings of the original Panel on the objectives of the original measure are applicable to the Amended Tuna Measure."); *see also id.* paras. 234, 238-39.

[294] *See, e.g.*, *US – Tuna II (Mexico) (AB)*, paras. 302-06; *US – Tuna II (Mexico) (Panel)*, paras. 7.400-427.

[295] *US – Tuna II (Mexico) (Panel)*, para. 7.418. The original panel cited numerous pieces of evidence to support this finding, including the location of the DPCIA in the U.S. Code (as part of the Conservation and Protection of Marine Mammals chapter), *id.* para. 7.417, the congressional findings underlying the DPCIA, *id.* para. 7.418, the "structure and design" of the measure, *id.*, and consumer preferences in the United States, *see id.* paras. 7.439-440.

Furthermore, the original panel recognized that the U.S. measure was concerned with consumer information *because of* its relationship to dolphin protection. It found that "the US objectives relate[d] to genuine concerns in relation to the protection of the life or health of dolphins and the deception of consumers *in this respect*." *US – Tuna II (Mexico) (Panel)*, para. 7.438 (emphasis added). The panel described the measure as using "the public's preference for tuna products that are labeled dolphin safe" and the "incentives created by consumer preferences" to "contribut[e] to the protection of dolphins by ensuring that the US market is not used to encourage fishing methods that adversely affect dolphins." *Id.* paras. 7.439-40; *see also id.* para. 7.438. Thus, the U.S. dolphin safe labeling measure is clearly directed at the protection of dolphins.

[296] *EC – Seal Products (AB)*, para. 5.169.

of dolphins,"[297] and was "intended to protect animal life or health or the environment."[298] The original panel found this objective to be "legitimate" for purposes of Article 2.2, a point the Appellate Body affirmed.[299]

154. Mexico wholly ignores the DSB recommendations and rulings and, further, appears not to even contest that there is "a sufficient nexus" between the amended measure's dolphin protection objective and the protection of animal life or health."[300] As such, it appears uncontested that the DSB recommendations and rulings in this dispute establish that the amended measure pursues an objective that falls within the scope of subparagraph (b).

155. Mexico pursues an unprecedented alternative legal theory instead, arguing that the amended measure does not pursue an objective that falls within the scope of subparagraph (b) because it *does not contribute* to that objective enough.[301] This invented legal theory fails for at least two reasons.

156. As discussed above, Mexico's argument falls outside the scope of this analysis in that Mexico's entire argument is grounded in the aspects of the measure that Mexico neither alleges nor proves are GATT-inconsistent.[302]

157. In any event, Mexico's focus on the contribution of the measure improperly collapses the distinct questions of whether the relevant objective falls within the scope of subparagraph (b), and whether the challenged measure is "necessary" to protect animal life and health. While the issue of the level at which the measure contributes to its objective is relevant to the latter, it is not to the former, where the question is whether the measure at issue "address[es] the particular interest specified in [the] paragraph."[303] Mexico, of course, provides no explanation as to why it urges the Panel to deviate from the Appellate Body's guidance in this regard.[304]

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[297] *US – Tuna II (Mexico) (Panel)*, para. 7.438.

[298] *US – Tuna II (Mexico) (AB)*, para. 303 (citing *US – Tuna II (Panel)*, para. 7.437); *see also US – Tuna II (Mexico) (Panel)*, para. 7.442 ("As established above, the US dolphin-safe provisions aim at protecting dolphins.").

[299] *US – Tuna II (Mexico) (AB)*, para. 342 ("[W]e reject Mexico's claim that the Panel erred in finding the United States' dolphin protection objective to be a legitimate objective . . ."); *see also id.* para. 303 (summarizing the original panel's findings under Article 2.2 and citing *US – Tuna II (Mexico) (Panel)*, para. 7.444).

[300] *EC – Seal Products (AB)*, para. 5.169.

[301] *See* Mexico's Second Written 21.5 Submission, para. 252 ("The Amended Tuna Measure does not fulfill the objectives it claims to address and, therefore, it does not protect animal life or health within the meaning of Article XX(b) of the GATT 1994. The United States has not shown that the Amended Tuna Measure fulfils the objective that it claims to address."); *see also id.* para. 269 ("The Amended Tuna Measure has the same objectives as the Original Tuna Measure and continues, at best, to only partially fulfill these objectives.").

[302] *See supra*, sec. III.D.1.

[303] *Compare EC – Seal Products (AB)*, para. 5.215, *with id.* para. 5.169.

[304] Of course, the United States disputes that a measure ever needs to make a 100 percent contribution to its objective, as Mexico appears to believe, regardless of the placement of this analysis. *Compare* Mexico's Second Written 21.5 Submission, para. 252, *with US – Tuna II (Mexico) (AB)*, para. 315 (concluding that, for purposes of Article 2.2, a challenged measure need not achieve its objective to the fullest extent possible; rather, Members have

b. The Amended Dolphin Safe Labelling Measure Is "Necessary" for the Protection of Dolphin Life or Health

158. The Appellate Body has explained that a necessity analysis involves "a process of 'weighing and balancing' a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure."[305] A comparison of the challenged measure and possible alternatives should also be undertaken.[306]

i. The Protection of Dolphins Is Important

159. The United States explained in its first submission that the protection of dolphins is an important objective.[307] Mexico concedes this point.[308]

ii. The Amended Dolphin Safe Labelling Measure Contributes to the Protection of Dolphins

160. In the U.S. first submission, the United States discussed how the DSB recommendations and rulings had already established that the original measure contributed to the dolphin protection objective to a certain extent.[309] Indeed, the Appellate Body, relying on the conclusions of the original panel, concluded that the original measure "*fully* addresses the adverse effects on dolphins resulting from setting on dolphins" both inside and outside the ETP.[310] The United States further noted that, in light of the analyses of the original panel and Appellate Body, the amended measure contributes to this same objective at an even higher level than the original measure, given the new requirement that no dolphin was killed or seriously

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discretion to choose the level at which they want the objective to be fulfilled); *see also EC – Asbestos (AB)*, para. 168 ("[I]t is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation."); *EC – Seal Products (AB)*, para. 5.273.

[305] *EC – Seal Products (AB)*, para. 5.169 (quoting *Korea – Various Measures on Beef (AB)*, para. 164); *see* U.S. First Written 21.5 Submission, para. 320.

[306] *EC – Seal Products (AB)*, para. 5.169 (quoting *US – Gambling (AB)*, para. 292 and citing *US – Tuna II (Mexico) (AB)*, para 321).

[307] *See* U.S. First Written 21.5 Submission, para. 321.

[308] Mexico's Second Written 21.5 Submission, para. 262 ("Mexico does not dispute that the protection of dolphins is an important objective.").

[309] *See* U.S. First Written 21.5 Submission, para. 322. In the original proceeding, the panel found that the original measure capable of protecting dolphins inside the ETP, but outside the ETP was only capable of doing so "in relation to the practices of setting on dolphins and using high seas driftnets." *US – Tuna II (Mexico) (Panel)*, para. 5.599. Overall, therefore, the panel determined that the original measures "partially fulfill[ed] their stated objective of protecting dolphins." *Id.* The Appellate Body upheld these findings, and the Appellate Body grounded its finding that Mexico had failed to prove its Article 2.2 claim on the original panel's finding. *See US – Tuna II (Mexico) (AB)*, paras. 327, 330.

[310] *US – Tuna II (Mexico) (AB)*, para. 297 ("We note, in particular, that the US measure fully addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it does 'not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP.'") (quoting Panel Report, para. 7.544).

injured for tuna products containing tuna caught by vessels other than large purse seine vessels in the ETP to be labeled dolphin safe.[311]

161. Mexico disagrees with the findings of the original panel and Appellate Body. It argues that, in fact, "the actual contribution of the original Tuna Measure to the achievement of its objectives was *even lower* than that found by the original Panel."[312] Indeed, Mexico appears to go as far as to contend that neither measure – the original one or the amended one – makes *any* contribution to the dolphin protection objective, although, in truth, Mexico makes contradictory statements on this point and it is unclear exactly *to what degree* Mexico considers that the DSB recommendations and rulings inaccurately inflate the contribution of the original measure (and, by extension, the amended measure).[313]

162. Even if one were to agree with Mexico that it is not using this proceeding to "appeal" the Appellate Body's Article 2.1 finding, surely it is doing so here. The original panel made findings as to the original measure's contribution to the dolphin protection objective, and the Appellate Body affirmed those findings.[314] In the context of an Article 21.5 proceeding, the underlying DSB recommendations and rulings are taken as a given. As a result, Mexico cannot now claim that "the actual contribution of the original Tuna Measure to the achievement of its objectives was *even lower* than that found by the original Panel," while, on the other hand, claim that it "unconditionally accept[s]" the Appellate Body report, consistent with DSU Article 17.14. And the Panel should reject Mexico's unfounded "appeal" of the Appellate Body report in this Article 21.5 proceeding.

163. In any event, nothing Mexico asserts supports – much less proves – its conclusion. Mexico's entire argument relates to aspects regarding record-keeping/verification and observer coverage,[315] all of which fall outside the scope of this analysis, as discussed above.[316] But even if such an argument were relevant for purposes here, it is clearly wrong, as the DSB recommendations and rulings attest.

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[311] *See* U.S. First Written 21.5 Submission, para. 322 (citing 2013 Final Rule, 78 Fed. Reg. at 41002 (Exh. MEX-7)).

[312] Mexico's Second Written 21.5 Submission, para. 268.

[313] *Compare* Mexico's Second Written 21.5 Submission, para. 270 ("For the foregoing reasons, the Amended Tuna Measure, like the original measure, *does not contribute to the objectives that it pursues*.") (emphasis added), *with id.* para. 269 ("The Amended Tuna Measure has the same objectives as the Original Tuna Measure and continues, at best, to *only partially fulfill these objectives*.") (emphasis added).

[314] *See US – Tuna II (Mexico) (AB)*, para. 327 (citing *US – Tuna II (Mexico) (Panel)*, paras. 7.562-563).

[315] *See* Mexico's Second Written 21.5 Submission, para. 268 ("In the present proceeding, Mexico has supplemented the record with additional evidence concerning the serious deficiencies in the process by which tuna caught outside the ETP is initially designated as dolphin-safe, (i.e., the absence of an independent observer) as well as the gaps in the record-keeping, tracking and verification requirements and procedures in relation to same. Thus, the actual contribution of the original Tuna Measure to the achievement of its objectives was even lower than that found by the original Panel."). In this regard, we disagree that Mexico has put forth any evidence regarding these aspects of the measure, as discussed previously.

[316] *See supra*, sec. III.D.1.

iii. The Trade-Restrictiveness of the Amended Dolphin Safe Labelling Measure

164. Finally, in analyzing the necessity of the measure, the Appellate Body has inquired whether a reasonably available, WTO-consistent measure exists.[317] As part of the analysis as to whether a measure is "necessary" for purposes of Article XX(b), it may be useful to take into account the degree of trade restrictiveness of the measure. While we will discuss why neither of the two alternatives Mexico identifies proves the amended measure not "necessary" for purposes of subparagraph (b), we do note that the parties differ substantially as to the meaning of the term "trade-restrictiveness."

165. The Appellate Body in this very dispute stated that "trade-restrictiveness" "means something having a limiting effect on trade," a point the Appellate Body has reaffirmed on two different occasions.[318] Other Appellate Body and panel reports confirm that "trade restrictiveness" has been understood to refer to trade-limiting effects, *i.e.*, to limits on market access.[319]

166. In its second written submission, Mexico presents three arguments as to why the U.S. measure is "trade-restrictive": i) it does not allow setting on dolphins as a fishing method that can be used to catch tuna eligible for the dolphin safe label, while allowing other fishing methods; ii) it imposes "strict record-keeping, tracking and verification requirements and procedures for tuna caught in the ETP by setting on dolphins in accordance with the AIDCP" but not on tuna harvested by vessels not covered by the AIDCP observer regime; and iii) it requires

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[317] *See EC – Seal Products (AB)*, para. 5.214 (citing *US – Gambling (AB)*, para. 307; *Korea – Various Measures on Beef (AB)*, para. 166).

[318] *See US – Tuna II (Mexico) (AB)*, para. 319 ("What has to be assessed for 'necessity' is the trade-restrictiveness of the measure at issue. We recall that the Appellate Body has understood the word 'restriction' as something that restricts someone or something, a limitation on action, a limiting condition or regulation. Accordingly, it found, in the context of Article XI:2(a) of the GATT 1994, that the word 'restriction' refers generally to something that has a limiting effect. As used in Article 2.2 in conjunction with the word 'trade', the term means something having a limiting effect on trade."); *see also US – COOL (AB)*, para. 375 (quoting same); *EC – Seal Products (Panel)*, para. 7.425 (quoting same).

[319] *See US – Gambling (AB)*, para. 323 (summarizing the findings of the panel concerning trade restrictiveness, which focused on the "low barriers to entry" in the sector at issue and other factors relating to market access); *Brazil – Retreaded Tyres (AB)*, para. 144 (noting that the panel had found that the measure was "as trade-restrictive as can be, as far as retreaded tyres from non-MERCOSUR countries are concerned, since it aims to halt completely their entry into Brazil"); *China – Publications and Audiovisual Products (AB)*, para. 300 (noting that the panel, in a finding upheld by the Appellate Body, assessed trade restrictiveness by considering the "restrictive impact the measures at issue have on imports of relevant products" and on "those within to engage in importing, in particular on their right to trade" and considering that evidence regarding an increase in the number of publications imported into China "did not necessarily indicate that China's measure had not had any trade-restrictive effects, because the statistics did not indicate what import levels might have been if the measures had not been imposed); *EC – Seal Products (Panel)*, para. 7.472 (stating, in a finding not appealed: "[T]he EU Seal Regime limits trade in seal products, including those from the complainants, and thus is trade restrictive. . . . In comparison, the alternative measure could possibly permit seal products from the complainants that are prohibited under the EU Seal Regime.").

observer certifications "for tuna caught in the ETP by setting on dolphins in accordance with the AIDCP" but not for tuna harvested by vessels not covered by the AIDCP observer program.[320]

167. None of these relate to the amended measure's trade-restrictiveness: the amended measure does not bar Mexico from selling tuna product in the United States, and, indeed, Mexican non-dolphin safe tuna product continues to be sold in the United States today.[321]

168. As explained above, the arguments regarding the other two aspects of the measure, record-keeping/verification and observer coverage, fall outside the scope of the inquiry as to whether the amended measure qualifies under subparagraph (b). But even aside from that consideration, it is difficult to understand how either aspect has any impact on current exports of Mexican tuna product to the United States. As to trade-restrictiveness, Mexico appears to argue that Mexican producers would sell more non-dolphin safe tuna product in the United States if: 1) the United States eliminated the need for the Form 370 that accompanies Mexican tuna product to list the AIDCP-mandated tracking number and a Mexican government certification that an observer was on board the vessel; or 2) the United States required all tuna product to adhere to AIDCP-equivalent record-keeping/verification and observer coverage requirements. But it is difficult to see how either of these changes would increase the market access of Mexican non-dolphin safe tuna product, particularly given that U.S. consumer demand for non-dolphin safe tuna remains very low.[322]

iv. Mexico's First Proposed Alternative Fails To Prove that the Amended Dolphin Safe Labelling Measure Is Not "Necessary"

169. The Appellate Body has made clear that "the weighing and balancing exercise under the necessity analysis contemplates a determination as to whether a WTO-consistent alternative measure which the Member concerned could reasonably be expected to employ is available, or whether a less WTO-inconsistent measure is reasonably available."[323] According to the Appellate Body:

> An alternative measure may be found not to be reasonably available where it is merely theoretical in nature, for instance, where the responding Member is not

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[320] *See* Mexico's Second Written 21.5 Submission, para. 273.

[321] *See* "The U.S. Market for Canned Tuna Products, by Source Country, 2010-2013" (Exh. US-53); William Jacobson Witness Statement, Appendix 2 (Exh. US-4); William Jacobson Second Witness Statement, Appendix 2 (US-86).

[322] *See supra*, sec. III.A.3. As noted above, the original panel found it is "undisputed that US consumers are sensitive to the dolphin-safe issue." *US – Tuna II (Mexico) (Panel)*, para. 7.288; *see also* 1990 Dolphin Safe Articles (Exh. US-98) (quoting the spokesman for Star-Kist tuna explaining that after the film showing setting on dolphins was released, "[Consumers] told us they don't want us to kill dolphins," and reporting how Stark-Kist's officials had changed the company's policy in response to consumer surveys). The original panel found that the processors' policy suggests that the producers think they would not be able to sell non-dolphin safe tuna products at a profitable price. *See US – Tuna II (Mexico) (Panel)*, para. 7.289.

[323] *EC – Seal Products (AB)*, para. 5.261 (internal quotes omitted).

> capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Furthermore, in order to qualify as a genuine alternative, the proposed measure must be not only less trade restrictive than the original measure at issue, but should also preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued.[324]

170. Mexico describes its first alternative as a measure that requires AIDCP-equivalent record-keeping/verification and observer coverage for all tuna for tuna product sold in the United States as "dolphin safe."[325] Such requirements would apply to tuna caught by all vessels, operating anywhere in the world, and with any gear type, regardless of harms to dolphins in that particular fishery. Under this alternative, an independent observer "would certify that (i) the tuna was not caught in association with dolphins at any time during a particular fishing voyage, and (ii) that no dolphins were killed or seriously injured during the set or other gear deployment in which the tuna were caught."[326]

171. For the reasons explained below, Mexico has not put forward a "genuine alternative" that proves the amended measure is not "necessary" for the protection of dolphin life or health.

172. First, Mexico's description of its alternative is so brief and vague that it deprives the United States of the opportunity to evaluate it in any detail. For example, Mexico does not clarify which Member or Members would establish and pay for these new requirements. Does Mexico intend that: a) the United States establish one record-keeping/verification/observer program for all vessels (other than large purse seine vessels operating in the ETP) and that the United States fund all the start-up and operating costs; b) each tuna or tuna product producing Member will establish its own "AIDCP-equivalent" program and pay for the costs of its program itself; or c) some combination thereof, possibly involving RFMO-established (and paid for) programs for vessels operating on the high seas and Member-established (and paid for) programs in the territorial seas? Further, Mexico leaves it entirely unclear as to what it means by "in association with" for purposes of the observer certification. This language is not contained in the certifications required under either the amended measure or the AIDCP, and it is unclear whether Mexico intends to capture only the "intentional[] deploy[ment]" of a purse seine net "to encircle dolphins," or whether Mexico intends that its first alternative would deny eligibility for the label to scenarios other than "setting on dolphins," as the parties have used that term in this dispute.[327]

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[324] *EC – Seal Products (AB)*, para. 5.261 (internal quotes omitted). While the United States that the Appellate Body has referred to the possibility of a "less WTO inconsistent" measure we fail to see how degrees of WTO consistency would be measured.

[325] Mexico's Second Written 21.5 Submission, para. 281.

[326] Mexico's Second Written 21.5 Submission, para. 282 (emphasis added).

[327] *See* U.S. First Written 21.5 Submission, para. 16 (citing 50 C.F.R. §§ 216.91(a)(1), (a)(2), 216.92(b)(2) (Exh. US-2); NOAA Form 370, at 5(B)(5) (Exh. MEX-22)) (emphasis added); see also WCPFC Resolution 2011-03, art. 1 (Exh. US-11); IOTC Resolution 13/04, art. 2 (Exh. US-12); ICCAT, "Draft Recommendation on Monitoring and Avoiding Cetacean Interactions in ICCAT Fisheries," Doc. No. IMM-015/I 2014 (May 20, 2014) (Exh. US-13).

173. Second, and assuming Mexico does not intend to alter the eligibility conditions of the amended measure, the only difference between the amended measure and Mexico's first alternative is that tuna caught by all vessels other than large purse seine vessels operating in the ETP would be subject to AIDCP-equivalent record-keeping/verification and observer coverage requirements. But, as explained above, only those aspects of the challenged measure "that give rise to the finding of inconsistency under the GATT 1994" need be justified under the subparagraphs of Article XX.[328] As such, Mexico's alternative is not relevant to this analysis at all.

174. Third, Mexico has not shown that its alternative is "less WTO-inconsistent" than the amended measure allegedly is.[329] Mexico claims that this alternative would "reduce the *de facto* discrimination against Mexican tuna products currently resulting from the imposition of differing requirements on ocean regions,"[330] but Mexico provides no reason why this would be so. In particular, Mexico's GATT claims are based on the fact that tuna product containing tuna caught by setting on dolphins is ineligible for the label.[331] To the extent that Mexico's first alternative does not allow more Mexican tuna product containing tuna caught by setting on dolphins to be labeled as dolphin safe, we do not understand how the alternative could be considered less WTO-inconsistent, in light of how Mexico has framed (and attempted to prove) its GATT Articles I:1 and III:4 claims.[332]

175. Fourth, Mexico's alternative is not less trade restrictive than the amended measure. As noted above, the term "trade restrictive" refers to limiting trade effects, *i.e.*, limiting market access.[333] Under such an approach, however, it is clear that Mexico's alternative is not less trade restrictive. There is no evidence to suggest that imposing a higher regulatory burden on tuna product containing tuna caught outside the ETP will increase the market access of Mexican non-dolphin safe tuna. The evidence suggests just the opposite – U.S. consumers do not want to purchase non-dolphin safe tuna product.[334] Of course, the United States would think it very

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[328] *EC – Seal Products (AB)*, para. 5.185.

[329] *See EC – Seal Products (AB)*, para. 5.261. As noted above, the United States is unclear whether it would even be possible for a panel to make such a determination.

[330] Mexico's Second Written 21.5 Submission, para. 281.

[331] *See supra*, secs. III.B, III.C.

[332] As noted previously, Mexico's "one size fits all" approach with regard to these requirements may put the United States in the position of having to face accusations that it has acted inconsistently with TBT Article 2.2 by imposing the uniform requirement that all tuna product that qualifies for the "dolphin safe" label be accompanied by a fully verified observer certification even though the interaction between tuna and dolphins is very low in the particular fishery in which the tuna was caught in. *See* U.S. First Written 21.5 Submission, para. 274, n.518.

[333] *See supra*, sec. III.D.2.iii (citing *US – Tuna II (Mexico) (AB)*, para. 319).

[334] *See supra*, sec. III.A.3 (quoting *US – Tuna II (Mexico) (Panel)*, para. 7.288 stating that it is "undisputed that US consumers are sensitive to the dolphin-safe issue"). The same point holds true for the tuna product industry, which wants to be seen as producing a product that addresses its consumers concerns about whether dolphins are being adequately protected. *See* 1990 Dolphin Safe Articles (Exh. US-98); *see also US – Tuna II (Mexico) (Panel)*, para. 7.289 (finding that the processors' policy "suggests that the producers themselves assume that they would not

likely that imposing a higher regulatory burden on those U.S. trading partners that produce tuna or tuna product from outside the ETP would negatively impact the profits earned from sales of such tuna product.

176. Mexico disagrees, suggesting that the Panel should equate "trade-restrictiveness" with "discrimination" and find that the alternative is less trade restrictive because it is less discriminatory.[335] Mexico, of course, fails to explain why it considers it appropriate to collapse two *distinct* elements of the analysis – whether the alternative is less trade restrictive *and* whether it is less WTO-inconsistent.[336] Of course, even if the Panel were to collapse these two separate elements into one, Mexico's argument still fails. The alternative is not, in fact, less discriminatory in light of Mexico's claims, as explained above.

177. Finally, the proposed alternative is not reasonably available to the United States. As the Appellate Body has discussed, "an alternative measure may be found not to be reasonably available where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties."[337] There is no indication in Mexico's explanation of how the costs of the record-keeping/verification and observer programs that it proposes in this alternative would be paid. We are not aware that the costs of such an unprecedented worldwide verification and observer program have ever been estimated. However, leaving aside the start-up costs needed to establish such programs, simply operating the observer coverage piece of Mexico's alternative on an annual basis would cost *at the very least hundreds of millions of US dollars, if not significantly in excess of one billion US dollars*.[338]

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be able to sell tuna products that do not meet dolphin-safe requirements, or at least not at a price sufficient to warrant their purchase").

[335] *See* Mexico's Second Written 21.5 Submission, para. 281 (claiming that the alternative would "reduce the *de facto* discrimination against Mexican tuna products . . . and would therefore be less trade-restrictive").

[336] *See EC – Seal Products (AB)*, para. 5.261.

[337] *EC – Seal Products (AB)*, para. 5.261 (citing *Brazil – Retreaded Tyres (AB)*, para. 156; *US – Gambling (AB)*, para. 308) (internal quotes omitted).

[338] In 2012, the U.S. Pacific Islands Regional Observer Program (PIROP), which covers the Hawaii and American Samoa longline fisheries, had a budget of US$6,409,133 to support observer coverage. NMFS, *2012 Annual Report*, at 20 (Exh. US-114). Fifty observers covered 142 vessels for a total of 9,790 days at sea, yielding a cost per observed day of US$655. *See id.* at 32. Overall observer coverage was 25.4 percent, suggesting that, for 100 percent coverage, observers would need to cover a total of 38,498 days at sea per year, or 271 days per vessel. *See id.* This suggests that a program like the PIROP but with 100 percent observer coverage would cost approximately US$25,216,190 per year. *Based on these figures, covering all 3,687 longline vessels active in the WCPFC could cost approximately US$654,460,935 annually*. *See* WCPFC, *WCPFC Record of Fishing Vessels*, http://www.wcpfc.int/record-fishing-vessel-database (accessed July 21, 2014) (Exh. US-115).

The IDCP, which is a hybrid multilateral-national program operating in the much smaller ETP purse seine fishery (where trips are typically shorter than in longline fisheries) had an operating budget of US$2,701,938 in 2013. *See* AIDCP Budget, Doc. MOP-27-06, at 2, 27th Mtg. of the Parties (Veracruz, Mexico, 4 June 2013) (Exh. US-116). (This figure subtracts the cost of the AIDCP meeting from the total IDCP budget.) The program covered 151 vessels at a cost per observer per day of US$132. *See* IATTC, "AIDCP Observer Program Info" (data received by Erika Carlsen, NOAA, from Ernesto Altamirano Nieto, IATTC) (July 14, 2014) (Exh. US-117). Vessels were

178. We would further note that given the size of these costs, it would seem likewise impossible for industry to entirely fund the costs of such programs. Indeed, the Appellate Body noted in *EC – Seal Products* that such costs to industry are not excluded *a priori* from the analysis of whether a measure is reasonably available, "in particular where such costs or difficulties could affect the ability or willingness of the industry to comply with the requirements of that measure."[339]

179. For the reasons explained above, Mexico has not put forward a "genuine alternative" that proves the amended measure is not "necessary" for the protection of dolphin life or health.

v. Mexico's Second Proposed Alternative Fails To Prove that the Amended Dolphin Safe Labelling Measure Is Not "Necessary"

180. Mexico's second proposal is for the United States to "allow alternative labeling schemes," including the AIDCP label, "coupled with a requirement to provide consumers detailed information on what the labels mean."[340] This appears to be the same alternative Mexico put forward in the original proceeding for purposes of TBT Article 2.2.[341] As to that alternative, the Appellate Body noted that, under Mexico's alternative, tuna caught by setting on dolphins could be eligible for a dolphin safe label, whereas, under the U.S. measure, such tuna

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covered for an average of 135 days. *Id.* Extrapolating from these figures, covering the 776 purse seine vessels in the WCPFC could cost approximately US$13,757,040. *See* WCPFC, *WCPFC Record of Fishing Vessels* (Exh. US-115). However, the IDCP figures significantly underestimate the costs of an observer program, as national programs may provide up to 50 percent of observers on Class 6 vessels in the ETP. *See* AIDCP Budget, Doc. MOP-27-06, at 7 (Exh. US-116). In 2013, IATTC observers covered 57% of sea days observed under the IDCP, and observers from national programs covered the rest. *See* IATTC, "AIDCP Observer Program Info" (Exh. US-117); *see also* IATTC, *Quarterly Report – October-December 2012*, at 31 (2013) (Exh. US-118). Using the total number of sea days observed under the IDCP (and assuming the national programs have the same cost per observer per day) *suggests that a program covering all purse seine vessels in the WCPFC could cost US$24,378,816 per year*.

Together, these estimates suggest that an observer program with 100 percent coverage of the WCPFC purse seine and longline fleets alone could cost approximately US$678,839,751 per year. This estimate does not cover all potential tuna fishing vessels, including the non-purse seine and non-longline vessels authorized to fish in the WCPFC, *see WCPFC, Tuna Fishery Yearbook 2012*, Table 73 (Exh. US-82), all the other tuna fishing vessels in the agreement areas of the IOTC, ICCAT, the Commission for the Conservation of Southern Bluefin Tuna (CCSBT), and all the non-purse seine vessels active in the IATTC agreement area. And, as noted above, ***none*** of these figures account for the costs of *starting* an observer program, which would include training observers and establishing reporting procedures and infrastructure.

[339] *EC – Seal Products (AB)*, para. 5.277; *see also US – Gasoline (AB)*, at 28 (finding that the U.S. measure at issue was inconsistent with Article XX because, *inter alia*, the United States neglected "to count the costs for foreign refiners that would result from the imposition of statutory baselines").

[340] Mexico's Second Written 21.5 Submission, paras. 284, 287.

[341] *See US – Tuna II (Mexico) (AB)*, para. 326; *US – Tuna II (Mexico) (Panel)*, para. 7.566 ("Mexico has suggested that a 'reasonably available alternative measure' for the United States would be to permit the use in the US market of the AIDCP 'dolphin-safe label.' According to Mexico, the objective of informing consumers can be accomplished by the AIDCP, since the monitoring, tracking, verification and certification system under the AIDCP would allow the consumers to have the assurances that no dolphins were injured or killed during the capturing of tuna.") (citing Mexico's Response to Original Panel Question Nos. 67 and 134).

was ineligible.[342] Consequently, Mexico's proposal would contribute to dolphin protection "*to a lesser degree*" than the U.S. measure because "it would allow more tuna harvested in conditions that adversely affect dolphins to be labeled 'dolphin safe.'"[343]

181. The Appellate Body's finding on Mexico's Article 2.2 claim is clearly applicable to this alternative, as evidenced by the Appellate Body's analysis in *EC – Seal Products*.[344] Mexico provides no explanation of how its second proposed alternative measure is consistent with the Appellate Body report and, in fact, it is not. This is yet another example of Mexico's effort to use this compliance proceeding to undermine the DSB recommendations and rulings in this dispute.

3. The Amended Dolphin Safe Labeling Measure Satisfies the Standard of Article XX(g)

182. The amended measure satisfies Article XX(g) because it: 1) concerns an "exhaustible natural resource"; 2) relates to the conservation of that resource; and 3) is made effective "in conjunction with restrictions on domestic production or consumption."[345]

a. Dolphins Are Exhaustible Natural Resources

183. In its first written submission, the United States explained that dolphins are an exhaustible natural resource.[346] Mexico concedes that this is the case.[347]

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[342] *See US – Tuna II (Mexico) (AB)*, para. 329 ("Under the alternative measure identified by Mexico, tuna that is caught by setting on dolphins would be eligible for a 'dolphin-safe' label if the prerequisites of the AIDCP label have been complied with. By contrast, the measure at issue prohibits setting on dolphins, and thus tuna harvested in the ETP would only be eligible for a 'dolphin-safe' label if it was caught by methods other than setting on dolphins.").

[343] *See US – Tuna II (Mexico) (AB)*, paras. 330-31 ("Since under the proposed alternative measure tuna caught in the ETP by setting on dolphins would be eligible for the 'dolphin-safe' label, it would appear, therefore, that the alternative measure proposed by Mexico would contribute to both the consumer information objective and the dolphin protection objective to a lesser degree than the measure at issue, because, overall, it would allow more tuna harvested in conditions that adversely affect dolphins to be labelled 'dolphin-safe.' We disagree therefore with the Panel's findings that the proposed alternative measure would achieve the United States' objectives 'to the same extent' as the existing US 'dolphin-safe' labelling provisions, and that the extent to which consumers would be misled as to the implications of the manner in which tuna was caught 'would not be greater' under the alternative measure proposed by Mexico.").

[344] *EC – Seal Products (AB)*, paras. 5.265-288 (analyzing the panel's analysis regarding the TBT Article 2.2 alternative for purposes of GATT Article XX(a)).

[345] *See US – Shrimp (AB)*, paras. 127, 135, 143.

[346] *See* U.S. First Written 21.5 Submission, para. 326.

[347] *See* Mexico's Second Written 21.5 Submission, para. 295.

b. The Amended Dolphin Safe Labelling Measure Relates to the Conservation of Dolphins

184. As discussed previously and above, the original panel found, and the Appellate Body affirmed, that the U.S. measure pursues the above-quoted dolphin protection objective,[348] and, in fact, does contribute to that objective.[349]

185. Despite the fact that it is a *dolphin safe* labeling measure, Mexico asserts that the amended measure's connection to dolphin protection is so tenuous that it does not even "relat[e] to" the conservation of dolphins. Mexico wrongly claims this is so because: 1) the measure is "not intended to conserve dolphin stocks" in the ETP and "conserving dolphin populations" is only an indirect objective of the measure; and 2) the measure lacks a "real relationship" to the conservation of dolphins, as there is no "effective protection" outside the ETP and the objective of dolphin protection is not completely fulfilled.[350]

186. First, the U.S. measure, in fact, is aimed at the "conservation" of dolphins, both inside and outside the ETP. The plain meaning of the word "conservation" is: "The action of keeping from harm, decay, or loss; careful preservation."[351] The term is not limited to preserving species or populations but also encompasses the protection of individual members of a species or population. The U.S. measure focuses on protecting dolphins themselves from the harms of setting on dolphins and other fishing methods.[352]

187. Second, the amended measure makes a contribution to the protection of dolphins (outside and inside the ETP) that satisfies the "relating to" standard. A measure is "relating to" the conservation of natural resources under Article XX(g) where there is a "close and genuine relationship of ends and means."[353] As discussed above, the original panel found, and the Appellate Body affirmed, that the original measure was capable of achieving its dolphin

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[348] *See* U.S. First Written 21.5 Submission, para. 327 and *supra*, secs. III.D.2.a, III.D.2.b.ii; *US – Tuna II (Mexico) (AB)*, para. 302; *US – Tuna II (Mexico) (Panel)*, paras. 7.401, 7.425.

[349] *See US – Tuna II (Mexico) (AB)*, para. 327; *US – Tuna II (Mexico) (Panel)*, para. 5.599.

[350] *See* Mexico's Second Written 21.5 Submission, paras. 297, 299, 303, and 304.

[351] *See* "Conservation," *Oxford English Dictionary*, at 485 (Oxford: Clarendon Press, 1993) (Exh. US-119).

[352] *See US – Tuna II (Mexico) (Panel)*, paras. 7.485-486 ("[T]he adverse effects on dolphins targeted by the US dolphin-safe provisions, as described by the United States, relate to observed and unobserved mortalities and serious injuries to individual dolphins in the course of tuna fishing operations. In addition . . . to the extent that addressing such adverse effects might also be considered as seeking to conserver dolphin populations, the US objectives also incorporate, at least indirectly, considerations regarding the conservation of dolphin stocks."). Thus, as noted previously, Mexico's argument that the U.S. measure does not primarily address dolphin *stocks* in the ETP is irrelevant to the Article XX(g) analysis, as the measure aims to conserve dolphins themselves, both in the ETP and outside it. *See* Mexico's Second Written 21.5 Submission, paras. 296-98; U.S. First Written 21.5 Submission, paras. 102-03. Additionally, as noted previously, Mexico overstates the evidence that the ETP dolphin populations are recovering, as the study it cites is not a peer-reviewed published study and, in any event, does not demonstrate what Mexico asserts. *See* U.S. First Written 21.5 Submission, paras. 104-07. Mexico declined to address this point in its second written submission.

[353] *See US – Shrimp (AB)*, para. 136.

protection objective completely within the ETP and partially outside the ETP.[354] The amended measure goes even farther in protecting dolphins by applying a certification mechanism (captain's statement) that was found "capable of achieving" the U.S. objective in the context of setting on dolphins outside the ETP to the certification that no dolphin was killed or seriously injured in catching the tuna.[355]

c. The Amended Dolphin Safe Labelling Measure Is Made Effective in Conjunction with Restrictions on Domestic Production and Consumption

188. The amended measure also imposes comparable restrictions on domestic and imported products.[356] While Mexico claims that the United States has not "elaborate[d] on what kind of restriction on domestic production or consumption has been adopted,"[357] that is clearly false. The amended measure imposes the *same* eligibility conditions and requirements on U.S. vessels and on foreign vessels:

- *all* tuna product containing tuna caught by setting on dolphins is ineligible for the label, *regardless of the fishery, nationality of the vessel, and nationality of the processor*; and

- *all* tuna product containing tuna caught in a set or gear deployment where a dolphin was killed or seriously injured is ineligible for the label, *regardless of the fishery, gear type, nationality of the vessel, and nationality of the processor*.[358]

189. First, Mexico claims that these requirements fall outside the scope of subparagraph (g) because they do not "distribute the burden of conservation between foreign and domestic consumers in an 'even-handed' or balanced manner."[359] In other words, if the requirements result in a detrimental impact on the foreign product, then the amended measure does not "relat[e] to" an exhaustible natural resource. But such an approach is surely incorrect. Under Mexico's approach and in light of its GATT 1994 Articles I:1 and III:4 claims, subparagraph (g) would be rendered inutile.

190. Second, Mexico claims that the amended measure "does not impose any real restrictions on the tuna that is harvested by the U.S. fleet outside the ETP, for the purposes of conservation

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[354] *See supra*, sec. III.B; *US – Tuna II (Mexico) (AB)*, para. 327; *US – Tuna II (Mexico) (Panel)*, para. 5.599.

[355] *See US – Tuna II (Mexico) (AB)*, para. 327 (citing *US – Tuna II (Mexico) (Panel)*, paras. 7.562-563).

[356] See U.S. First Written 21.5 Submission, paras. 322, 327.

[357] Mexico's Second Written 21.5 Submission, para. 308.

[358] *See* U.S. First Written 21.5 Submission, para. 328. As also noted, all tuna caught in large-scale driftnets on the high seas is ineligible for the label, regardless of the fishery and nationality of the vessel.

[359] Mexico's Second Written 21.5 Submission, para. 309.

within the meaning of Article XX(g) of the GATT 1994 or otherwise."[360] Again, this argument directly undermines the DSB recommendations and rulings. The Appellate Body has already found that the amended measure contributes to the protection of dolphins. Indeed, the Appellate Body already determined that the original measure "fully addresses" the risks caused by the "particularly harmful" practice of setting on dolphins both inside and outside the ETP.[361] The 2013 Final Rule further contributes to the conservation of dolphins and expands the certification system that supported this finding to the risk of death and serious injury outside the ETP.

191. Finally, Mexico's arguments regarding the relevance of the record-keeping/verification and observer coverage are clearly in error for the reasons explained elsewhere in the submission.

4. The Amended Dolphin Safe Labeling Measure Is Applied Consistently with the Article XX Chapeau

192. The amended measure is also not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade. This analysis involves two inquiries: 1) whether the measure is applied in a manner that is discriminatory, and, if so, whether such discrimination is "arbitrary or unjustifiable" or 2) whether the measure is applied so as to be a disguised restriction on trade.[362] The United States addresses each part of the analysis separately below.

a. The Amended Dolphin Safe Labelling Measure Does Not Discriminate for Purposes of the Chapeau

193. The term "discrimination" as referenced in the chapeau refers to a different standard than the "discrimination" encompassed in Articles I:1 and III:4 of the GATT 1994.[363] Under the chapeau, discrimination exists only where "countries in which the same conditions prevail are treated differently."[364] Thus, there are two questions to answer: 1) whether the amended measure provides different regulatory treatment to the products originating from different countries; and 2) whether the "conditions" prevailing in those countries are "the same."[365]

194. Neither is the case here – the amended measure provides the same regulatory treatment to Mexican tuna product as it does to the tuna product of other Members and, furthermore, the relevant "conditions" are not (and have never been) the "same" between the ETP and other fisheries.

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[360] Mexico's Second Written 21.5 Submission, para. 310.

[361] *US – Tuna II (Mexico) (AB)*, paras. 289, 297; *see also supra*, sec. II.C.1.a.

[362] *EC – Seal Products (AB)*, para. 5.303 (citing *US – Shrimp (AB)*, para. 165); *see also* U.S. First Written 21.5 Submission, para. 330.

[363] *EC – Seal Products (AB)*, para. 5.298 (citing *US – Gasoline (AB)*, at 22).

[364] *See EC – Seal Products (AB)*, para. 5.303 (citing *US – Shrimp (AB)*, para. 165).

[365] *EC – Seal Products (AB)*, paras. 5.316-317.

i. The Amended Dolphin Safe Labelling Measure Provides the Same Regulatory Treatment to Mexican Tuna Product as It Does to Tuna Product of Other Members

195. As the United States has explained, the eligibility condition regarding setting on dolphins is *neutral* as to nationality. *All* tuna product containing tuna caught by setting on dolphins is ineligible for the label, *regardless of the fishery, nationality of the vessel, and nationality of the processor*. This provision has no carve-out whereby the products of certain Members automatically qualify for different regulatory treatment, as was the case in the measures challenged in *Brazil – Retreaded Tyres* and *EC – Seal Products*.[366]

196. Whether tuna product is eligible for the dolphin safe label depends on the choices made by vessel owners, operators, and captains.[367] As discussed extensively in both proceedings, there are many ways to catch tuna. Setting on dolphins is one such way, but it is not the only way. Indeed, even in the ETP purse seine fishery, most sets by large purse seine vessels are *not* sets on dolphins.[368] But whatever choice different industry participants make, *the consequences are the same for everyone*. Further, there is no evidence to suggest that this particular eligibility requirement singles out Mexico. As we noted previously, at the time the DPCIA was originally enacted, U.S.-flagged vessels (as well as many other vessels) operated in the ETP and set on dolphins.[369] The mere fact that, over the past 20 years, vessels flagged to some Members have adopted methods of fishing that are less harmful to dolphins (while others have not) does not mean the U.S. measure provides different regulatory treatment to different countries.

197. Mexico disagrees. While Mexico purports to recognize that the standard for discrimination under the chapeau is different from under Articles I and III,[370] Mexico, in fact, concludes that the *same* standard – evidence of detrimental impact – proves "discrimination" for purposes of the chapeau, Article I:1, and Article III:4.[371] Mexico cites to no textual basis or

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[366] *See EC – Seal Products (AB)*, para. 5.316 (considering the different regulatory treatment to be the prohibition of seal products originating from "commercial hunts" in Canada and Norway and the allowance of seal products originating from indigenous communities in Greenland); *Brazil – Retreaded Tyres (AB)*, paras. 226-33 (discussing the Mercosur exception).

[367] U.S. First Written 21.5 Submission, para. 333 (quoting *US – Tuna II (Mexico) (Panel)*, para. 7.333 ("[T]he choice facing the fleets of the United States, of Mexico, and other foreign origin was the same, and that US and other fleets operating in the ETP could equally have chosen to continue to set on dolphins in the ETP under the conditions set out in the AIDCP . . . . In that respect, the situation arising from the measure was the same for both fleets.")).

[368] *See* U.S. First Written 21.5 Submission, para. 92 (citing IATTC, EPO Dataset 2009-2013 (Exh. US-26)).

[369] U.S. First Written 21.5 Submission, para. 333 (citing *US – Tuna II (Mexico) (Panel)*, paras. 7.307, 7.315, 7.320 ("It is undisputed that, at the time of enactment of the measures, there were a number of vessels of different fleets fishing in the ETP by setting on dolphins, including a number of US and Mexican vessels.")).

[370] *See* Mexico's Second Written 21.5 Submission, para. 322.

[371] Mexico's Second Written 21.5 Submission, para. 323 ("The application of the Amended Tuna Measure continues to *de facto* discriminate against Mexican tuna products. As previously stated, the lack of access to the

previous WTO reports for this proposition, and none appear to be available. The fact is that no such different regulatory treatment occurs here, and therefore no "discrimination" exists for purposes of the chapeau.

ii. The Conditions Prevailing Between Countries Are Not the Same

198. Even aside from the fact that different regulatory treatment does not exist, the conditions prevailing in the relevant countries are not the same.

199. The Appellate Body has noted that, "in conducting this assessment, the subparagraph under which a measure has been provisionally justified, as well as the provision of the GATT with which a measure has been found to be inconsistent, provide important context."[372] As discussed above, in the context of this dispute, subparagraphs (b) and (g) relate to the protection and conservation of dolphins. As also discussed above, the circumstance that creates the alleged inconsistency with Articles I:1 and III:4 is that Mexican tuna product cannot carry the dolphin safe label because that tuna product contains tuna caught by setting on dolphins, while the tuna product of the other Members whose product is sold in the United States can potentially carry the label because it contains tuna caught by purse seine (other than setting on dolphins), longline, and pole-and-line fishing.[373]

200. As such, because this eligibility condition does not distinguish between Members, or even between fisheries, but between fishing methods, it would appear that the most appropriate "condition" to examine in this analysis is the different harms to dolphins caused by setting on dolphins, on the one hand, and by purse seine (other than setting on dolphins), longline, and pole-and-line fishing, on the other.

201. And that comparison is not even close. The science regarding harms to dolphins fully supports the distinction the amended measure draws between setting on dolphins and other fishing methods.[374] Setting on dolphins is, indeed, a "particularly harmful" practice. The three fishing methods that produce virtually all the tuna for the U.S. tuna product market simply cause

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advantage of the dolphin-safe label for tuna products containing tuna caught by setting on dolphins has a detrimental impact on the competitive opportunities of Mexican tuna products in the U.S. market.").

[372] *EC – Seal Products (AB)*, para. 5.317; *see also id.* para. 5.300 ("We consider that, in determining which 'conditions' prevailing in different countries are relevant in the context of the chapeau, the subparagraphs of Article XX, and in particular the subparagraph under which a measure has been provisionally justified, provide pertinent context. In other words, 'conditions' relating to the particular policy objective under the applicable subparagraph are relevant for the analysis under the chapeau. Subject to the particular nature of the measure and the specific circumstances of the case, the provisions of the GATT 1994 with which a measure has been found to be inconsistent may also provide useful guidance on the question of which 'conditions' prevailing in different countries are relevant in the context of the chapeau. In particular, the type or cause of the violation that has been found to exist may inform the determination of which countries should be compared with respect to the conditions that prevail in them.").

[373] *See supra*, secs. III.B, III.C.

[374] *See supra*, sec. II.B-E; U.S. First Written 21.5 Submission, paras. 338-40.

nowhere near the observed dolphin mortality or serious injury that setting on dolphins does,[375] even putting aside for the moment the important fact that, if tuna product contains tuna caught where a dolphin was killed or seriously injured, such tuna product is ineligible to be labeled dolphin safe regardless of what fishing gear was used. And, of course, there is no evidence that any of these three fishing methods causes anywhere close to the level of unobserved harms that results from the repeated chase and capture of dolphins by large purse seine vessels. This same point holds true even if the comparison were expanded to the fishing methods that only produce *de minimis* amounts of tuna for the U.S. tuna product market (*i.e.*, hand line, gillnet, and trawl fishing).[376]

202. As such, with regard to the protection and conservation of dolphins, the "conditions" prevailing in a Member whose fleet routinely sets on dolphins are *not the same* as those in a Member whose fleet employs the other methods used to produce tuna for the U.S. tuna product market.

203. Mexico disagrees, and argues that there are two interrelated conditions: 1) "the adverse effects on dolphins caused by commercial tuna fishing"; and 2) "every country producing tuna products produces at least some tuna products which contain tuna that was caught in a manner that caused adverse effects on dolphins."[377] Mexico appears to conclude that both of these conditions are the "same" because fishing methods other than setting on dolphins cause observed and unobserved harm to dolphins.[378]

204. To accept such a proposition – that a dolphin safe labeling regime cannot allow tuna product to carry a dolphin safe label if it contains tuna caught by a fishing method that has ever caused any dolphin bycatch, no matter how rare the occurrence – is simply another way of saying that the United States must make a choice: either declare that setting on dolphins is a dolphin safe fishing method, or eliminate the label entirely.[379]

205. In Mexico's view, the United States is prohibited under the covered agreements to narrowly tailor the measure to the science. But there is no indication in the GATT 1994 or in the DSB recommendations and rulings that this is the case. Indeed, surely the opposite is true.[380]

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[375] *See supra* sec. II.C; U.S. First Written 21.5 Submission, paras. 338-39.

[376] *See supra* sec. II.D; U.S. First Written 21.5 Submission, para. 339.

[377] Mexico's Second Written 21.5 Submission, para. 319.

[378] *See* Mexico's Second Written 21.5 Submission, para. 319 ("As Mexico has demonstrated, dolphins suffer observed and unobserved adverse effects – including serious injury or death – as a result of commercial tuna fishing operations throughout the fisheries of the world (i.e., both within and outside the ETP) by every country with a commercial tuna fishing fleet. Hence, the relevant prevailing condition of adverse effects on dolphins caused by commercial tuna fishing is the same for all countries that are engaged in commercial tuna fishing and, as a consequence, for all countries that use the tuna harvested by such commercial tuna fishing in the production of finished tuna products.").

[379] Mexico's First Written 21.5 Submission, para. 263 ("[A]ll tuna fishing methods should be either disqualified or qualified.").

[380] *See, e.g.*, *EC – Seal Products (AB)*, para. 5.317 (stating that the EU had not appealed the panel's finding that "the same animal welfare concerns as those arising from seal hunting in general also exist in IC hunts"); *US –*

And Mexico is wrong to argue for an approach where the United States must ignore the obvious fact that different fishing methods cause different levels of harm.[381]

iii. Mexico's Additional Argument Also Fails

206. Mexico also appears to make a separate argument that the alleged difference in the record-keeping/verification and observer requirements also proves that the amended measure discriminates where the conditions are the same.[382] This argument similarly fails.

207. First, Mexico cannot explain why such an argument is even relevant to this analysis. Indeed, Mexico itself argues that:

> [T]he circumstances that bring about the discrimination under the chapeau may be the same as those which have led to the finding of a violation of the substantive provisions of the GATT. This was the case in *EC – Seal Products*, and *it is also the case in the present proceedings*.[383]

208. The United States agrees. But what Mexico ignores is that it does not even allege, much less prove, that the record-keeping/verification and observer coverage requirements result in a detrimental impact on Mexican tuna product, which Mexico claims is sufficient to prove the amended measure inconsistent with Articles I:1 and III:4.[384]

209. Second, and as explained above,[385] these requirements *stem from the AIDCP*, not U.S. law, and as such, no <u>*genuine relationship*</u> exists between the amended measure and any disadvantage that Mexico perceives its tuna product industry is operating under vis-à-vis other Members that are selling tuna or tuna product in the U.S. tuna product market.[386]

Clove Cigarettes (AB), para. 225 (criticizing the U.S. measure that prohibited the sale of flavored cigarettes, which were subject to the ban because of their particular appeal to young people, as that same characteristic (youth appeal) existed in both U.S.-produced menthol cigarettes (which were not banned) and Indonesian-produced clove cigarettes (which were banned)).

[381] *See US – Tuna II (Mexico) (Panel)*, para. 7.438 ("[C]ertain fishing techniques seem to pose greater risks to dolphins than others. It is undisputed, in particular, that the fishing method known as setting on dolphins may result in a substantial amount of dolphin mortalities and serious injuries") (cited in *US – Tuna II (Mexico) (AB)*, paras. 288-89).

[382] *See* Mexico's Second Written 21.5 Submission, para. 324.

[383] *See* Mexico's Second Written 21.5 Submission, para. 326 (emphasis added) (citing *EC – Seal Products*, para. 5.298).

[384] *See supra*, secs. III.B, III.C.

[385] *See supra*, secs. III.A.4.b-c.

[386] *See US – Tuna II (Mexico) (AB)*, paras. 236-39; *see also EC – Seal Products (AB)*, para. 5.336 (noting the importance of such a "genuine relationship" being established).

210. Third, Mexico is wrong that the "conditions," as they relate to these requirements, are the "same." As noted previously,[387] the IATTC Members agreed to *different* requirements regarding record-keeping/verification and observer coverage because the ETP *is different* – nowhere else in the world has tuna fishing caused the harm to dolphins that large purse seine vessels have caused in the ETP. The number of dolphins killed in the ETP tuna purse seine fishery since the fishery began in the late 1950s *is the greatest known for any fishery*.[388] In light of this *unique* history, the AIDCP parties agreed to *unique* requirements, including the AIDCP record-keeping/verification and observer coverage requirements that Mexico now insists the United States must require of itself and all of its trading partners, regardless of where or how they catch tuna, to come into compliance with its WTO obligations. In this regard, it simply cannot be said that the "conditions" that gave rise to these AIDCP requirements are the "same" among different fisheries. *They are wholly unique*.

211. The amended measure does not discriminate between countries where the same conditions prevail.

b. Any Discrimination that Exists Is Not Arbitrary or Unjustifiable

212. If discrimination is found, one of the "most important factors" in determining whether that discrimination is "arbitrary or unjustifiable" is "whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX."[389] The relevant objective of the amended measure, for both subparagraphs (b) and (g), is 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."[390] To the extent that the Panel considers that the amended measure discriminates, it clearly does not do so in an arbitrary or unjustifiable manner.

213. In particular, the denial of eligibility for the label to tuna product containing tuna caught by setting on dolphins is directly related to the dolphin protection objective. As the United States has demonstrated, setting on dolphins is a "particularly harmful" fishing method, and other fishing methods do not cause the same level of harm to dolphins that setting on dolphins does.[391] And, again, this makes perfect sense – *all* of the potentially eligible fishing methods interact with dolphins only by accident, while *the whole point* of setting on dolphins is to capture them in a purse seine net. Of course, where a dolphin is killed or seriously injured in the harvesting of tuna with any gear type, tuna product containing that particular tuna will not be

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[387] *See supra*, secs. III.A.4.b-c.

[388] Gerrodette, "The Tuna Dolphin Issue," at 1192 (Exh. US-29).

[389] *EC – Seal Products (AB)*, paras. 5.306, 5.318.

[390] *US – Tuna II (Mexico) (AB)*, para. 325 (citing *US – Tuna II (Mexico) (Panel)*, paras. 7.425 and 7.401).

[391] *See* U.S. First U.S. First Written 21.5 Submission, paras. 89-101, 110-61.

eligible for the label. Accordingly, the two eligibility conditions are directly related to the objective of the amended measure, both individually and collectively.

214. Indeed, Mexico appears not to focus at all on whether these eligibility conditions are rationally related to the dolphin protection objective. Rather, Mexico's focus in its second submission appears to be more on the fact that most Mexican-caught tuna, because it is harvested by a large purse seine vessel in the ETP, is subject to AIDCP-mandated record-keeping/verification observer coverage requirements that tuna caught outside the ETP is not subject to. In Mexico's view, this "difference" does not contribute to dolphin protection outside the ETP.[392]

215. First, and as discussed above, Mexico's assertion is contrary to the findings of the DSB that the original measure *did* contribute to dolphin protection outside the ETP, with respect to driftnet fishing and setting on dolphins,[393] and to the Appellate Body's suggestion that captain's statements would provide a suitable certification.[394]

216. Second, to the extent that the record-keeping/verification and observer requirements are relevant to this analysis, which we dispute, we note that the fact that the AIDCP imposes unique requirements that legal regimes covering other fisheries do not replicate is indeed related to the protection and conservation of dolphins. Again, it is undisputed that the number of dolphins killed in the ETP tuna purse seine fishery since the fishery began in the late 1950s *is the greatest known for any fishery*. Of course the AIDCP imposes unique requirements not replicated elsewhere. *The ETP is unique*.

217. Mexico's position simply ignores the realities of the past and present of the ETP tuna fishery, asserting that the special observer and verification requirements placed on large purse seine vessels in the ETP, instead of being an extraordinary multilateral response to an extraordinary situation, are the minimum requirements necessary to ensure reliable information concerning dolphin sets and dolphin mortalities.[395] This is inconsistent with the DSB recommendations and rulings and with the facts in this dispute.

218. Furthermore, the amended measure does not constitute a disguised restriction on trade.

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[392] *See* Mexico's Second Written 21.5 Submission, para. 336.

[393] *See US – Tuna II (Mexico) (AB)*, para. 327(citing *US – Tuna II (Mexico) (Panel)*, paras. 7.562-563).

[394] *See US – Tuna II (Mexico) (AB)*, para. 296. Furthermore, as noted above, the United States, other Members, and RFMOs rely on captain's statements in a variety of contexts and for a for a wide range of purposes. *See supra*, sec. III.A.4.c (citing examples of U.S. regulations and international agreements that rely on captain certifications and logbooks).

[395] *See* Mexico's Second Written 21.5 Submission, paras. 335-36.

c. Mexico's Other Arguments Fail To Prove that the Amended Dolphin Safe Labelling Measure Discriminates in an Unjustifiable or Arbitrary Manner

219. Finally, Mexico asserts that the United States has discriminated arbitrarily and unjustifiably by not working through the AIDCP to "address[] its remaining concerns about dolphins and tuna fishing."[396]

220. Again, Mexico is wrong on the law. As noted previously, a Member may take measures "at the levels that it considers appropriate," and nothing in covered agreements requires a Member to adhere to an international agreement, a point that Article 2.4 of the TBT Agreement confirms.[397]

221. Mexico is also wrong on the facts. The United States *has engaged* in multilateral negotiations with Mexico through the AIDCP process. The issue of setting on dolphins was discussed, *inter alia*, during negotiation of the Panama Declaration in 1995.[398] Thereafter, the DPCIA provided for changing the definition of dolphin safe if the scientific evidence showed that setting on dolphins was not having a "significant adverse impact on dolphin stocks."[399] However, "the conditions foreseen . . . for this change to occur were ultimately not fulfilled," and the rule that had temporarily changed the definition was struck down by the *Hogarth* court as contrary to the evidence before it.[400] Further, we have continued to discuss this issue with Mexico in multiple different fora, including two meetings held in Mexico City in the latter half of 2009.

222. We would also note, as we have mentioned above, that Mexico's reliance on *US – Shrimp* is particularly misplaced. In that dispute, the measure at issue expressly directed the United States to pursue negotiations to preserve sea turtles, which was an important factor in the DSB's finding that following those instructions with respect to some countries and not others was inconsistent with the chapeau.[401] No such direction is provided for as part of the DPCIA. Indeed, it is odd that Mexico seeks support in *US – Shrimp* at all. In that dispute, the U.S. measure was initially found not to be justified under Article XX in part because of the "rigid and unbending" nature of the measure.[402] Yet Mexico now claims that the United States must

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[396] *See* Mexico's Second Written 21.5 Submission, paras. 337-39.

[397] *See* TBT Article 2.4 (stating that Members need not base their measure son international standards where "such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems"); SPS Article 3.3 (stating that Members need not base their measures on international standards where the Member is able to provide a "scientific justification" for the higher level of protection).

[398] *See US – Tuna II (Mexico) (Panel)*, para. 4.21.

[399] *See US – Tuna II (Mexico) (Panel)*, para. 4.22.

[400] *See US – Tuna II (Mexico) (Panel)*, para. 7.332.

[401] *See US – Shrimp (Article 21.5 – Malaysia) (AB)*, paras. 5.44-45.

[402] *See US – Shrimp (Article 21.5 – Malaysia) (AB)*, paras. 163, 177.

impose "rigid and unbending" record-keeping/verification and observer requirements on all tuna sold as dolphin safe in the U.S. tuna product market, regardless of where or how it was caught, *in order to be justified under Article XX*. Mexico's approach turns *US – Shrimp* upside down. Mexico's argument fails.

223. The amended measure is justified under Article XX of the GATT 1994.

IV. CONCLUSION

224. For the above reasons, we respectfully request the Panel to deny Mexico's claims in their entirety.