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

Recourse to Article 21.5 of the DSU by the United States
Second Recourse to Article 21.5 of the DSU by Mexico

(DS381)

(AB-2017-9)

Appellee Submission of
the United States of America

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TABLE OF ACRONYMS

Acronym	Full Name
2016 IFR	Enhanced Document Requirements and Captain Training Requirements To Support Use of the Dolphin Safe Label on Tuna Products, 81 Fed. Reg. 15,444 (Mar. 23, 2016)
AIDCP	Agreement on the International Dolphin Conservation Program
C.F.R.	Code of Federal Regulations
CMM	Conservation and Management Measure
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
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
IOTC	Indian Ocean Tuna Commission
ISSF	International Seafood Sustainability Foundation
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
RFMO	Regional Fishery Management Organization
TBT Agreement	Agreement on Technical Barriers to Trade
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 – Wheat Exports and Grain Imports (AB)	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004
Chile – Price Band System (Article 21.5 – Argentina) (AB)	Appellate Body 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/AB/RW, adopted 22 May 2007
China – GOES (AB)	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012
China – Rare Earths (AB)	Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014
Dominican Republic – Import and Sale of Cigarettes (AB)	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005
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 – Fasteners (China) (AB)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
EC – Fasteners (China) (Article 21.5) (AB)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China*, WT/DS397/AB/RW adopted 12 February 2016

EC – Hormones (AB)	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC – Poultry (AB)	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998
EU – Biodiesel (AB)	Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R, adopted 26 October 2016
India – Solar Cells (AB)	Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/AB/R, adopted 14 October 2016
Korea – Dairy (AB)	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R
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 – Softwood Lumber VI (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006
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 II (Article 21.5 – Mexico) (AB)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/AB/RW, adopted 3 December 2015
US – Tuna II (Article 21.5 – Mexico) (Panel)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/RW, adopted 3 December 2015, as modified by Appellate Body Report WT/DS381/AB/RW
US – Tuna II (Article 21.5 – US/Mexico) (Panels)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States*, WT/DS381/RW, circulated 14 July 2017 Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/RW/2, circulated 14 July 2017
US – Upland Cotton (AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005
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 – Washing Machines (AB)	Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R, adopted 26 September 2016

I. INTRODUCTION

1. This is the third time this long-standing dispute over whether the U.S. dolphin safe labeling requirements discriminate against Mexican tuna and tuna product has come before the Appellate Body. We believe it should be the last.

2. In November 2015, the Appellate Body circulated its second report in this dispute. In that report, the Appellate Body determined that the design of the so-called "determination provisions" was not even-handed. On this basis, the Appellate Body found the measure to be inconsistent 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) and not justified under Article XX of the GATT 1994. In doing so, the Appellate Body confirmed its previous findings that there is "a special relevance" of the calibration analysis to the inquiry of whether the measure is even-handed and that the U.S. measure will not be found to be inconsistent with U.S. WTO obligations if it is properly 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the oceans."[1]

3. Following the Dispute Settlement Body's (DSB) adoption of its recommendations and rulings in December 2015, the United States conducted an immediate, thorough review of the measure to determine what changes needed to be made to ensure that the differing labeling conditions are appropriately calibrated to the differences in risk to dolphins occurring due to different fishing methods inside and outside the eastern tropical Pacific Ocean (ETP) large purse seine fishery. As a result of that careful internal analysis, the U.S. National Oceanic and Atmospheric Administration (NOAA) issued an interim final rule on March 22, 2016 (2016 IFR) to bring the U.S. dolphin safe labeling requirements into compliance with the DSB recommendations and rulings and to further ensure that the measure was consistent with the covered agreements. These amendments to the measure directly responded to the concerns of the Appellate Body and the first compliance panel that the design of the determination provisions was not even-handed and made further changes to the certification and tracking and verification requirements to address particular concerns raised during the first compliance proceeding.

4. But to be clear, the United States did not alter one central aspect of the measure. The measure still treats tuna product produced from the intentional chase and capture of dolphins ("setting on dolphins") as ineligible for the "dolphin safe" label, while continuing to allow tuna product produced from other fishing methods to be potentially eligible for the label. To do otherwise, would reflect a lack of recognition of the unique risk to dolphins presented by setting on dolphins, compared to other fishing methods. That is, to allow tuna product produced from vessels engaging in this inherently dangerous fishing method to have access to the dolphin safe label would not protect dolphins and would be misleading to U.S. consumers. And, on the other hand, to deny access of the label to tuna product produced from all other fishing methods would also not protect dolphins and would wrongly suggest to U.S. consumers that tuna product cannot be produced without harming dolphins, which is incorrect.

5. Following the issuance of the 2016 IFR, each party requested establishment of a compliance panel under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). In those proceedings, the Panels reviewed the claims of each party as to whether the measure had been brought into compliance with the DSB recommendation and is otherwise consistent with the TBT Agreement and GATT 1994, based on

[1] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.101, 7.155, 7.330.

the legal framework provided by the Appellate Body.

6. Accordingly, the Panels began their analysis by conducting an exhaustive and highly detailed assessment of the scores of pages of argumentation and hundreds of exhibits submitted by the parties on the risk profile for dolphins of different tuna fishing methods and fisheries. The Panels' assessment spans 90 pages and includes detailed analysis of the arguments and evidence the parties put forward concerning methodologies for measuring dolphin harms[2] and the observable and unobservable harms to dolphins caused by each of the seven tuna fishing methods in general and in each fishery for which there was evidence on the record.[3] For example, the Panels' analysis of one fishing method and ocean area – purse seine fishing in the western and central Pacific Ocean – included assessments of observable dolphin mortalities in a dozen national fisheries in the area, as well as overall observable mortality levels, and a detailed assessment of the parties' numerous arguments on the probative value of nearly 30 exhibits relating to the risk profile of the fishing method and ocean area.[4]

7. Based on this extensive assessment of the risk profiles of different fishing methods in different ocean areas in terms of overall harms to dolphins (observable and unobservable), the Panels correctly concluded that "setting on dolphins is significantly more dangerous to dolphins than are other fishing methods."[5] Beginning from that factual basis, the Panels conducted their legal analysis, ultimately concluding that each of the elements of the 2016 measure are calibrated to the differences in risks to dolphins and, as such, that the measure is not inconsistent with Article 2.1 of the TBT Agreement and is justified under Article XX of the GATT 1994.[6] That is, the Panels found that the 2016 dolphin safe labeling measure addresses the risks to dolphins posed by tuna fishing in a manner that is "calibrated to" or "commensurate with" the risks arising "from the use of different fishing methods in different areas of the ocean."[7]

8. Mexico now appeals those findings of the Panels. In doing so, Mexico urges the Appellate Body, in essence, to reverse its own findings and adopt a very different legal framework that would require the United States to adopt a very different measure than the one it has now. In short, Mexico argues that only a dolphin safe labeling measure that determines the eligibility of tuna product for the label based on fishery-by-fishery comparisons with various under-developed external benchmarks could be considered "calibrated." Additionally, only a measure where the certification and tracking and verification requirements are adjusted based on the fishing regulations of other Members, or the occurrence of illegal fishing or trans-shipment, can be deemed "calibrated." In this version of the measure, the determination provisions have no practical use at all.

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[2] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.145-152, 7.164-214.

[3] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.153-162, 7.215-525.

[4] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.336-370.

[5] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.525, 7.539.

[6] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.793-717, 7.739-740.

[7] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.715, 7.717.

9. Mexico's approach is incorrect.

10. First, Mexico's arguments directly conflict with the two sets of DSB recommendations and rulings applicable in this dispute. As discussed below, Mexico has not treated these second and third compliance proceedings as the Panels did – to inquire whether the United States has made sufficient changes to bring its measure into compliance pursuant to the legal framework provided by the Appellate Body. Rather, Mexico appears to have another goal – to use these proceedings to change the applicable legal framework. Mexico's approach is simply not compatible with the purpose of a proceeding conducted pursuant to Article 21.5 of the DSU.[8]

11. Second, the design, architecture, and revealing structure of the 2016 measure indicate that the eligibility criteria operate on a fishing method-by-fishing method basis and that all of the labeling conditions – eligibility criteria, certification requirements, and tracking and verification requirements – are calibrated to the differences in risk to dolphins. Further, where comparably high risk fisheries exist, the determination provisions play an important role in allowing the measure to treat similarly situated fisheries similarly. No previous panel or Appellate Body report in this dispute has suggested that the United States must fundamentally restructure this legitimate environmental measure for it to become WTO-consistent.

12. All of Mexico's appeals – including Mexico's legal claims, its single DSU Article 11 challenge, and the several claims that appear actually to challenge the Panels' appreciation of the evidence on the record but are brought under the guise of legal claims – are without merit and should be rejected. As this submission shows, the Panels' findings that Mexico seeks to reverse are all sound – both legally and factually.

13. In Section II, the United States will briefly review the factual record in this proceeding, including noting, where necessary, aspects of Mexico's introductory assertions that are not supported by the factual findings of the Panels. In Section III, the United States addresses Mexico's appeals of the Panels' findings concerning Article 2.1 of the TBT Agreement. In section IV, the United States addresses Mexico's appeals of the Panels' findings as to Article XX of the GATT 1994. Finally, Section VI addresses Mexico's remarks concerning open hearings.

II. THE FACTUAL RECORD IN THIS PROCEEDING

14. In this proceeding, the Panels conducted an exhaustive review of the hundreds of exhibits and numerous findings by previous panels that make up the factual record in this proceeding. On the basis of this review, the Panels made extensive factual findings. These findings cover the content and nature of the 2016 measure,[9] possible metrics for assessing the risk to dolphins posed by different fishing methods in different fisheries,[10] the nature and extent of the risks to dolphins posed by each of the fishing methods used to catch tuna generally and in each of the specific fisheries for which there was evidence on the record,[11] and numerous other issues relevant to the

[8] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.112.

[9] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.42-71.

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

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

analysis of the measure at issue.[12] Mexico has elected to appeal very few of these factual findings, and the vast majority of them, including the ones most relevant for this proceeding, are unchallenged.[13]

15. Further, the relevant factual background for this appeal does not include suggestions or assertions that have no basis in, or are contradicted by, the factual findings of the Panels and uncontested evidence on the record. Section III of Mexico's submission contains many such suggestions and assertions, both major and minor, including the following:

- Mexico omits pole-and-line fishing from the list of "relevant fishing methods," even though it is uncontested that this is a significant method of tuna fishing.[14] This is particularly notable as Mexico's list includes two fishing methods – gillnet and trawl fishing – that are not major methods of fishing for tuna.[15]

- Mexico asserts that it is a U.S. "position" that changes to the regulations implementing the Dolphin Protection Consumer Information Act (DPCIA) "override the language of the statute."[16] In fact, that is not the U.S. "position," and Mexico cites to no statement of the United States that suggests the contrary. Rather, it is a fact that the NOAA regulations implement the DPCIA and any additional requirements included in those regulations have the force of law and form part of the measure at issue in this dispute.[17]

- Mexico asserts that, for purposes of the eligibility criterion relating to no dolphin being killed or seriously injured in the set or other gear deployment in which tuna were caught, "the United States has taken the position that, outside the ETP, all sets and gear deployments in which dolphins are killed or injured are 'accidental.'"[18] This is incorrect. Neither the paragraph of the U.S. first written submission nor the paragraphs of the Reports to which Mexico cites support this assertion.[19] In fact, the Panels' findings establish that the United States argued that "in purse seine fisheries outside the ETP, there is no evidence that vessels routinely intentionally set on dolphins" and that other fishing methods do not, by nature, target dolphins.[20] The Panels agreed on both points.[21]

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

[13] *See* Mexico's Appellant Submission (raising one appeal under Article 11 of the DSU).

[14] Mexico's Appellant Submission, sec. III; *see US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.512-516; U.S. Second Written Submission, n.263.

[15] *See* Mexico's Appellant Submission, paras. 27-28, 30; *US – Tuna II (Article 21.5 – US / Mexico) (Panel)*, paras. 7.432, 7.487; U.S. Second Written Submission, n.269, 285.

[16] Mexico's Appellant Submission, para. 36.

[17] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.48-71.

[18] Mexico's Appellant Submission, para. 41.

[19] *See* U.S. First Written Submission, para. 62; *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.321-322, 7.408, 7.553, n.968.

[20] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.321-322

[21] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.400, 7.479, 7.494, 7.501, 7.515, 7.539, 7.551, 7.570.

The Panels also found that the definition of "intentional" in the 2016 measure was sufficiently clear with respect to fisheries inside and outside the ETP.[22]

- Mexico seems to suggest that the fact that there is no independent observer program authorized to make dolphin safe certifications in the Indian Ocean gillnet fisheries means that tuna from those fisheries can be sold as "dolphin safe" without such a certification.[23] In fact, the independent observer certification requirement for fisheries designated under the determination provisions does not depend on some observer program actually being authorized to provide the certification.[24] If there is no authorized independent observer program, tuna product produced from that fishery is not eligible for the label.[25]

- Mexico asserts that the 2013 measure "purported to require" segregation of dolphin safe and non-dolphin safe tuna for "all tuna and tuna products, but contained no enforcement mechanisms."[26] The paragraph of the first compliance panel report to which Mexico cites in support of this assertion provides no such support, and the first compliance panel did not make such a finding.[27]

- Mexico asserts that the "2016 tuna measure simply added a statement that U.S. processors and importers should collect and retain" complete chain of custody information for dolphin safe tuna products.[28] In fact, as the Panels found, this aspect of the 2016 IFR amending the tuna measure constitutes a mandatory and enforceable legal requirement.[29] Specifically, in the paragraph of the Reports to which Mexico cites, the Panels found that "US processors and importers of tuna or tuna products from such 'other fisheries' *are now required* to collect and retain, for two years, information on each point in the chain of custody of the tuna or tuna product."[30]

- Mexico suggests that no "multilateral or national fisheries management organization other than the IATTC" has adopted measures to protect dolphins from tuna fishing or "even to monitor harm to dolphins."[31] This assertion is unsupported and, indeed, it is incorrect. As the Panels' findings and the evidence on the record establish, other tuna regional fisheries management organizations (RFMOs), and certainly other countries

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[22] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.584-589.

[23] *See* Mexico's Appellant Submission, para. 42.

[24] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.68; U.S. Second Written Submission, para. 174; U.S. Response to Panels' Question 30, para. 157.

[25] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.686; *see also* Mexico's Appellant Submission, para. 50 (acknowledging that this is the case).

[26] Mexico's Appellant Submission, para. 45.

[27] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 3.51.

[28] Mexico's Appellant Submission, para. 45.

[29] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.643-645.

[30] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.643 (emphasis added).

[31] Mexico's Appellant Submission, para. 62.

(such as the United States), have adopted measures to protect dolphins from the harms that can be caused by tuna fishing – including, notably, banning the intentional encirclement of cetaceans with purse seine nets – and to monitor harms that occur.[32]

- Mexico's characterization at paragraphs 63-64 of its appellant submission of the status of dolphin stocks in the ETP does not reflect factual findings of the Panels or uncontested facts on the record. Mexico suggests that the U.S. Department of Commerce "determined" that the rate of dolphin mortality caused by tuna fishing in the ETP was below the potential biological removal (PBR) level for eastern spinner dolphins and northeastern offshore spotted dolphins and that the evidence proves that the populations are recovering.[33] This reflects Mexico's argument, not fact. In particular, the NOAA report in question does not address the unobservable harms caused by dolphin sets in the ETP and, therefore, does not address all the mortalities and other harms (such as reproductive and health effects) affecting the depleted dolphin stocks.[34] Indeed, Mexico argued before the Panels that the evidence showed that the depleted dolphin stocks in the ETP were recovering, and the Panels rejected Mexico's argument.[35]

- Mexico asserts that 765 dolphins represents the total dolphin mortality caused by dolphin sets in the ETP in 2015 and that this figure is the "most accurate fisheries data available globally."[36] Those assertions are not supported by the findings of the Panels or uncontested evidence on the record – indeed, they are refuted. The Panels found that setting on dolphins likely causes significant levels of observable but unobserved dolphin harms, such that observer data does not represent the extent of direct mortalities caused by dolphin sets.[37] Additionally, observer data does not reflect the unobservable harms caused by the chase itself, which by nature are not susceptible of observation.[38]

16. The United States considers that the sections of the Panels' Reports containing their factual findings represent the most appropriate description of the factual background relevant to these proceedings.

III. THE PANELS DID NOT ERR IN FINDING THAT THE CHALLENGED MEASURE IS CONSISTENT WITH ARTICLE 2.1 OF THE TBT AGREEMENT

17. As explained below, the Panels did not err in finding that the dolphin safe labeling

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[32] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.208, 7.221-222, 7.504 (describing studies done and measures taken by the WCPFC and the IOTC concerning or addressing the effects on dolphins of tuna fishing); U.S. Third Written Submission, para. 67.

[33] Mexico's Appellant Submission, paras. 63-64.

[34] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.290; NOAA, "Taking and Importing of Marine Mammals; Decision Regarding the Impact of Purse Seine Fishing on Depleted Dolphin Stocks," 68 Fed. Reg. 2010, 2015, Jan. 15, 2003 (Exh. MEX-10).

[35] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.291-293.

[36] Mexico's Appellant Submission, para. 65.

[37] *See US – Tuna II (Article 21.5 – Mexico) (Panels)*, paras. 7.283-285.

[38] *See US – Tuna II (Article 21.5 – Mexico) (Panels)*, paras. 7.309-310.

measure, as amended by the 2016 IFR, does not accord less favorable treatment to Mexican tuna product in light of the fact that the detrimental impact caused by the measure stems exclusively from legitimate regulatory distinctions. In Section III.A, the United States explains the requirements of Article 2.1, as clarified by the Appellate Body, and explains how the approach Mexico describes in its appellant submission differs from that set out in the previous reports adopted by the DSB in this dispute.

18. In the remaining parts of Section III, the United States demonstrates that the Panels were correct to find that the 2016 measure does not afford less favorable treatment to Mexican tuna product and that Mexico's appeals should be rejected. Specifically, in Section III.B the United States demonstrates that Mexico's claim that the Panels erred in their interpretation of Article 2.1 should be rejected. In Section III.C., the United States demonstrates that Mexico's claim that the Panels erred in their application of Article 2.1 – in general and with respect to each of the challenged aspects of the 2016 measure – should be rejected.

A. What Article 2.1 Requires

19. Article 2.1 contains both a national treatment obligation and a most favored nation treatment obligation.[39] To establish a breach of Article 2.1, the complainant must prove three elements:

> (i) that the measure at issue is a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement; (ii) that the relevant products are "like products"; and (iii) that the measure at issue accords less favourable treatment to the imported products than to the relevant group of like products.[40]

20. The Appellate Body has interpreted the less favorable treatment element as requiring a two-step analysis. First, the panel must determine that the challenged measure "modifies the conditions of competition to the detriment of such imported products vis-à-vis like products of domestic origin and/or like products originating in any other country."[41] If the panel makes such a finding, it then must determine whether "the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products."[42]

1. Technical Regulation, Like Products, and Detrimental Impact

21. As discussed in the Panel Reports, the majority of the elements of the Article 2.1 analysis are not in dispute between the parties. Specifically, the Panels found that the 2016 IFR did not make changes to the measure such that the previous findings that: (1) the measure constituted a technical regulation within the meaning of Annex 1.1 of the TBT Agreement;[43] (2) Mexican tuna

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[39] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.25.

[40] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.25 (citing *US – Tuna II (Mexico) (AB)*, para. 202).

[41] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.26 (citing *US – Tuna II (Mexico) (AB)*, para. 215).

[42] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.26 (citing *US – Tuna II (Mexico) (AB)*, para. 215).

[43] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.74.

products and the tuna products produced by the United States and other countries are "like products"';[44] and (3) the 2016 measure modifies the conditions of competition to the detriment of Mexican tuna products in the U.S. market[45] remain applicable. Neither party has appealed the Panels' findings with regard to any of these elements. The parties' disagreement before the Panels, and now before the Appellate Body, is focused solely on the last element of the analysis – whether or not the detrimental impact stems exclusively from a legitimate regulatory distinction.[46]

2. Legitimate Regulatory Distinctions

a. The Proper Interpretation of the Term "Legitimate Regulatory Distinction," as Clarified by the Appellate Body

22. As to the last step of the Article 2.1 analysis, the Appellate Body has stated that "Article 2.1 should not be read to mean that any distinctions, in particular ones that are based exclusively on such particular product characteristics, or on particular processes and production methods, would *per se* constitute less favourable treatment within the meaning of Article 2.1."[47] Rather, a measure does not provide less favorable treatment to imported products "where the detrimental impact on imports stems exclusively from a legitimate regulatory distinction."[48] To make such a determination, a panel should analyze whether the measure "is even handed in its design, architecture, revealing structure, operation, and application in the light of the particular circumstances of the case."[49] Thus, while an assessment of whether a detrimental impact can be reconciled with or is rationally related to the policy pursued by the measure can be "helpful" to this part of the analysis,[50] "even-handedness is the central concept for determining whether the identified detrimental treatment stems exclusively from a legitimate regulatory distinction."[51]

23. As recounted by the Appellate Body in the first compliance proceeding, even-handedness is "a relational concept, and must be tested through a comparative analysis."[52] In the circumstances of this dispute, it is well established that there is "*a special relevance*" of the calibration analysis to the inquiry of whether the measure is even-handed.[53] Indeed, the Appellate Body in the first compliance proceeding made clear that it had previously "accepted the premise that [the U.S. measure] *will not* violate Article 2.1 if it is properly 'calibrated' to the

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[44] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.74.

[45] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.78.

[46] *See, e.g., US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.79 (stating that this "question is at the heart of these proceedings.").

[47] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.30.

[48] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.30.

[49] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.31.

[50] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.106-107.

[51] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.96 (internal quotes omitted).

[52] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.125.

[53] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.101 (emphasis added).

risks to dolphins arising from different fishing methods in different areas of the oceans."[54] Therefore, for purposes of this dispute, the Appellate Body stated that the appropriate analysis is:

> [W]hether . . . the differences in labelling conditions for tuna products containing tuna caught by large purse-seine vessels in the ETP, on the one hand, and for tuna products containing tuna caught in other fisheries, on the other hand, are 'calibrated' to the differences in the likelihood that dolphins will be adversely affected in the course of tuna fishing operations by different vessels, using different fishing methods, in different areas of the oceans.[55]

b. How "Legitimate Regulatory Distinctions" Was Interpreted in the First Compliance Proceeding and by the Panels

24. The Appellate Body was clear in the original proceeding that the assessment of whether the dolphin safe labeling measure is calibrated to risks to dolphins is determinative of whether the measure is consistent with Article 2.1.[56] Nevertheless, the first compliance panel did not conduct such an analysis. Rather, it found that the eligibility criteria are consistent with Article 2.1 based on an incomplete calibration analysis and finding that the certification and tracking and verification requirements are inconsistent with Article 2.1 because a potential difference in the accuracy of certifications (for the certification requirements) and a difference in the burden imposed by the requirements (for the tracking and verification requirements) meant that these labeling conditions could not be consistent with the objective of the measure.

25. On appeal, the Appellate Body rejected those findings.[57] The Appellate Body repeatedly stated that the first compliance panel erred not only by failing to assess the consistency of the measure based on whether it was "'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the oceans,"[58] but also erred in taking a "segmented approach" by engaging in "discrete assessments of the even-handedness of the different certification requirements, and of the different tracking and verification requirements."[59]

26. Following the release of the Appellate Body report in November 2015, the United States carefully studied the Appellate Body's analysis and designed the 2016 IFR to respond directly to the DSB recommendations and rulings in the first compliance proceeding, in recognition that the

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[54] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.155; *see also id.* para. 7.112 ("We reiterate that these Article 21.5 proceedings form part of a continuum, such that due cognizance must be accorded to the recommendations and rulings made by the DSB in the original proceedings, based on the adopted findings of the Appellate Body and original panel.").

[55] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.101.

[56] *See US – Tuna II (Mexico) (AB)*, paras. 297-298; *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.155 ("These passages [in paragraph 297 of the original Appellate Body report], in our view, demonstrate that the Appellate Body's assessment of 'even handedness' in the original proceedings was focused on the question of whether the original tuna measure was 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the oceans.").

[57] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.230.

[58] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.155; *see also id.* para. 7.229.

[59] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.169; *see also id.* para. 7.229.

newly amended measure would be assessed under this legal framework. In particular, the United States made changes to the determination provisions to bring the measure into compliance in light of the DSB's recommendation. The United States also made changes to the certification requirements, and tracking and verification requirements to further ensure that the 2016 measure, as a whole, is calibrated to the differences in the risks to dolphins from setting on dolphins in the ETP large purse seine fishery and other fishing methods in different areas of the ocean.

27. Subsequently, both parties initiated compliance proceedings, with the United States demonstrating that it brought the measure into compliance[60] and Mexico claiming that "the United States has not brought the dolphin safe labelling provisions into compliance with the DSB's recommendations and rulings. Moreover, the 2016 Tuna Measure is not consistent with the United States' obligations under the covered Agreements."[61]

28. As discussed below, the Panels determined that it was appropriate to apply the legal framework described in the Appellate Body report in the first compliance proceeding. Thus, the Panels determined that the question of whether the measure, including the eligibility criteria, certification requirements, and tracking and verification requirements, is "'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean "is central to our analysis in these proceedings."[62] After an extensive review of the evidence on the record, the Panels correctly determined that the differences in the labeling conditions were so calibrated, and, on that basis, found that the measure did not provide less favorable treatment to Mexican tuna product and was consistent with Article 2.1. That is to say, the Panels accepted the Appellate Body's guidance that "there is a special relevance" for the calibration analysis in this dispute,[63] and that the U.S. measure "will not violate Article 2.1 if it is properly 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the oceans."[64]

c. Mexico's Appeals of the Panel Reports Should Be Rejected

29. Mexico now appeals the Panel Reports, claiming that the Panels erred in both their interpretation and application of the Article 2.1 analysis. As to those claims regarding interpretation, Mexico argues, *inter alia*, that the Panels erred in interpreting the calibration test by (1) only assessing whether the regulatory distinctions are calibrated to the risks of mortality and injury and not to other risks, such as the risks related the level of domestic fishing regulations of exporting countries and the occurrence of illegal fishing or trans-shipment[65] and

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[60] The United States demonstrated that the existence of a measure taken to comply with the DSB recommendation and further demonstrated that, for purposes of the compliance panel requested by Mexico, Mexico had failed to establish its claims that the measure taken to comply was inconsistent with the covered agreements.

[61] Panel request by Mexico (WT/DS381/38).

[62] *See, e.g.*, *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.85 ("In the light of these statements of the Appellate Body, both parties have argued, and we agree, that the question whether the 2016 Tuna Measure is 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean is central to our analysis in these proceedings.").

[63] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.101.

[64] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.155.

[65] *See* Mexico's Appellant Submission, sec. V.B.2.b.

(2) not properly taking account of the objectives of the measure.[66] Mexico puts forward its substantive claims as to the Panels' interpretation of the calibration analysis in section V.B.2 of its appellant submission, and we address those appeals below. Before doing so, however, the remainder of this section briefly addresses a few of the introductory remarks Mexico makes in section V.B.1 of its appellant submission.

30. In section V.B.1, Mexico makes several assertions about the role of the "rational connection" test – *i.e.*, whether "the discriminatory effects constitute arbitrary or unjustifiable discrimination on the basis that the regulatory distinctions cannot be reconciled with, or rationally connected to, the measure's policy objectives"[67] – in assessing the consistency of the 2016 measure with Article 2.1. In section V.B.1.b(1), Mexico argues that, while the question of whether the measure is calibrated is a "relevant consideration, it "*is not the complete test*."[68] In Mexico's view, the Appellate Body "considered that a 'calibration' test does not override or replace the overall assessment of even-handedness and, thus, the analysis of whether the detrimental impact stems exclusively from a legitimate regulatory distinction."[69] While Mexico allows that a calibration test "is part of the overall analysis," it is a "supplement" for the other relevant factors, not a "substitute."[70] Mexico thus seems to argue that two separate legal tests should be used to assess the consistency of the measure with Article 2.1, the rational connection test and the calibration test.[71] Mexico considers that "such an approach reflects symmetry and consistency in the legal analyses under Article 2.1 and the chapeau of Article XX."[72]

31. In section V.B.1.b(2), Mexico then claims that if the measure fails the rational connection test, it "cannot be found to be even-handed on the ground that it is 'calibrated.'"[73] This appears to be a reformulation of the claim that the Panels referred to as Mexico's "constraints" argument.[74] However, Mexico then shifts its argument somewhat, contending that "the nexus between the regulatory distinctions and the objectives" need not be "inflexible in all respects."[75] Rather, Mexico argues that "any apparent anomalies in the nexus must be assessed to determine

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[66] *See* Mexico's Appellant Submission, sec. V.B.2.c.

[67] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.88.

[68] Mexico's Appellant Submission, sec. V.B.1.b(1) (entitled "Calibration is a Relevant Consideration in the Assessment of Even-handedness, *but is not the Complete Test*") (emphasis added).

[69] Mexico's Appellant Submission, para. 93.

[70] Mexico's Appellant Submission, para. 96.

[71] *See* Mexico's Appellant Submission, para. 98 ("Accordingly, *both* an examination of the nexus between the regulatory distinctions and the objectives of the measure *and* an examination of whether the measure is "calibrated" are relevant factors for consideration in the assessment of whether the 2016 tuna measure is designed and applied in an even-handed manner.") (emphasis added).

[72] Mexico's Appellant Submission, para. 98.

[73] Mexico's Appellant Submission, para. 100.

[74] *See, e.g., US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.88 ("In response to a question from the Panels, Mexico contends that the calibration analysis 'can and must' occur within the 'constraints' of the rational connection test for arbitrary and unjustifiable discrimination.") (quoting Mexico's Response to Panels' Question 73, para. 79); *see also US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.116.

[75] Mexico's Appellant Submission, para. 101.

whether they are 'calibrated' to the relevant differences in circumstances."[76] And it is from this framework that Mexico introduces its argument that "insufficient regulatory oversight and unreliable reporting" of those Members exporting tuna product to the United States as being the critical aspect of the calibration analysis for purposes of assessing the certification and tracking and verification requirements (instead of the risk to dolphins of mortality and injury).[77]

32. Mexico claims that this is "*the first time*" in this dispute that the Appellate Body is required to "specifically clarify the role played in the 'calibration' test by the inquiry into the nexus between the regulatory distinctions and the objectives of the tuna measure, including the role of label accuracy."[78] This assertion is true only if Mexico is referencing just its own specific argument. Mexico never made this argument in the first compliance proceeding, and the Appellate Body, therefore, has not specifically addressed it up to this point. More generally, however, Mexico is incorrect. The Appellate Body in the first compliance proceeding thoroughly examined the interplay between the rational connection and calibration analyses.[79] And the Appellate Body determined that the panel had erred by not assessing the measure's consistency with Article 2.1 based on whether it was calibrated to the risks to dolphins arising from different fishing methods in different areas of the oceans.[80] Thus, the Appellate Body made it clear that, in this dispute, the concept of calibration reflects the nexus between the distinctions of the measure and the measure's objective that is necessary for the measure to be even-handed and, thus, not inconsistent with Article 2.1.[81]

33. Finally, the United States disagrees with Mexico that the Appellate Body's "clarifications … will have profound systemic implications" for the WTO."[82] The Appellate Body has already provided guidance on the calibration test in the two previous reports, and this clarification did not, in fact, have any "profound systemic implications" for the WTO and its Membership. Surely, it is not surprising to suggest that, where a Member tailors its regulatory distinctions to differences in risk, the Member will not be found to have acted inconsistently with its WTO obligations. This is not to say, however, that "profound systemic implications" are not at stake in this appeal – indeed, they are.

34. As discussed below, Mexico has argued, before the Panels and now on appeal, that a new legal framework must be created to evaluate the 2016 measure and that the Panels erred in following the DSB recommendations and rulings of *the two previous proceedings*. But it is well established that compliance proceedings are not a "fresh start"[83] but rather "form part of a

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[76] Mexico's Appellant Submission, para. 101.

[77] Mexico's Appellant Submission, para. 102.

[78] Mexico's Appellant Submission, para. 103 (emphasis added).

[79] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.78-102.

[80] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.100-102.

[81] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.92, 7.98, 7.101.

[82] Mexico's Appellant Submission, para. 74.

[83] *Chile – Price Band System (Article 21.5 – Argentina) (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

continuum, such that due cognizance must be accorded to the recommendations and rulings made by the DSB" in the previous proceedings.[84] The United States studied the Appellate Body's analyses in both previous proceedings and relied on that legal framework in designing the 2016 IFR. Mexico now argues the United States was wrong to do so, as the Appellate Body's analysis was incorrect or incomplete. Mexico's approach is not consistent with the way the WTO dispute settlement system operates and how Members are expected to come into compliance following adverse rulings. If Mexico's arguments are accepted, it will indeed have "profound systemic implications" for the WTO and its Members.[85]

B. Mexico's Claim that the Panels Erred in Their Interpretation of Article 2.1 Should be Rejected

35. In this section the United States responds to the specific appeals of the Panels' interpretation of the calibration test that Mexico provides in section V.B.2 of its appellant submission. Specifically, in Section III.B.1, the United States addresses Mexico's claim in section V.B.2.b of its appellant submission that the Panels erred in failing to incorporate certain risks of inaccurate labeling into the risk profiles of harms to dolphins for purposes of the calibration analysis. Next, in Section III.B.2, the United States addresses Mexico's claim in section V.B.2.c(1)-(4) of its appellant submission that the Panels erred in failing to assess the consistency of the 2016 measure based on the rational connection test. Finally, in Section III.B.3, the United States addresses Mexico's claim in section V.B.2.c(5) of its appellant submission that the Panels erred in failing to assess the consistency of the 2016 measure based on whether it furthers sustainable development.

1. The Panels Correctly Found that the Risk Profiles Must Reflect the Risk of Mortality and Injury to Dolphins

36. In section V.B.2.b of its appellant submission, Mexico claims that the Panels erred in interpreting the calibration analysis by finding that the risk profiles of the different fishing methods should only reflect harms to dolphins – *i.e.*, mortality and injury (both observed and

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consistency of the original measure with a covered agreement undertaken by the Original Panel and subsequently by the Appellate Body.").

[84] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.112; *see also Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 136 ("Article 21.5 proceedings do not occur in isolation from the original proceedings, but . . . both proceedings form part of a continuum of events. The text of Article 21.5 expressly links the 'measures taken to comply' with the recommendations and rulings of the DSB concerning the original measure. A panel's examination of a measure taken to comply cannot, therefore, be undertaken in abstraction from the findings by the original panel and the Appellate Body adopted by the DSB. Such findings identify the WTO-inconsistency with respect to the original measure, and a panel's examination of a measure taken to comply must be conducted with due cognizance of this background."); *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…").

[85] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.156 ("We also consider it appropriate for WTO Members to seek guidance in the reasoning set out in adopted Appellate Body and panel reports when seeking to bring their inconsistent measures into compliance with their obligations under the covered agreements.").

unobserved) – and not the reliability of different systems for certification and tracking and verification. As explained below, Mexico's appeal is without merit and should be rejected.

a. The Panels' Analysis

37. In paragraphs 7.108-113 of their Reports, the Panels addressed Mexico's argument that, for purposes of the calibration analysis, the reliability of different systems for certification and tracking and verification are integral elements of the risk profile of different fisheries, and, as such, that the Panels' assessment of fisheries' risk profiles should reflect certain additional factors beyond harms to dolphins of mortality and injury (observed and unobserved), such as the level of regulatory oversight of certain countries.

38. The Panels began their analysis by reviewing the passages of the previous Appellate Body report identifying the relevant risks for purposes of the calibration analysis.[86] In the Panels' view, the Appellate Body has described such risks as, *inter alia*, "the risk that dolphins may be killed or seriously injured when tuna was caught,"[87] and "the likelihood that dolphins would be adversely affected in the course of tuna fishing operations in the different fisheries."[88] The Panels concluded that they did not find "any reference in either of the Appellate Body reports in this dispute suggesting that the proper analysis is whether the 2016 Tuna Measure is calibrated to anything other than the risks posed to dolphins by the use of different fishing methods in different areas of the ocean."[89]

39. As to Mexico's claim regarding the content of the relevant risk profiles, the Panels understood the Appellate Body's guidance to be that "the relevant inquiry is one that focuses on the risks that dolphins face as a result of the use, in different areas of the ocean, of different fishing methods."[90] In other words, the inquiry "centres on the risks that dolphins will be killed or injured by the use of different fishing techniques in different fishing grounds."[91] The risks that Mexico raised of inaccurate certification, reporting, or record-keeping "are not risks that affect dolphins themselves," "[n]or are they risks that arise from the use of different fishing methods in different areas of the ocean."[92] On this basis, the Panels found that:

> [W]e do not think the Appellate Body in either the original or the first compliance proceedings intended subsequent compliance panels to include risks relating to

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[86] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.108 (citing *US – Tuna II (Mexico) (AB)*, paras. 283, 297; *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.33, 7.78, 7.98, 7.108, 7.109, 7.111, 7.119, 7.123, 7.144, 7.146, 7.152, 7.156, 7.169, 7.266, 7.327, and 7.347).

[87] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.108 (citing *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.80, 7.121).

[88] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.108 (citing *US – Tuna II (Mexico) (AB)*, para. 286; *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.157, 7.239, and 7.330).

[89] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.108.

[90] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.109.

[91] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.109 (citing *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.80, 7.121).

[92] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.110.

> inaccurate certification, reporting, and/or record-keeping within the 'risk profiles' that it instructed those panels to assess and compare. Rather, the Appellate Body's focus was clearly on the risks of observable and unobservable mortality and injury caused to dolphins as a result of the use of different fishing methods in different areas of the ocean.[93]

40. Finally, the Panels observed that, in response to a question from the Panels as to whether Mexico considered there was "support in either of the Appellate Body's reports for its view" that the relevant "risk profile in different fisheries" includes the reliability of different certification and tracking and verification systems, Mexico had responded that the two previous Appellate Body reports "do not directly address" this issue.[94]

b. Mexico's Appeal

41. Mexico claims the Panels' finding that the risk profiles of different fishing methods in different ocean areas should be based on the risks of observable and unobservable mortality and injury to dolphins "is too narrow, incomplete, and is legally erroneous."[95] Mexico further claims that "*is particularly so* for the certification requirements and the tracking and verification requirements, which are directly aimed at ensuring label accuracy."[96]

42. At the outset of its appeal, Mexico appears to acknowledge that the Panels did, in fact, follow the Appellate Body's guidance, but argues that they erred in doing so. In Mexico's view, "[r]ather than focusing *solely* on the reasoning of the Appellate Body," the Panels should have looked beyond the Appellate Body's guidance, and "interpreted calibration in the light of the rules of treaty interpretation in the Vienna Convention as they relate to the clarification of Article 2.1 of the TBT Agreement."[97] In this regard, Mexico argues that the context of Article 2.1 – *i.e.*, the sixth recital of the TBT Agreement and the chapeau of Article XX of the GATT 1994 – requires an examination of "any factors that affect label accuracy,"[98] including "the absence of

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[93] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.110; *see id.* para. 7.113 ("[T]hose risks are not part of the risk profiles of different fisheries, and accordingly the applicable legal standard does not require us to assess whether the different regulatory distinctions are calibrated to the different risks of inaccurate certification or tracking and verification that may exist in different fisheries."); *id.* para. 7.112 ("[W]e agree with Mexico that the question of the accuracy of certification, and tracking and verification was relevant to the Appellate Body's analysis in the original and the first compliance proceedings. That, however, is different from saying that the applicable legal standard, as clarified by the Appellate Body, requires the Panels to determine whether the 2016 Tuna Measure is calibrated, *inter alia*, to the risk of inaccurate dolphin-safe information being passed to consumers, or that risks relating to inaccurate labelling are an integral part of the risk profiles of different fisheries.").

[94] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.111 (citing Mexico's Response to Panels' Question No. 78, para. 96).

[95] Mexico's Appellant Submission, para. 124.

[96] Mexico's Appellant Submission, para. 124 (emphasis added).

[97] Mexico's Appellant Submission, para. 122 (emphasis added).

[98] Mexico's Appellant Submission, para. 123.

sufficient regulatory oversight, the reliability of reporting, the existence of IUU fishing, and the existence of transshipment at sea."[99]

43. In Mexico's view, the result of capturing such "factors that affect label accuracy" in the risk profiles would be that the Panels would have assessed whether the different certification and tracking and verification requirements are calibrated to these different factors. (Mexico's analysis does not appear to apply to the eligibility criteria.) That is to say, to be considered calibrated, the certification and tracking and verification requirements must be strict where "the reliability of applicable systems" is low – *i.e.*, where there is an absence of sufficient regulatory oversight by the fishing nations, there is a lack of reliability in reporting, or there is an occurrence of IUU fishing or transshipment – and can be lower where "the reliability of applicable systems" is high.[100]

44. Mexico has framed this argument differently on appeal than it did before the Panels. At the panel stage, Mexico argued that the Panels must conduct two different calibration analyses. First, they must assess whether the relevant regulatory distinctions "are 'calibrated' to the different relative risks (*i.e.*, the likelihood) that dolphins will be adversely affected (*i.e.*, killed or seriously injured) in the course of tuna fishing operations by different fishing methods in different areas of the oceans."[101] Second, as an "additional examination," they must assess whether the relevant regulatory distinctions "are 'calibrated' to the different relative risks (*i.e.*, the likelihood) of inaccurate dolphin-safe certification, reporting, and/or record-keeping with respect to the tuna caught in different fisheries and different ocean regions."[102]

45. On appeal, however, Mexico contends that the risk of inaccurate certification or tracking relates to the risk *of harm to dolphins*.[103] In support of this argument, Mexico makes a new factual allegation not made (or supported) before the Panels, namely, that "the reliability of applicable systems" is "inextricably linked" with actual, physical harm to dolphins.[104] Accordingly, Mexico contends that "dolphins will be at a greater relative risk of harms from that fishing method in ocean areas that are unregulated or that have insufficient regulatory oversight,

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[99] Mexico's Appellant Submission, para. 124.

[100] *See* Mexico's Appellant Submission, para. 110; *see also id.* para. 111 ("It follows that where the tuna measure imposes requirements that are less strict on fishing methods in ocean areas with high risks, including risks related to insufficient regulation, unreliable reporting, IUU fishing and transshipment, this treatment cannot be justified on the basis that it is appropriately 'calibrated.'").

[101] Mexico's First Written Submission, para. 217.

[102] Mexico's First Written Submission, para. 218; *see also US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.107 ("As we have explained above, Mexico argues that the reliability of the applicable systems in different fisheries for certification, tracking and verification are integral elements of the 'risk profile' of different fisheries. In Mexico's view, this means that, in addition to analysing whether the relevant regulatory distinctions are calibrated to the risks to dolphins, we must conduct an 'additional examination' of whether the relevant regulatory distinctions are calibrated to the different relative risks (i.e. likelihood) of inaccurate dolphin-safe certification, reporting, and/or record-keeping with respect to the tuna caught in different fisheries and different areas of the ocean.") (citing and quoting Mexico's First Written Submission, paras. 214, 218).

[103] *See, e.g.*, Mexico's Appellant Submission, para. 110.

[104] Mexico's First Written Submission, para. 124.

resulting in unreliable reporting, significant IUU fishing, and/or significant transshipment at sea, than in ocean areas that have sufficient regulatory oversight and reliable reporting."[105]

c. Mexico's Appeal Should Be Rejected

46. Mexico's appeal has no support in the DSB recommendations and rulings. Indeed, one of the most notable aspects of Mexico's appeal is that nowhere in section V.B.2.b does Mexico cite to *either* Appellate Body report. Mexico's appeal should be rejected.

47. First, Mexico is wrong to claim that the Panels erred in strictly following the Appellate Body's guidance in the previous compliance proceeding. Of course the Panels did not err in following that guidance and thus, in contrast to Mexico's argument, the Panels were correct to focus on the reasoning of the Appellate Body.[106]

48. The Appellate Body set out clearly what it considered to be the appropriate calibration analysis. In doing so, the Appellate Body repeatedly referred to the risk profiles of the different fishing methods and that those risk profiles should reflect the relative risks of observed and unobserved mortalities and injury. As the Panels noted, at no time did the Appellate Body ever suggest that the risk profiles reflect anything other than observed and unobserved mortality or injury to dolphins,[107] and certainly never suggested that the level of fishing regulation in other nations was relevant in deciding the risk profiles of different fishing methods in different areas of the ocean. Just the opposite – the Appellate Body was *explicit* that the "*relative* risks . . . in respect of both observed *and* unobserved harms" are essential components of the correct analysis.[108] Further, the Appellate Body engaged in a thorough discussion of the issue that addressed, *inter alia*, the proper interpretative context of Article 2.1.[109]

49. Moreover, the Appellate Body report in the first compliance proceeding shows Mexico errs by suggesting an approach where the risk of mortality and injury to dolphins is irrelevant. In the first compliance proceeding, Mexico defended on appeal the theory that the consistency of the certification and tracking and verification requirements must be assessed based on factors other than harm to dolphins. The Appellate Body squarely rejected that approach, finding that the first compliance panel "was *required* to assess whether *the certification and tracking and verification requirements* are 'calibrated' to the risks to dolphins arising from different fishing

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[105] Mexico's First Written Submission, para. 109.

[106] *See* Mexico's Appellant Submission, para. 122 ("Rather than focusing solely on the reasoning of the Appellate Body, which was presented in the context of the specific issues raised in the first compliance proceedings, the Panels should have interpreted calibration in the light of the rules of treaty interpretation in the Vienna Convention as they relate to the clarification of Article 2.1 of the TBT Agreement.").

[107] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.108.

[108] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.249; *see also id.* para. 7.246 ("The Panel, however, did not address what the evidence adduced by the parties indicated in respect of the overall relative harms, *both observed and unobserved*, associated with setting on dolphins versus other fishing practices, but rather focused only on whether that evidence undermined its understanding that these fishing practices are distinguishable on the basis of unobserved harms.") (emphasis added).

[109] *See generally US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.78-102.

methods in different areas of the oceans."[110] Mexico puts forward no reason why the Appellate Body's analysis, and the U.S. reliance on that analysis, was incorrect.[111]

50. And to be clear – Mexico's argument does not suggest a small change to the U.S. measure (as it currently exists following two amendments done during the course of nine years of litigation). Under Mexico's approach, the certification and tracking and verification requirements, are, in essence, *entirely backwards* because they are designed to be commensurate with the risk profile for dolphins of tuna fishing in different fisheries.[112] Indeed, Mexico appears to suggest that even where there is a higher risk to dolphins from certain fishing methods in particular ocean areas, tuna product from tuna harvested in those areas could actually be subject to "less strict" requirements.

51. Second, Mexico's appeal should be rejected because it is premised on the insistence that the Panels should have subjected the eligibility criteria to one legal test and the certification and tracking and verification requirements to another. As noted above, Mexico's insistence that the risk profiles of fisheries account for "the reliability of applicable systems" suggests that this analysis would only apply to an assessment of the certification and tracking and verification requirements, not the eligibility criteria,[113] a point that Mexico also made before the Panels.[114] Indeed, it is not clear how the test *could* be applied to the eligibility criteria.

52. In the previous proceeding, however, the Appellate Body faulted the panel for applying different tests to the certification and tracking and verification requirements, on the one hand, and eligibility criteria on the other, emphasizing that *the same test* must be applied to each of these "cumulative and highly interrelated" regulatory distinctions.[115] By claiming that the Panels

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[110] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.169 (emphasis added).

[111] The United States also notes that Mexico's approach is incongruous with the design of the determination provisions, which are "an integral part of the certification system," and raise the certification (and now the tracking and verification) requirements in "circumstances of comparably high risk" to *dolphins*. *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.181, 7.266. Mexico insists that under the appropriate analysis, the certification and tracking and verification requirements would calibrate *not to risk to dolphins, but to risk of inaccuracy*. But Mexico fails to explain why Article 2.1 requires the United States to consider the risk to dolphins irrelevant with regard to the default certification and tracking and verification requirements, when it is established that risk to dolphins should be the entire focus of the determination provisions.

[112] *See* Mexico's Appellant Submission, paras. 110-111.

[113] *See* Mexico's Appellant Submission, para. 124.

[114] *See, e.g.*, Mexico's First Written Submission, para. 219 ("Clearly stronger *certification and tracking and verification requirements* will be necessary in ocean areas that have poor record-keeping and reporting reliability and significant [IUU] fishing.") (emphasis added).

[115] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.166 ("We are not convinced that, as the Panel seems to have thought, considerations of the similarities and differences in risks may not be reflected in and relevant to all stages of the capture and subsequent transport and processing of tuna. We read the Panel as having taken the view that the relevant risk profiles would change or become irrelevant to the analysis of 'even-handedness' merely because those requirements regulate a situation that occurs after the tuna has been caught. In our view, this approach by the Panel does not seem to comport with its own reasoning that the accuracy of the US dolphin-safe label can be compromised at any stage of the tuna production stage, in contradiction with the objectives of the amended tuna measure. Moreover, we consider that the Panel's approach also runs counter to our observations that an assessment of the even-handedness of the amended tuna measure must take account of the fact that its various elements – the eligibility criteria, the certification requirements, and the tracking and verification requirements –

erred by not applying different tests to two of the three interrelated regulatory distinctions, Mexico appears to argue that the Panels should have conducted the same "segmented analysis" that the Appellate Body disagreed with in the previous proceeding.[116] The question, ultimately, is whether *the measure* is even-handed.[117]

53. Finally, Mexico's appeal should be rejected because it has been put forward without any factual basis. As noted above, Mexico now claims that "the reliability of applicable systems" is "inextricably linked" with actual, physical harm to dolphins,[118] such that "dolphins will be at a greater relative risk of harms" where the "the reliability of applicable systems" is low.[119] As such, Mexico argues that its proffered analysis prevents the undermining of the measure's objective *as to risks to dolphins*.[120] However, Mexico never provided to the Panels any evidence whatsoever that such a "link" exists – indeed, Mexico never even argued this point before the Panels – and the Panels made no such finding of fact.[121] Mexico is not permitted to make new factual arguments on appeal.[122] Further, Mexico has not submitted a DSU Article 11 appeal that

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establish a series of conditions of access to the dolphin safe label that are cumulative and highly interrelated."); *see also id.* para. 7.305 (noting, in the context of the Article XX chapeau, that the Appellate Body "do[es] not see on what basis the conditions relevant for the certification or tracking and verification requirements would differ from those relevant for the eligibility criteria given that, as we have pointed out, access to the dolphin-safe label is conditioned on the satisfaction of all of the conditions, including the certification and tracking and verification requirements, that are contained in the amended tuna measure").

[116] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.169 ("[D]ue to the segmented approach that it adopted in its analyses of the different sets of certification and tracking and verification requirements, the Panel did not properly apply the legal test that it had identified as relevant to an assessment of even handedness, namely, whether the detrimental treatment can be reconciled with, or is rationally related to, the policy pursued by the measure at issue. The Panel thus erred in its discrete assessments of the even-handedness of the different certification requirements, and of the different tracking and verification requirements.").

[117] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.249 ("[W]e do not consider that the Panel put itself in a position to conduct an assessment of whether *the amended tuna measure* is even-handed in addressing the respective risks of setting on dolphins in the ETP large purse-seine fishery versus other fishing methods outside that fishery.") (emphasis added); *see also id.* para. 7.342 (making the same point in the context of the GATT 1994 analysis).

[118] Mexico's First Written Submission, para. 124.

[119] Mexico's First Written Submission, para. 109.

[120] Mexico's First Written Submission, para. 109.

[121] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.110 ("As we see it, the risks of inaccurate certification, reporting, and/or record-keeping *are not risks that affect dolphins themselves*, though they may, as Mexico alleges, have an indirect influence on the extent to which different fishing methods are used to catch tuna intended for the US market. *Nor are they risks that arise from the use of different fishing methods in different areas of the ocean*, even though fish caught in different areas of the ocean through the use of different fishing methods may be associated with a greater or smaller risk of inaccurate labelling depending on a range of interconnected factors, including the persons involved in the catch, available technology, and applicable domestic and international regulatory requirements.") (emphasis added).

[122] Mexico also never established a factual basis for the argument it made before the Panels, namely that the differences in regulatory measure in other nations, existence of IUU fishing, etc. affect the accuracy of the dolphin safe label. *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.107 (describing Mexico's argument). The certification and tracking and verification requirements that apply to tuna product produced from fisheries other than the ETP large purse seine fishery do not rely on compliance with the domestic regulations of other Members. Rather, the requirements of the *U.S. measure* are imposed directly on producers and importers of tuna product

the Panels erred in not finding that there is a "link" between the regulatory systems of particular fishing nations and the actual risk of mortality and injury to dolphins in any fisheries. Consequently, there is no basis for the Appellate Body to review the absence of such a finding.

54. In sum, Mexico's appeal directly contradicts the DSB recommendations and rulings applicable in these compliance proceedings. This is clear from Mexico's own submission, where Mexico seems to acknowledge that the Panels' analysis adheres to the guidance of the Appellate Body,[123] yet claims that analysis "is too narrow, incomplete, and is legally erroneous."[124] But it is well established that compliance proceedings "form part of a continuum, such that due cognizance must be accorded to the recommendations and rulings made by the DSB" in the previous proceedings.[125] Mexico's appeal is not compatible with that guidance, or with the role of compliance proceedings in WTO dispute settlement. As such, it fails.

2. The Panels Correctly Assessed the 2016 Measure Based on Whether Its Distinctions Are Calibrated to the Relative Risks to Dolphins

55. In section V.B.2.c(1)-(4), Mexico argues that the Panels erred in failing to assess the consistency of the 2016 measure based on the rational connection test. Mexico appears to raise eight separate arguments in this regard, all broadly addressing the Panels' statement that the Appellate Body's use of the phrase "taking account of the objectives of the measure" means that the Panels were required to take into account that: "(a) the form and content of the calibration test must be appropriately informed by the objectives pursued by the measure, and (b) the calibration test should itself be applied taking account of the measure's objectives."[126] This section shows that all eight of Mexico's arguments should be rejected.

a. The Panels' Analysis

56. In their analysis of the legal standard under Article 2.1, the Panels explicitly considered "the relationship between the calibration analysis and the question of whether there is a rational connection between the regulatory distinctions and the objectives of the 2016 Tuna Measure."[127] The Panels noted Mexico's argument that the calibration analysis must "occur within the constraints of the rational connection test."[128] They explained that the idea that the rational connection test exists "as a separate or distinct step" from the calibration analysis or as a

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marketed in the United States as dolphin safe. Mexico never put forward any evidence before the Panels that would suggest otherwise, nor has Mexico raised a DSU Article 11 claim.

[123] *See* Mexico's Appellant Submission, para. 117 ("*Although these statements of calibration encompass most of the elements articulated by the Appellate Body*, they are incomplete because they omit the requirement to take account of the objectives of the measure which, in turn, requires the consideration of additional factors.") (emphasis added).

[124] *See* Mexico's Appellant Submission, para. 124.

[125] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.112; *see also Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 136; *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 107.

[126] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.116.

[127] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.106, 7.114-127.

[128] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.114-115.

"constraint" or "external benchmark" on that analysis, is not consistent with the Appellate Body reports in previous proceedings.[129] In those proceedings, the Appellate Body was clear that, "the question of whether the 2016 Tuna Measure is consistent with Article 2.1 of the TBT Agreement can be answered by assessing whether that Measure is calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean."[130]

57. The Panels then turned to the particular phrase in the Appellate Body report that Mexico cited in support of its interpretation, namely that the calibration test should be applied "taking account of the objectives of the measure." The Panels rejected Mexico's interpretation of that phrase. Rather, they understood the statement to mean "that (a) the *form* and *content* of the calibration test must be appropriately informed by the objectives pursued by the measure, and (b) the calibration test should itself be applied taking account of the measure's objectives."[131]

58. With respect to point (a), the Panels understood the Appellate Body's reference to the objectives of the Measure to mean that those objectives inform the criteria of the risk profiles in respect of which calibration is to be assessed.[132] The fact that the risk profiles reflect "the risks to dolphins arising from the use of different fishing methods in different areas of the ocean" thus "take[s] account of the objectives" of the 2016 measure.[133]

59. With respect to point (b), the Panels explained that it understood the Appellate Body's statement to mean that, in assessing whether the regulatory distinctions are calibrated to risks to dolphins, they should "bear in mind" the objectives of the measure. On this basis, the Panels found that "the risks of inaccurate certification, reporting, and/or record-keeping" are "central" to the analysis, not in assessing risk to dolphins but in considering the distinctions of the 2016 measure.[134] In this regard, the Panels recognized that "the existence of a margin of error in certification, and tracking and verification requirements does not necessarily equate or give rise to a risk that the information ultimately conveyed to a consumer by a dolphin-safe label will itself be incorrect."[135] Rather, "the risk of inaccurate information being passed to consumers by the label will depend not only on the referred margin of error, but also, and importantly, on the extent of events that require recording whether a dolphin mortality or serious injury was observed in a given fishery."[136] Accordingly, the Panels found that:

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[129] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.114-116.

[130] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.115 (citing *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.155).

[131] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.116.

[132] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.117.

[133] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.117.

[134] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.118. In this regard, the Panels noted that the Panels understand the expression "risk of inaccuracy" has been used in this dispute "to mean the risk that an error in the recording and reporting of information somewhere in the catch and processing chain could result in a batch of tuna being designated as dolphin-safe while in fact containing tuna that should have been designated as non-dolphin-safe." *Id.* para. 7.119.

[135] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.120.

[136] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.120.

> [W]e cannot assume that the mere existence of margins of error in certification, and tracking and verification requirements are necessarily inconsistent with the objectives of the Measure. Rather, in our view, *the central question* is whether any margins of error in certification, tracking and verification, and any differences in the margins of error tolerated by different certification, and tracking and verification requirements, are calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.[137]

60. The Panels thus considered that "it is necessary to examine [those regulatory differences] in the light of the relevant risk profiles in different fisheries, in particular by assessing whether any margins of error in certification, and tracking and verification requirements are themselves calibrated to, tailored to, and commensurate with the different risk profiles in different fisheries."[138] As such, the Panels found that the measure's objectives "can and should be taken into account in the application of the calibration test to the facts," albeit not in the manner that Mexico advocated.[139]

61. The Panels then made two further points concerning Mexico's "constraint" argument. First, the Panels considered that Mexico's approach – that the calibration analysis must be "constrained" by the rational relationship test – creates "an artificial distinction between the consumer information and the dolphin protection objectives of the Measure."[140] Such a distinction, however, does not occur under the Panels' approach, which the Panels recognized as being "mutually complementary and reinforcing, and work together" to address adverse effects of fishing techniques on dolphins.[141] Second, the Panels addressed Mexico' argument "that conducting a calibration analysis that is constrained by [the rational connection test] is necessary in order to 'ensure[] symmetry between Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994.'"[142] The Panels noted that "the calibration analysis we have described is fully consistent with the legal standard applicable under the chapeau of Article XX of the GATT 1994, as clarified by the Appellate Body."[143]

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[137] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.122 (emphasis added).

[138] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.123; *see also id.* ("This is because the risk that the dolphin-safe label will communicate inaccurate information is a function of numerous factors, including not only the regulations in place, but also the different levels of dolphin interaction, mortality, and serious injury in different fisheries. Thus, in fisheries with high dolphin interactions and harms, more sensitive certification, and tracking and verification requirements may be needed to ensure the ultimate accuracy of the dolphin-safe label, whereas in fisheries with low dolphin interactions and harms, less sensitive requirements may be sufficient.").

[139] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.124.

[140] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.125.

[141] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.125 (internal quotes omitted); *id.* ("The objective of providing information to consumers is therefore a part of, rather than separate from, the objective of protecting dolphins.").

[142] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.126 (quoting Mexico's Comments on U.S. Response to Panels' Question 117, para. 173).

[143] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.126 (citing *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.253).

62. In conclusion, the Panels returned to two central points of the Appellate Body's previous report that served as important guideposts for the Panels throughout their analysis: (1) "there is a 'special relevance' to an analysis of whether the 2016 Tuna Measure is calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean;"[144] and (2) "that the Measure will not be inconsistent with Article 2.1 of the TBT Agreement if it is properly calibrated to those risks."[145]

b. Mexico's Appeals Should Be Rejected

63. In challenging the Panels' interpretation of the statement that "the calibration test should itself be applied taking account of the measure's objectives,"[146] Mexico claims that, as a general matter, the Panels' analysis "did not give meaningful relevance to the relationship between the detrimental impact caused by the regulatory distinctions and the objectives of the measure."[147] As explained below, Mexico does not identify a legal error in any of its eight arguments on this point. The Panels' analysis is, in fact, sound. Mexico's appeal described in sections V.B.2.c(1)-(4) should be rejected in its entirety.

64. Mexico's first argument, put forward in section V.B.2.c(1), concerns the Panels' failure to include in "the criteria for the calibration test" factors allegedly "related to the accuracy of the label."[148] In making this argument, Mexico simply refers to its above analysis.[149] As such, Mexico's appeal fails for the reasons explained above in Section III.B.1.

65. In its second argument, advanced in the first portion of section V.B.2.c(2), Mexico claims that the Panels erred in "determin[ing] that allowing inaccurate labels is consistent with the objectives of the measure."[150] In this regard, Mexico alleges that, in fact, the Panels "calibrat[ed] for the inaccuracy of the label."[151] Mexico thus appears to suggest that, given the difference in certification and tracking and verification requirements, the Panels' calibration analysis tolerates less accurate labels for tuna product produced outside the ETP large purse seine fishery (where risk to dolphins is comparatively low) while requiring completely accurate labels for tuna

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[144] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.127 (referring to *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.101).

[145] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.127 (referring to *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.155).

[146] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.116.

[147] Mexico's Appellant Submission, para. 127.

[148] *See* Mexico's Appellant Submission, para. 130.

[149] Mexico's Appellant Submission, para. 130 ("However, *as explained above*, the Panels erred at paragraphs 7.116-117 of their Reports by not including in the criteria for the calibration test the factors in the different ocean areas related to the accuracy of the label, including the absence of sufficient regulatory oversight, the reliability of reporting, the existence of IUU fishing, and the existence of transshipment at sea.") (emphasis added).

[150] Mexico's Appellant Submission, paras. 135-136.

[151] *See* Mexico's Appellant Submission, para. 137 ("There are several other errors associated with the Panels' approach to calibrating for the inaccuracy of the label.").

product produced from the ETP large purse seine fishery (where risk to dolphins is comparatively higher).[152]

66. Mexico's argument is based on a fundamental misunderstanding of the Panels' analysis and is without merit. Simply put, the Panels analysis is not driven to tolerate less accuracy in the labeling of tuna product produced in some fisheries than in others.

67. First, the Panels, in contrast to what Mexico had argued, correctly reasoned that they could not assume that the certifications of no mortality or injury from any fishery, regardless of the requirements, could be said to be completely and uniformly accurate.[153] Indeed, the Panels concluded, based on the evidence on the record, that "it is likely that dolphins are killed and seriously injured in the ETP in larger numbers than are observed."[154]

68. Second, the Panels correctly recognized that the risk of inaccurate labeling is not a constant. Rather, "the risk of inaccurate information being passed to consumers by the label will depend not only on the referred margin of error, but also, and importantly, on the extent of events that require recording whether a dolphin mortality or serious injury was observed in a given fishery."[155] Thus, the sensitivity of the certification mechanism may affect the margin of error of

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[152] Mexico argued against the same inaccurate construct in the panel proceeding. *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.604 ("Mexico argues that the use of a less sensitive mechanism outside the ETP purse seine fishery cannot be even-handed if it would result in the label becoming less accurate. According to Mexico, any possibility of label inaccuracy would be inconsistent with the objectives of the 2016 Tuna Measure, because '[i]f the dolphin-safe information regarding the tuna in products is inaccurate, then consumers cannot make a properly informed or meaningful decision.' According to Mexico, '[a]ccuracy cannot be calibrated.'") (citing and quoting Mexico's Response to Panels' Question 86, para. 147; Mexico's Comments on U.S. Response to Panels Question 40, para. 94).

[153] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.605 ("Mexico's argument appears to us to be premised on the notion that certification can guarantee accurate labelling in every case. However, as the separate panelist explained in the first compliance proceedings (and as the United States recognizes in these proceedings), certification, whether by captain or captain and observer, is unlikely to be able to detect every instance of dolphin mortality or serious injury in every case. In our view, it is unlikely that any system could be completely error-proof."); *see also id.* para. 7.601 (quoting the separate panelist's statement in the previous proceeding that: "[t]he language of the certification notwithstanding, all that can really be certified, by either a captain or an observer, is that no dolphin mortality or serious injury was detected – that is, observed – in a set or other gear deployment. The capacity for human error being what it is, it is simply impossible for even the most highly qualified observer to say with certainty that no dolphin was killed or seriously injured during a fishing operation.").

[154] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.285 ("To us, these sources suggest that it is likely that dolphins are killed and seriously injured in the ETP in larger numbers than are observed. They also seem to be consistent with the fact, accepted by the panel in the first compliance proceedings, that the task of observing dolphin mortalities and serious injury in the ETP is complicated by the intensity and length of the interactions in a dolphin set between the dolphins, on the one hand, and the vessel, speed boats, helicopter, and purse seine net on the other. We further note that, because setting on dolphins necessarily involves interaction with dolphins in 100% of sets, the likelihood of unobserved mortality or serious injury is present in every set.") (internal quotes omitted); *see also id.* para. 7.283 ("Bearing in mind that on average some six million dolphins are chased and some three and a half million dolphins are encircled each year, we think it is reasonable to assume that some dolphins may be killed or seriously injured, without this being observed."); *id.* para. 7.543 (recalling the Panels' finding "that the method of setting on dolphins is more likely than other fishing methods to cause unobserved mortality and serious injury" due to the "routin[e] and systematic[]" dolphin interactions). Mexico *does not* challenge these findings on appeal.

[155] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.120; *id.* para. 7.607 ("This is because, in our view, the risk of inaccurate certification is not a constant that remains unchanged in all fisheries. Rather, the risk of

the certification but does not necessarily correlate directly with the accuracy of the dolphin safe label for tuna from a particular fishery.

69. Ultimately, the Panels reasoned that "the central question is whether any margins of error in certification, tracking and verification, and any differences in the margins of error tolerated by different certification, and tracking and verification requirements, are calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean."[156] In the Panels' view, "in fisheries with high dolphin interactions and harms, more sensitive certification, and tracking and verification requirements may be needed to ensure the ultimate accuracy of the dolphin-safe label, whereas in fisheries with low dolphin interactions and harms, less sensitive requirements *may be sufficient*."[157] Accordingly, the Panels concluded that in order to determine whether those regulatory differences are consistent with the measure's objectives, they needed to examine those differences "in the light of the relevant risk profiles in different fisheries" to determine that the regulatory requirements are "calibrated to, tailored to, and commensurate with the different risk profiles in different fisheries."[158]

70. The Panels conducted such an assessment and concluded that those requirements are, in fact, calibrated given the much higher risk to dolphins inside the ETP large purse seine fishery than outside.[159] Contrary to Mexico's assertions, those findings, and the analysis that the Panels used to come to those findings, do not accept a difference in labeling accuracy across fisheries or, in Mexico's words, accept that "allowing inaccurate labels is consistent with the objectives of

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inaccurate certification seems to us to be closely tied to the level of risk posed to dolphins by the use of a particular fishing method in a particular area of the ocean.").

[156] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.122; *see also id.* para. 7.601 (quoting approvingly the separate panelist's statement in the previous proceeding as concluding: "The consequence of this is that, in respect of both captain and observer certification, a certain degree or margin of error is necessarily tolerated. The margin of error may be smaller in the case of observer certification than in the case of captain certification; but in both cases there is always some chance that a dolphin death or serious injury will go unobserved. Accordingly, we can talk of the difference between captain and observer certification not only in terms of how accurate or sensitive each one is, but also in terms of how large a margin of error each one allows.").

[157] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.123.

[158] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.123 ("[T]he extent to which margins of error in certification, and tracking and verification requirements, or any differences in the margins of error in different certification, and tracking and verification requirements, are consistent with the objectives of the 2016 Tuna Measure cannot be answered by looking at the regulations in isolation. Rather, it is necessary to examine them in the light of the relevant risk profiles in different fisheries, in particular by assessing whether any margins of error in certification, and tracking and verification requirements are themselves calibrated to, tailored to, and commensurate with the different risk profiles in different fisheries.").

[159] *See, e.g., US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.603 ("In our view, the unique intensity of the association and interaction explains why the parties of the AIDCP considered it necessary to place observers on-board large purse seine vessels in the ETP large purse seine fishery whose sole task it is to monitor dolphin interactions and certify the dolphin-safe status of a set. Conversely, the relatively low risk profiles of other fisheries, which results from both the absence of a tuna-dolphin association similar to that in the ETP and the fact that other fishing methods pose relatively fewer risks to dolphins, and in many cases do not interact with dolphins at all, explain why the 2016 Tuna Measure does not generally require observer certification in those fisheries."); *see also id.* para. 7.672.

the measure."[160] Just the opposite is true – the findings and supporting analysis promote a consistent standard of label accuracy for tuna product produced across different fisheries, consistent with both of the measure's objectives.[161]

71. In its third argument, the first of the three "other errors" raised in section V.B.2.c(2), Mexico claims that "[t]he objectives of the measure must be reflected in *the substantive criteria* for assessing whether the measure's regulatory distinctions are designed and applied in an even-handed manner, including on the basis of "calibration."[162] Mexico further states that "[t]he Panels' reasoning does not accomplish this, *omitting criteria* that are relevant to the examination of 'calibration.'"[163] Although Mexico does not specify what it means by "substantive criteria" or what "criteria" the Panels have omitted, the United States understands that Mexico is referring to its argument that the Panels erred by analyzing the risk profile of fishing methods in different ocean areas without taking into account the factors that affect "the reliability of applicable systems." As such, this argument is entirely redundant of the argument Mexico made in section V.B.2.b. Accordingly, Mexico's argument is without support and should be rejected for the reasons the United States explained above in Section III.B.1.

72. Similarly, in its fourth argument, the second "other error[]," Mexico again claims that the Panels erred in their treatment of the various factors that affect "the reliability of applicable systems."[164] Specifically, Mexico argues that because the Panels did not take such factors into account in the calibration analysis, ocean areas where these factors exist "are treated the same as fishing areas that do not have these problems."[165] Mexico concludes by stating that, "[c]onsequently, the Panels failed to properly assess the relevant differences between fisheries and therefore did not take into account the risk factors that exist in the different ocean areas."[166] It is not clear how Mexico's third and fourth arguments differ. Regardless, this argument, like the third, is redundant of Mexico's argument in section V.B.2.b of its submission. Accordingly, the United States explained above in Section III.B.1 why this argument lacks support.

73. In its fifth argument, Mexico claims that the Panels erred in relying on the concept of "margin of error." Specifically, Mexico claims that the U.S. measure "does not contemplate a 'margin of error' or a tolerance threshold for inaccurate labelling, and it does not incorporate a *de minimis* test for accuracy."[167] This argument appears to be closely related to Mexico's first argument, and, like that argument, is without merit.

74. As an initial matter, the Panels were correct that "it is unlikely that any system could be completely error-proof" and that the U.S. measure need not "be completely error-proof in order

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[160] Mexico's Appellant Submission, para. 135.

[161] *See, e.g., US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.607.

[162] Mexico's Appellant Submission, para. 138 (emphasis added).

[163] Mexico's Appellant Submission, para. 138 (emphasis added).

[164] *See* Mexico's Appellant Submission, para. 139.

[165] Mexico's Appellant Submission, para. 139.

[166] Mexico's Appellant Submission, para. 139.

[167] Mexico's Appellant Submission, para. 140.

to be calibrated" (and, thus consistent with Article 2.1).[168] Indeed, even requiring an independent observer on ETP large purse seine vessels does not guarantee that every dolphin mortality or injury will be observed. In fact, the Panels found that it is likely that underreporting of mortalities and injuries occur in that fishery, and Mexico has not challenged this finding.[169] Rather, as the Panels thought, "the more pertinent question is whether the possibility of error is tailored to, or commensurate with, the different risks to dolphins arising from the use of different fishing methods in different areas of the ocean."[170]

75. In this regard, the Panels did not err in relying on the concept of a "margin in error" in discussing the certification and tracking and verification requirements. Indeed, such a concept is entirely consistent with the Appellate Body's clear instruction that a compliance assessment must assess all relevant aspects of the measure under the calibration analysis in order to determine whether the measure is, as a whole, calibrated to the risks of adverse harms to dolphins occurring in different fisheries in different parts of the ocean, and thus consistent with Article 2.1.[171] Mexico fails to put forward *any* reason why the Panels' use of the concept of differing margins of error of different certification and tracking and verification requirements is inconsistent with the DSB recommendations and rulings in this dispute.

76. Simply claiming, as Mexico does here, that "on its face, the measure does not contemplate a 'margin of error,'" appears to be nothing more than Mexico arguing that it is incorrect to use the calibration analysis to determine whether the measure is even-handed. This is, of course, what Mexico argued in the previous compliance proceeding.[172] Yet, the Appellate Body *rejected* that approach, emphasizing that the U.S. measure "*will not violate Article 2.1* if it

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[168] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.605 ("Mexico's argument appears to us to be premised on the notion that certification can guarantee accurate labelling in every case. … In our view, it is unlikely that any system could be completely error-proof. Neither, in our view, must the United States' dolphin-safe labelling regime be completely error-proof in order to be calibrated."); *see also id.* para. 7.601 (quoting approvingly the separate panelist's statement in the previous proceeding that "[t]he capacity for human error being what it is, it is simply impossible for even the most highly qualified observer to say with certainty that no dolphin was killed or seriously injured during a fishing operation.").

[169] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.283, *id.* para. 7.285.

[170] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.605.

[171] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.166; *see also id.* para. 7.305 (noting, in the context of the Article XX chapeau, that the Appellate Body "do[es] not see on what basis the conditions relevant for the certification or tracking and verification requirements would differ from those relevant for the eligibility criteria given that, as we have pointed out, access to the dolphin-safe label is conditioned on the satisfaction of all of the conditions, including the certification and tracking and verification requirements, that are contained in the amended tuna measure").

[172] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, n.492 ("Indeed, Mexico *disputed the relevance* of the concept of 'calibration' to the analysis of the even handedness of the amended tuna measure. In Mexico's view, such concept is 'inconsistent with the primary objective of the measure in question, which is concerned with the accuracy of information provided to consumers.") (internal quotes omitted); *see also id.* para. 7.149 (arguing that "the 'calibration' that the United States proposes is clearly arbitrary, unjustifiable, and lacking in even-handedness because it results in inaccurate and misleading information, in direct contradiction with the measure's objectives.").

is properly 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the oceans."[173] The Panels did not err by making the same finding.[174]

77. In its sixth argument, a final point raised in section V.B.2.c(2), Mexico appears to claim that the Panels erred in their application of the legal standard rather than in the interpretation of that standard. Specifically, Mexico argues that the Panels' analysis "did not account for the variability in the risks to dolphins in particular fisheries outside the ETP where there are substantial adverse effects on dolphins," "treat[ing] all fisheries other than the ETP large purse seine fishery as having *de minimis* effects on dolphins" other than the fisheries designated under the determination provisions.[175] Mexico states that "[t]his conclusion is contradicted by evidentiary findings made by the Panels themselves," citing two paragraphs of the Panel Reports that are part of the Panels' assessment of gillnet and trawl fishing.[176]

78. This argument appears to allude to Mexico's arguments on the application of the calibration standard in sections V.C.2.a(2), V.C.2.b(1)-(2), V.C.2.b(4), V.C.2.c(1), and V.C.2.c(3) of its appellant submission. In sections V.C.2.a(2), V.C.2.b(1)-(2), and V.C.2.c(1), Mexico argues that the Panels failed to assess the risk profile of different fishing methods, as used in different ocean areas. In sections V.C.2.b(4) and V.C.2.c(3), Mexico argues that the Panels erred in finding that the determination provisions contribute to the 2016 measure's calibration. These arguments are addressed in Sections III.C.2.d, III.C.3.b-c, III.C.3.e, III.C.4.b, and III.C.4.d below. As explained in those sections, the Panels both assessed and accounted for the risk profiles for dolphins of all the tuna fisheries for which there was relevant and probative evidence on the record. Mexico's particular allegations concerning the alleged "evidentiary findings" that "contradict" the Panels' approach are elaborated at paragraph 237 of Mexico's appellant submission, and addressed in Section III.C.2.d below. In fact, neither paragraph of the Panel Reports contradicts the Panels' conclusions or approach.

79. It is unclear what Mexico is claiming in its seventh argument, advanced in section V.B.2.c(3) of its appellant submission. Mexico appears to simply argue that the Panels misunderstood Mexico's argument regarding the relationship between the measure's two objectives.[177]

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[173] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.155 (emphasis added).

[174] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.127 ("In sum, we find that in these proceedings, there is a 'special relevance' to an analysis of whether the 2016 Tuna Measure is calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean. In particular, we recall the Appellate Body's statement in the first compliance proceedings *that the Measure will not be inconsistent with Article 2.1 of the TBT Agreement if it is properly calibrated to those risks*.") (emphasis added); *see also id.* paras. 7.100, 7.115 (quoting and citing *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.155).

[175] Mexico's Appellant Submission, para. 141.

[176] Mexico's Appellant Submission, para. 141 (citing *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.441, 7.490).

[177] *See* Mexico's Appellant Submission, paras. 143-144 ("The Panels erred in asserting that Mexico's argument that the calibration analysis should be constrained by the rational relationship test appears to create an artificial distinction between the consumer information and the dolphin protection objectives of the Measure. … *The Panels misunderstood Mexico's argument*.") (internal quotes omitted) (emphasis added); *id.* para. 152 ("For the foregoing reasons, the Panels erred in their legal interpretation of Article 2.1 of the TBT Agreement: … (iv) At

80. Leaving aside the fact that the Panels did not misconstrue Mexico's argument,[178] Mexico has not identified a legal error. Certainly, Mexico cites no support for the fact that a panel commits reversible legal error simply by misstating an argument of a party.

81. Further, it is not the case that the Panels' analysis relies on an "artificial distinction" between the measure's two objectives.[179] As noted above, the Panels explicitly recognized in paragraph 7.125 and elsewhere that the objectives of the measure are "mutually complementary and reinforcing, and work together" to address the adverse effects of "fishing techniques on dolphins.'"[180] Moreover, the calibration analysis that the Panels applied in these proceedings pursuant to the guidance of the Appellate Body does, indeed, take into account the objectives of the measure, for the reasons explained above in the U.S. response to Mexico's first argument.

82. Finally, in its eighth argument, Mexico claims that the Panels erred in not interpreting the second step of the less favorable treatment standard in its context as called for by customary rules of interpretation reflected in the *Vienna Convention on the Law of Treaties*.[181] Mexico contends that if the Panels had done so, they would have interpreted the obligation in a manner that "ensure[s] symmetry between Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994."[182] Mexico is not explicit as to what analysis is required to achieve such "symmetry." However, Mexico argued in a previous section of its appellant submission that "symmetry" can only be achieved by assessing consistency of Article 2.1 based on "whether the detrimental impact can be reconciled with, or is rationally related to, the policy objective pursued by the measure."[183] Mexico made the same argument before the Panels[184] and before the Appellate Body in the previous proceeding.[185] Mexico's argument is without merit.

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paragraph 7.125 of their Reports in finding that there is an artificial distinction *created by Mexico's interpretation*.") (emphasis added).

[178] Mexico has long sought for the panels and the Appellate Body to prioritize the "accuracy" prong over the "dolphin protection" prong in analyzing the measure as support for its argument that it is incorrect to assess the consistency of the measure based on whether the requirements are calibrated to the risks to dolphins arising from different fishing methods in different areas of the oceans. In paragraph 7.125, the Panels cite to just one example of this long-running argument of Mexico's. *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.125 (citing Mexico's Response to Panels' Question 115, para. 231 ("The 2016 tuna measure is a labelling measure which, by its nature and design, is primarily focused on conveying accurate information to consumers.")).

[179] *See* Mexico's Appellant Submission, para. 144.

[180] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.125 (quoting *US – Tuna II (Mexico) (Panel)*, para. 7.550).

[181] Mexico's Appellant Submission, paras. 145-146.

[182] Mexico's Appellant Submission, para. 145.

[183] Mexico's Appellant Submission, para. 86.

[184] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.126 ("[W]e note Mexico's argument that conducting a calibration analysis that is constrained by an examination of the existence of a rational connection between the detrimental impact and the objectives of the Measure is necessary in order to 'ensure[] symmetry between Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994.'") (quoting Mexico's Comments on U.S. Response to Panels' Question 117, para. 173).

[185] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.79-80 ("Mexico contends that 'the question of whether the regulatory distinction that accounts for the detrimental impact is designed and applied in an

83. First, the Panels' approach adheres closely to the guidance of the Appellate Body in the previous proceeding, and in that proceeding the Appellate Body did closely examine the relationship between the two provisions.[186] So it cannot be said the calibration test that the Panels applied did not reflect that consideration.

84. Second, Mexico is wrong as a factual matter to suggest that the Panels' approach does not reflect a "symmetry" with the approach taken by the Appellate Body with regard to Article XX. As the Panels note, the calibration analysis articulated and applied by the Panels "is fully consistent with the legal standard applicable under the chapeau of Article XX of the GATT 1994, as clarified by the Appellate Body."[187]

85. Mexico's actual complaint seems to be that the Panels did not assess the consistency of the measure based on the "rational connection test" that Mexico put forward. But, as noted previously, the Appellate Body squarely rejected Mexico's argument in the previous proceedings,[188] and the Panels did not err in following that guidance. At its heart, Mexico's disagreement is not with the Panels' statements in paragraph 7.126 but with the Appellate Body's statement in the previous proceeding that the U.S. measure "will not violate Article 2.1 if it is properly 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the oceans."[189] But Mexico puts forward no reason why that statement is not correct nor explains on what basis it is appropriate to use a compliance proceeding to "appeal" the DSB recommendations and rulings applicable in the dispute.[190]

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even-handed manner' and 'the question of whether the detrimental impact caused by the regulatory distinction *can be explained by, or reconciled with, the objectives of the measure at issue*' are 'not mutually exclusive.' … According to Mexico, the jurisprudence developed by the Appellate Body in interpreting Article 2.1 of the TBT Agreement and Article XX of the GATT 1994 *does not include a 'calibration' test*. … In response to questioning at the oral hearing, Mexico added that, even if 'calibration' may be one way to assess whether a regulatory distinction involves arbitrary or unjustifiable discrimination, such an examination is not appropriate in the present dispute, in particular, given that the amended tuna measure does not incorporate or reflect any concept of 'calibration.'") (emphasis added).

[186] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.87-94.

[187] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.126; *see also id.* ("The calibration test looks precisely at whether the relevant regulatory distinctions are 'tailored to,' 'commensurate with,' or 'explained' by differences in the underlying situation to which the 2016 Tuna Measure seeks to respond. As we see it, this is similar to the inquiry under Article XX of the chapeau, which considers, inter alia, whether the measure is 'applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination.'") (quoting *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.253).

[188] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.169 (emphasis added).

[189] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.155.

[190] In this regard, the United States observes that Mexico's arguments appear to be internally inconsistent. Mexico has not appealed the Panels' findings regarding the applicability of the rational connection test and has specifically not appealed paragraphs discussing this test or finding that the measure's consistency will be based on whether it is calibrated or not. *See, e.g.*, Mexico's Appellant Submission, para. 152 (avoiding appealing paragraphs 7.115 or 7.127 where the Panels discuss this issue).

3. The Panels Correctly Assessed 2016 Measure Without Regard to the Objective of Sustainable Development

86. Finally, in section V.B.2.c(5) of its appellant submission, Mexico appeals paragraphs 7.126 and 7.128-131 of the Panel Reports, based on an argument that relates neither to the calibration analysis nor to the objectives of the measure. For this reason, this argument is addressed separately from the arguments addressed above. Mexico argues that the Panels erred in finding the 2016 measure consistent with Article 2.1 because the measure "undermines the objective of sustainable development."[191] Mexico describes the Panels' finding in this regard as "both perverse and systemically dangerous."[192] Mexico's appeal should be rejected.

a. The Panels' Analysis

87. Before the Panels, Mexico argued that the Panels should "interpret Article 2.1 of the TBT Agreement in the light of the principle of sustainable development," because the preamble of the WTO Agreement "refers to sustainable development" and because sustainable development is "a principle of international law applicable . . . between all countries."[193] The Panels began their analysis of this argument by recognizing that, despite Mexico's statements to the contrary, to accept Mexico's argument "would elevate the language of the preamble to the level of a norm, and accord it more weight than the language used by the Members in framing the obligations contained in the covered agreements."[194] Further, the Panels recognized that the measure is not concerned with sustainable development, but "with the protection and well-being of dolphins."[195] The fact that the measure "has an impact on the conservation" of dolphins does not transform the measure into a "sustainability" measure.[196] The Panels concluded that "[t]he WTO Agreement does not obligate the United States or any other Member to regulate only for the objective of 'sustainable development,' and in our view a measure is not inconsistent with Article 2.1 of the TBT Agreement merely because it pursues some other objective."[197]

b. Mexico's Appeal

88. Mexico begins its appeal by observing that the preamble to the WTO Agreement states that "'trade and economic endeavor' should be conducted 'while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development,'" and that the

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[191] Mexico's Appellant Submission, para. 148.

[192] Mexico's Appellant Submission, para. 151.

[193] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.129.

[194] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.130.

[195] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.131 ("At any rate, we note that, we do not consider that the 2016 Tuna Measure is concerned with sustainable development. Rather, it is concerned with the protection and well-being of dolphins.") (citing *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.527).

[196] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.131 ("While the protection of dolphins of course has an impact on the conservation and therefore the sustainability of dolphin populations, that does not render the 2016 Tuna Measure a 'sustainability' measure, nor does it turn a dolphin-safe label into a 'sustainability' label.").

[197] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.131.

Appellate Body in *US – Shrimp* stated that the preambular language "must add colour, texture and shading to our interpretation of the agreements annexed to the WTO agreement.'"[198] On this basis, Mexico claims that "[w]here those obligations relate to sustainable development, they must be interpreted consistently with the objective of sustainable development."[199]

89. Mexico then contends that it "has demonstrated in the facts Mexico has submitted to the Panels" that the 2016 measure "undermines the objective of sustainable development because it rejects a demonstrated environmentally sustainable fishing practice and promotes the exclusive use of one that has proven to be environmentally damaging,"[200] although Mexico cites no factual findings of the Panels in this regard. Rather, Mexico simply claims – without support – that by "encouraging" fishing methods other than setting on dolphins, the 2016 measure "does grievous harm to fisheries and to the overall marine ecosystem," and "must therefore be seen as inconsistent with the objective of sustainable development."[201]

90. Mexico concludes by stating that, where a technical regulation relates to sustainable development, panels must find that measure inconsistent with Article 2.1 if the measure's "effects are unsustainable."[202] This is so because "[a]cting unsustainable is 'unjustifiable,'" and, as such the 2016 measure reflects "unjustifiable discrimination."[203]

c. Mexico's Appeal Should Be Rejected

91. Mexico's appeal should be rejected for the reasons set out in the Panel Reports. As the Panels explained, Mexico does, in fact, seek to transform preambular language regarding sustainable development into a substantive obligation that Members are required to further a sustainability objective pursuant to the TBT Agreement obligation regarding discrimination.[204] There is simply no support for such an argument, and Mexico provides none. Indeed, Mexico appears to tacitly acknowledge the strength of the Panels' analysis by providing no response – nor even a direct acknowledgement – of the Panels' reasoning contained in the paragraphs that Mexico challenges in this appeal.

92. Moreover, to even make this argument, Mexico is forced to substantially change the

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[198] Mexico's Appellant Submission, para. 147.

[199] Mexico's Appellant Submission, para. 147.

[200] Mexico's Appellant Submission, para. 148.

[201] Mexico's Appellant Submission, para. 148.

[202] Mexico's Appellant Submission, para. 149 ("Not all technical regulations will relate to sustainable development, but, where they do, they will be inconsistent with this obligation if their effects are unsustainable.").

[203] Mexico's Appellant Submission, para. 149 ("Acting unsustainably is 'unjustifiable,' especially where, as here, there is a proven sustainable alternative that achieves the same objectives. … The application of the tuna measure results in 'unjustifiable discrimination' because the discrimination resulting from it is not only inconsistent with the objective of sustainable development, it undermines it.").

[204] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.130 ("This argument, however, does appear to elevate the preambular language to the level of substantive obligation, despite Mexico's assertion to the contrary. As Mexico itself acknowledges, however, the preamble to the WTO Agreement does not of itself create substantive obligations.").

objectives of the 2016 measure. In Mexico's re-imagined objectives, the U.S. dolphin safe labeling requirements relate to the sustainability of *tuna stocks* and of the marine ecosystem generally, not to the protection of dolphins.[205] That, of course, is incorrect. It is beyond dispute that the objectives of the measure relate to the protection of individual dolphins, not to the sustainability of populations of fish, sharks, seabirds, or, even for that matter, dolphins.[206] The fact that Mexico considers that the measure should pursue different objectives is irrelevant. Mexico cites no substantive obligation of the TBT Agreement (or any other agreement) that requires the result Mexico seeks, nor can it cite any part of the DSB recommendations and rulings – in either previous proceeding – to support such an argument. Indeed, Mexico's argument seems to contradict its own argument that the calibration analysis must be focused on the objectives of the measure.[207]

93. As is the case with other arguments Mexico raises, this argument makes clear that Mexico does not view the purpose of this compliance proceeding as determining whether the 2016 IFR has brought the dolphin safe labeling measure into compliance with the DSB recommendations and rulings. Rather, Mexico sees this proceeding as an opportunity to reject the previous analysis of the Appellate Body and press for an entirely new legal framework. Mexico's approach is simply incompatible with the oft-repeated statement that compliance proceedings "form part of a continuum, such that due cognizance must be accorded to the [previous] recommendations and rulings made by the DSB."[208]

C. Mexico's Claim that the Panels Erred in Their Application of Article 2.1 Should Be Rejected

94. In this section, the United States responds to the appeals Mexico raises in section V.C of its appellant submission, which Mexico claims pertain to the Panels' application of the calibration test. At the outset, the United States observes that Mexico makes a number of arguments that are redundant of arguments made in other parts of Mexico's appellant submission. Where this is the case, the United States simply refers to the section of this submission that addresses that particular argument in full.

95. The remainder of this section proceeds as follows. Section III.C.1 addresses Mexico's

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[205] *See* Mexico's Appellant Submission, para. 148 ("By encouraging [fish aggregating devices (FAD)] and other forms of tuna fishing outside the ETP as alternatives to setting on dolphins, the tuna measure does grievous harm to fisheries and to the overall marine ecosystem.").

[206] *See, e.g., US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.49 ("The 2016 Tuna Measure, like the previous versions of the Tuna Measure, pursues two objectives: first, to ensure that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins; and, second, to contribute 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.") (citing previous reports); *see also US – Tuna II (Mexico) (Panel)*, para. 7.550 (stating that the measure's legitimate objective of dolphin protection, *i.e.*, "minimiz[ing] observed and unobserved mortality and injury to dolphins," is not "dependent on dolphin populations being depleted").

[207] *See* Mexico's Appellant Submission, sec. V.B.2.c(2) entitled "Applying the Calibration Test Taking into Account the Measure's Objectives."

[208] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.112.

claim, raised in section V.C.1 of its appellant submission, that the Panels erred in their assessment of the different risk profiles of different fishing methods in different ocean areas. Section III.C.2 addresses Mexico's claim, raised in section V.C.2.a of its appellant submission, that the Panels erred in finding that the eligibility criteria are calibrated. Sections III.C.3 and III.C.4 address Mexico's claims, raised in sections V.C.2.b and V.C.2.c of its appellant submission, that the Panels erred in finding that the certification requirements and tracking and verification requirements, respectively, are calibrated. Finally, Section III.C.5 addresses Mexico's claim, raised in section V.C.2.d of its appellant submission, that the Panels erred in finding that the 2016 measure, as a whole, is calibrated.

1. The Panels Correctly Assessed the Different Risk Profiles of Different Fishing Methods in Different Ocean Areas

96. In section V.C.1 of its appellant submission, Mexico puts forward three groups of arguments related to its claim that the Panels erred in their assessment and analysis of the risk profiles of different fishing methods in different ocean areas. Mexico argues that the Panels erred by: (a) failing to include assessments of fisheries in their assessment of the risk profiles of different fishing methods; (b) using the harm to dolphins caused by setting on dolphins in the ETP large purse seine fishery as the "single benchmark" for the calibration analysis; and (c) relying on measurements of risk to dolphins that Mexico alleges are deficient while omitting important risk factors. The United States addresses these arguments in subsections a, b, and c below and explains why all Mexico's claims should be rejected.

97. Prior to engaging with Mexico's substantive appeals, the United States observes that Mexico begins section V.C.1 *not* with an appeal, but with a generalized complaint about the Panels' decision not to request input from experts. Specifically, Mexico claims that because of the "scientific complexities of the evidence," it was "imperative" for the Panels to seek assistance from experts.[209] Because the Panels did not seek expert assistance, Mexico claims that "the Panels did not make an appropriate exercise of their discretion under Article 13 of the DSU … and this failure pervades many of their findings."[210]

98. However, Mexico makes no appeal with respect to the Panels' decision not to consult experts,[211] and thus there is no reason, or basis, for the Appellate Body to engage on this aspect of the Panel Reports.

99. As a general matter, the United States notes that, although neither of the first two panels in this dispute ever sought assistance from outside experts, Mexico has never before made this complaint. Indeed, as noted in the Reports, the Panels sought comments from the parties on this issue, and *neither party* requested that the Panels seek such outside assistance.[212] In particular,

[209] Mexico's Appellant Submission, para. 157.

[210] Mexico's Appellant Submission, para. 157.

[211] *See* Mexico's Notice of Appeal (Dec. 1, 2017).

[212] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.150 ("In this vein, we asked the parties during the course of our substantive meeting whether, in their view, the Panels should consult with external experts

Mexico "agreed that it was in the Panels' discretion to seek such guidance."[213] At the time of the Panels' meetings, the United States had submitted three written submissions (relying on 177 exhibits) and Mexico had submitted two written submissions (relying on 78 exhibits). As reflected in the Panel Reports, many of these exhibits pertained to the scientific questions relevant to the dispute. In short, the evidentiary points of contention were well established by the time of the Panels' meetings. It is difficult to understand, therefore, on what basis Mexico now considers that it was "imperative" for the Panels to seek assistance from outside experts.

a. Mexico's Claim that the Panels' Analysis of the Risk Profiles of Different Fishing Methods Did Not Encompass Assessments of Relevant Fisheries Should Be Rejected

100. In section V.C.1.a of its appellant submission, Mexico appeals the following paragraphs of the Panel Reports: paragraphs 7.270-7.311, 7.518, 7.519, paragraphs 7.402, 7.522, paragraphs 7.457, 7.520, paragraphs 7.475, 7.481, paragraph 7.494, and paragraph 7.511.[214] In these paragraphs, the Panels: (1) set out their analysis and conclusion concerning the risk profile of setting on dolphins, including in the ETP,[215] and (2) draw overall conclusions concerning the risk profile of purse seine fishing, gillnet fishing, longline fishing, trawl fishing, and handline fishing (but not pole and line fishing) "as used in different areas of the ocean."[216]

101. Mexico constructs its appeal as two different but related arguments. First, Mexico claims that the Panels erred in determining a single risk profile for each fishing method employed in different parts of the ocean instead of determining different risk profiles for each area of the ocean where a particular fishing method is used.[217] In other words, Mexico appears to claim that the Panels erred in finding that the risk profile for longlining, as used in all the fisheries for which there was evidence on the record, was relatively low, compared with setting on dolphins in the ETP large purse seine fishery. Rather, Mexico appears to insist that the Appellate Body's report obligated the Panels to make *individual* comparisons between each individual longline fishery and some independent benchmark (or benchmarks). Second, Mexico claims that the Panels erred by not denying eligibility for the label to tuna product produced from those individual fisheries that Mexico claims "have relatively higher risk profiles."[218]

102. Mexico's arguments should be rejected. The Panels' analysis was sound and consistent with the DSB recommendations and rulings in this dispute. In contrast, Mexico's approach is

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to better understand the different risk profiles in different fisheries. *Both parties agreed* that it was in the Panels' discretion to seek such guidance from independent and qualified experts.") (emphasis added).

[213] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.150.

[214] *See* Mexico's Appellant Submission, para. 172(i).

[215] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.270-7.311, 7.518, 7.519.

[216] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.402 (purse seine fishing other than by setting on dolphins), 7.457 (gillnet fishing), 7.475, 7.481 (longline fishing), 7.494 (trawl fishing), 7.511 (handline fishing); *see also id.* paras. 7.519, 7.520, 7.522 (recalling those findings with respect to gillnet fishing and purse seine fishing without setting on dolphins).

[217] *See* Mexico's Appellant Submission, paras. 159-166.

[218] *See* Mexico's Appellant Submission, paras. 167-171.

inconsistent with those recommendations and rulings and also with the design, architecture, and revealing structure of the U.S. measure. In particular, Mexico bases its appeal of the Panels' analysis of the risk profiles on an unreasonably narrow interpretation of the phrase "different areas of the ocean," as used by the Appellate Body.

i. The Panels' Analysis

103. In Section 7.7.2 of their Reports, the Panels set out their analysis and conclusions concerning the risk profile for dolphins of "individual fishing methods as used in different areas of the ocean."[219] Specifically, the Panels "considered the evidence on the record in respect of setting on dolphins, purse seine fishing without setting on dolphins, gillnet fishing, trawl, longline fishing, pole and line, and handline fishing."[220] With respect to each fishing method, they assessed all the evidence on the record as to "both observable and unobservable harms" and as to specific fisheries and the fishing methods in general.[221] In this regard, neither party has raised a DSU Article 11 appeal alleging that the Panels ignored or did not objectively consider any piece of evidence they submitted relating to the risk profile of any fishing method or fishery.

104. The Panels first analyzed the risk profile of setting on dolphins and, specifically, of setting on dolphins in the ETP. Considering the evidence on the record, the Panels found that setting on dolphins in the ETP: (1) caused 91.15 observed dolphin mortalities per 1,000 sets from 2009-2015,[222] (2) likely causes more dolphin mortalities and serious injuries "than are observed" due to "the intensity and length of the interactions" with dolphins that it requires (and "the likelihood of unobserved mortality or serious injury is present in every set"),[223] and (3) causes unobservable harms due to the chase itself.[224]

105. Second, the Panels analyzed the risk profile of purse seine fishing other than by setting on dolphins in the various fisheries in which the method is used. The Panels assessed the evidence as to the observable harms caused by this fishing method in the ETP purse seine fishery, the western and central Pacific Ocean (WCPO) purse seine fishery and individual fisheries therein, the Indian Ocean purse seine fishery, and the eastern tropical Atlantic purse seine fishery and made findings concerning levels of observable harms in those fisheries.[225] The Panels also found that "neither party has submitted evidence showing that purse seine fishing without setting on dolphins . . . causes the kinds of unobservable harms caused by setting on dolphins in the ETP."[226] On this basis, the Panels concluded that "while purse seine fishing without setting on dolphins poses some risks to dolphins, the risk profile of this fishing method as used in different

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[219] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.517 (summarizing Section 7.7.2).

[220] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.517.

[221] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.517; *id.* sec. 7.7.2.

[222] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.285, 7.519.

[223] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.279-280, 7.519.

[224] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.309, 7.518.

[225] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.328-335, 7.336-370, 7.371-386, 7.387-399.

[226] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.335, 7.370, 7.386, 7.399.

areas of the ocean is relatively low."[227]

106. The Panels next analyzed the risk profile of gillnet fishing, in general and in particular fisheries. The Panels noted that, as gillnet fishing is not a major tuna fishing method and tends to occur only in "small and medium coastal mixed-target fisheries," there was limited evidence on tuna gillnet fishing or specific gillnet fisheries targeting tuna.[228] Therefore, the Panels relied both on the fishery-specific evidence that is available and on "more general information."[229] The Panels considered evidence on "absolute levels of death to dolphins caused by gillnet fishing in different areas of the ocean" and, on this basis, found that gillnet fishing "causes considerable observable harms to dolphins *in different areas of the ocean*."[230] The Panels also found, however, that other evidence shows that "there are gillnet fisheries in which dolphin interactions are rare, and some in which no dolphin interactions are known to happen at all," identifying three fisheries in particular.[231] Based on all this evidence, the Panels concluded that "gillnet fishing poses high levels of observable harms to dolphins in certain areas of the ocean, but does not pose the same harms in other areas."[232] The Panels found that the evidence did not show that gillnet fishing caused "unobservable stress effects" such as those caused by dolphin sets.[233]

107. Fourth, the Panels analyzed the risk profile of longline fishing. The Panels first considered evidence on levels of observable dolphin mortalities and injuries in ten different longline fisheries in the Pacific, Atlantic, and Indian Oceans.[234] Based on this data, the Panels found that, in *all* longline fisheries for which evidence was on the record, "[t]he available data" showed "that the dolphin mortality rate per 1000 sets . . . is consistently low, with many years in different fisheries registering no known mortality or captures."[235] On this basis, the Panels concluded that "some longline fisheries present no known risks of observable harms to dolphins, while in the ones that do present some level of risk, such levels are, in general, relatively low."[236] With respect to unobservable harms, the Panels found that no evidence showed that longline fishing anywhere "causes acute unobservable stress effects similar to those caused by setting on dolphins."[237] Overall, the Panels concluded that the risk profile of longlining is "low."[238]

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[227] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.402.

[228] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.432-433.

[229] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.434.

[230] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.438-440.

[231] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.442, 7.433, 7.441, 7.443.

[232] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.444; *see also id.* para. 7.447 (finding that "gillnet fishing can pose particularly high levels of observable harms to dolphins in certain areas of the ocean" but "in some gillnet fisheries dolphin interactions are rare, while in [they] are not known to happen at all").

[233] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.456.

[234] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.469.

[235] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.470.

[236] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.475.

[237] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.480.

[238] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.481.

108. The Panels then assessed the risk profile of trawl fishing. They assessed all the fishery-specific evidence on the record, as well as general evidence on the fishing method.[239] Based on this evidence, the Panels found, with respect to observable harms, that "observed mortalities are very low in some fisheries and moderate in others" and that, due to the fact that "the evidence suggests that interaction with dolphins is generally low," the "extent of unobserved mortality or serious injury is" not "likely to be very high."[240] The Panels specifically rejected Mexico's evidence concerning a particular North Atlantic trawl fishery that it alleged was high risk.[241] The Panels found that "none of the evidence suggests that trawling causes the kinds of unobservable harms caused by setting on dolphins."[242]

109. Sixth, the Panels assessed the risk profile for dolphins of tuna handlining, including fishery-specific evidence on fisheries in the Indian Ocean, which the Panels considered in detail.[243] Based on all this evidence, the Panels found that there is "no evidence of handlining causing observable mortalities to dolphins."[244] The Panels made the same finding concerning unobservable mortalities.[245] On this basis, the Panels concluded that the "the risk profile of handlining fishing is low."[246]

110. Lastly, the Panels assessed the evidence on the record concerning pole and line fishing. They found that "[t]here is no report of any dolphins being killed or seriously injured as a result of pole and line fishing" nor any "evidence about any unobservable harm that this method causes to dolphins."[247] On this basis, the Panels found that "pole and line fishing poses no risk of observable or unobservable harms to dolphins" and, accordingly, its risk profile is "very low."[248]

111. Overall, the Panels concluded: (1) the six fishing methods other than setting on dolphins cause levels of observed dolphin mortality and serious injury that are, on a per set basis, "clearly below those caused by setting on dolphins in the ETP;"[249] (2) setting on dolphins "likely" causes many more dolphin mortalities and serious injuries than are observed[250] while this is not the case

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[239] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.488-492.

[240] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.493.

[241] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.490, 7.494.

[242] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.494.

[243] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.498-499, 7.502-510.

[244] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.511.

[245] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.511.

[246] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.511.

[247] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7. 515.

[248] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7. 516.

[249] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.520 (gillnet fishing), 7.521 and 7.494 (trawl fishing), 7.522 and 7.401 (purse seine fishing without setting on dolphins), 7.523 and 7.481 (longline fishing), 7.524 (handline and pole and line fishing).

[250] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.519.

with the other fishing methods[251]; and, (3) "none of the other fishing methods causes to dolphins the kind of unobservable harms that setting on dolphins causes."[252]

ii. Mexico's Appeal

112. In section V.C.1.a(1), Mexico begins its argument by observing that the Appellate Body stated in the first compliance proceeding that the proper Article 2.1 analysis should have involved "an identification of whether different tuna fishing methods in different areas of the oceans pose different risks to dolphins."[253] Mexico interprets this language to mean that the risk assessments must be done on "a fishery-by-fishery basis,"[254] and the Panels "erroneously limited their determination of the risk profiles to the seven examined tuna fishing methods."[255] In Mexico's view, by assessing the different fishing methods "on a worldwide basis," the Panels "effectively averaged" the overall relative risks, resulting in the "mask[ing]" or "hid[ing] of higher risk fisheries "within the worldwide risk profile for that method."[256] Mexico concludes the first part of its argument by claiming that, "it is clear from the design, architecture, and revealing structure of the measure and from the prior rulings of the Appellate Body" that the Panels erred by failing to undertake the proper analysis.[257] Mexico also asserts that the Panels' finding that "the eligibility criteria do not draw distinctions on a fishery-by-fishery basis" "is factually and legally incorrect."[258]

113. In the second part of its argument, set out in section V.C.1.a(2), Mexico appears to argue that the fishery-by-fishery comparison that it claims the DSB recommendation and rulings requires is applicable to the assessment of the eligibility criteria only, by framing the issue as to what tuna product should be "[p]ermitt[ed] access to the label."[259] (As discussed above, Mexico considers that the assessment of whether the certification and tracking and verification

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[251] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.522 (purse seine fishing without setting on dolphins), 7.520 (gillnet fishing), 7.523 (longline fishing), 7.521 (trawl fishing), 7.524 (handline and pole and line fishing).

[252] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.518.

[253] Mexico's Appellant Submission, para. 159 (quoting *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.84 (citing *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.155)).

[254] Mexico's Appellant Submission, para. 160.

[255] Mexico's Appellant Submission, para. 161; *see also id.* para. 166 ("[T]he Panels' conclusions erroneously reflect a comparison of risk profiles of different fishing methods, rather than a comparison of the risk profiles of different fishing methods in different ocean areas (i.e., fisheries).").

[256] Mexico's Appellant Submission, para. 164.

[257] Mexico's Appellant Submission, para. 166.

[258] Mexico's Appellant Submission, n.207.

[259] *See* Mexico's Appellant Submission, para. 167 ("Clearly, *fisheries (i.e., method and area) that have relatively higher risk profiles may be treated differently from those with relatively lower risk profiles*. The implications of the Panels' errors are illustrated most clearly by the Panels' own findings on gillnet fishing, longline fishing and trawling. As discussed below, the Panels disregarded that there are very high risks to dolphins caused by these methods in certain ocean areas. *Permitting access to the label* to tuna caught by such methods in those ocean areas contradicts and undermines the objective of the tuna measure to discourage fishing practices that adversely affect dolphins.") (emphasis added).

requirements are calibrated must be based, not on the risk of mortality and injury to dolphins, but on "the reliability of applicable systems."[260]) Mexico then claims that the Panels were wrong not to apply the calibration analysis in the manner it has described and deny eligibility to tuna produced from fisheries that, Mexico asserts, "have relatively higher risk profiles."[261] In this regard, Mexico refers to particular gillnet, longline, and trawl fisheries.

iii. Mexico's Appeal Should Be Rejected

114. Prior to engaging with the substance of Mexico's arguments, the United States observes that Mexico challenges various factual findings of the Panels with regard to "the risk profiles of individual fishing methods as used in different areas of the ocean" based on the available evidence on the record.[262] However, Mexico does not assert that those factual findings are incorrect in that they lack evidentiary support in a manner inconsistent with DSU Article 11. Rather, Mexico claims to make a legal appeal here regarding *the type* of findings the Panels made. But, as summarized in subsection (i), those factual findings of the Panels are clear – fishing methods used to catch tuna – gillnet, trawling, purse seine (without setting on dolphins), longline fishing, handlining, and pole-and-line fishing – *all present lower risk* to dolphins in terms of mortality and injury than does setting on dolphins in the ETP large purse seine fishery.[263] Accordingly, by not making Article 11 challenges, Mexico concedes that, for purposes of its appeals, these factual findings *are substantively correct*.[264]

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[260] *See supra* sec. III.B.1.

[261] *See* Mexico's Appellant Submission, paras. 167-170.

[262] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.517 ("Above, we have made findings about the risk profiles of individual fishing methods as used in different areas of the ocean. Specifically, we have considered the evidence on the record in respect of setting on dolphins, purse seine fishing without setting on dolphins, gillnet fishing, trawl, longline fishing, pole and line, and handline fishing. In assessing the risk profiles, we have taken into account both observable and unobservable harms caused by each of these fishing methods in different parts of the ocean.").

[263] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.525 ("[G]iven that none of the six methods we have assessed causes the kinds of unobservable harms to dolphins that setting on dolphins causes, and considering the important differences between setting on dolphins and each of the other six methods with respect to observable harms to dolphins, we conclude that, overall, the risk profile of setting on dolphins is much higher than that of each of the other six fishing methods used to catch tuna); *id.* paras. 7.520 (gillnet fishing), 7.494 and 7.521 (trawl fishing), 7.522 (purse seine fishing without setting on dolphins), 7.532 and 7.481 (longline fishing), 7.524 (handline fishing).

[264] In this regard, we note that in the absence of a DSU Article 11 claim, there is no basis to reevaluate a panel's factual findings. *See* DSU, article 17.12 ("The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding."); *China – GOES (AB)*, para. 184) (explaining that, because China raised only a legal appeal concerning the "application of the legal standard under Articles 3.2 and 15.2, read together with Articles 3.1 and 15.1, to MOFCOM's Final Determination," "there is no basis separately to consider whether the Panel, in assessing the significance of 'low price' in MOFCOM's Final Determination, conducted an objective assessment of the facts"); *cf. EC – Bed Linens (Article 21.5 – India) (AB)*, para. 93 ("All the same, in our view, an unappealed finding included in a panel report that is adopted by the DSB must be treated as a final resolution to a dispute between the parties in respect of the particular claim and the specific component of a measure that is the subject of that claim."); *DR – Cigarettes (AB)*, para. 79 ("Where participants challenging a panel's fact-finding under Article 11 have failed to establish that a panel exceeded the bounds of its discretion as the trier of facts, the Appellate Body has not interfered with the findings of the panel.") (citing other reports).

115. With that context in mind, we now explain that Mexico's appeal is without merit and should be rejected. First, Mexico's argument that risk profiles must be assessed exclusively on a "fishery-by-fishery basis," should be rejected for the reasons from which Mexico claims support, namely: (1) the design, architecture, and revealing structure of the measure and (2) the Appellate Body's guidance.[265] Second, Mexico's argument that the Panels' assessment "averaged" risk profiles of fisheries where the different fishing methods are used and thereby "masked" higher risk fisheries should be rejected because, in fact, the Panels' assessment reflected analysis of the risks to dolphins in all the individual fisheries for which there was evidence on the record.

116. First, Mexico's argument that risk profiles should be assessed exclusively on a "fishery-by-fishery basis" should be rejected because an exclusively fishery-by-fishery approach conflicts with the design, architecture, and revealing structure of the dolphin safe labeling measure.

117. As is well established, the eligibility criteria draw distinctions on a fishing method-by-fishing method basis, not on a fishery-by-fishery basis. Accordingly, under the measure, tuna product produced from setting on dolphins is ineligible for the label, *regardless of where the tuna was captured*. Similarly, tuna product produced from the other relevant fishing methods – *i.e.*, gillnet, handlining, longline fishing, trawling, pole-and-line fishing, and purse seine (without setting on dolphins) – can, potentially, produce tuna product eligible for the label (as long as no dolphin was killed or seriously injured in the capture of the tuna), *regardless of where the tuna was captured*. The Panels agreed with the United States on this point, finding that the U.S. measure "draw[s] distinctions on the basis of . . . different fishing methods," specifically between setting on dolphins, on the one hand, and the potentially eligible fishing methods, on the other.[266] Mexico does not appeal this factual finding.

118. Yet Mexico now argues that *the design* of the eligibility criteria is legally flawed and that, for the measure to be found even-handed, it must allow a fishery-by-fishery determination of eligibility. Mexico states that this conclusion is "legally" required, but provides no reason why this would be so.[267] And, of course, it is not so. In particular, nowhere in the two sets of DSB recommendations and rulings is there any indication that addressing this issue on a fishing method-by-fishing method basis is inconsistent with Article 2.1. To the contrary, although the eligibility criteria have been the central focus of the previous proceedings, they have never been

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[265] Mexico's Appellant Submission, para. 166 ("[I]t is clear from the design, architecture, and revealing structure of the measure and from the prior rulings of the Appellate Body that a calibration analysis in this instance requires the comparison of the risk profiles of the different fishing methods in different areas of the oceans. The Panels erred by failing to undertake such an assessment of risk profiles.").

[266] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.568 ("The Panels begin their analysis by noting that, *unlike the eligibility requirements*, the certification requirements (and the tracking and verification requirements, which we consider later in these Reports) draw distinctions on the basis of different fisheries, rather than different fishing methods.") (emphasis added); *see also id.* 7.532 ("[T]he eligibility criteria are the criteria pursuant to which tuna products made from tuna caught by (a) setting on dolphins and (b) driftnets in the high seas are disqualified from accessing a dolphin-safe label, while tuna products made from tuna caught by other fishing methods are provisionally eligible.").

[267] Mexico's Appellant Submission, n.207 ("Even if the measure did not apply the eligibility criteria on an ocean area basis, *legally* the calibration assessment must be undertaken on a fishing method and ocean area basis and, in certain circumstances, *requires* that the measure apply the eligibility criteria on an ocean area basis in order to be in compliance with Article 2.1.") (emphasis added).

found to support a finding of less favorable treatment under Article 2.1.

119. Further, as is the case with other of Mexico's appeals,[268] this argument directly conflicts with the design of the determination provisions. As the Appellate Body will recall, the determination provisions allow NOAA to adjust its certification requirements (and, under the 2016 IFR, the tracking and verification requirements) "in scenarios where the risks of harm to dolphins in the form of mortality or serious injury would be comparably high to those existing in the ETP large purse-seine fishery."[269] Yet Mexico now argues that Article 2.1 requires that all tuna product produced from such "comparably high [risk]" fisheries must be ineligible for the label, rendering any heightened certification and tracking and verification requirements meaningless. Mexico fails to explain why such an approach can possibly be legally required where it renders the design of this "integral part" part of the measure meaningless.[270]

120. Second, Mexico's appeal also should be rejected because the approach Mexico insists is required directly conflicts with the Appellate Body's analysis. There is no support in the Appellate Body's analysis in the previous two proceedings for what Mexico argues here – that the United States can only bring its measure into compliance with Article 2.1 by amending the design of the eligibility criteria such that the measure would allow the denial of eligibility of tuna product on a fishery-by-fishery basis rather than on a fishing method-by-fishing method basis as it does now (and, indeed, as it has done since its inception in 1990).

121. As discussed above, Mexico grounds its argument on its view that the Appellate Body's (and the Panels') use of the phrase "different areas of the oceans" means that "the analysis must consider the overall relative risks to dolphins on a fishery-by-fishery basis, taking account of both the fishing method and the ocean area."[271] And aside from simply repeating this phrase throughout its argument, Mexico cannot point to any reason why the Appellate Body meant that phrase to be interpreted so narrowly by both the United States (when deciding how to come into compliance) and a subsequent panel (in deciding whether the United States had, in fact, come into compliance). And, indeed, no such reason exists.

122. Proof of this can be found in the Appellate Body's analysis of the eligibility criteria in the first compliance proceeding. In that proceeding, the panel found that the eligibility criteria were even-handed based on the conclusion that setting on dolphins inside the ETP large purse seine fishery causes unobservable harms, on the one hand, while other fishing methods used outside

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[268] *See, e.g., supra* sec. III.B.1.c.

[269] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.185 ("At the outset, we note the Panel's statement that the determination provisions 'appear to be designed to enable the United States to impose conditions on fisheries other than the ETP large purse seine fishery where the conditions in the former approach those of the latter.'") (quoting *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.263 and the minority panelist at paragraph 7.280 as stating the determination provisions "enable the United States to impose the same requirements in fisheries where the same degree of risk prevails").

[270] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.181 ("Like the Panel, we see the determination provisions as 'an integral part of the certification system put in place by the amended tuna measure.'") (quoting *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.257).

[271] Mexico's Appellant Submission, paras. 159-160.

the ETP large purse seine fishery do not.[272] The Appellate Body reversed the panel's analysis. The Appellate Body found that by "focusing solely" on unobservable harms, the panel erred by not "consider[ing] the relative risks posed by the relevant fishing methods in respect of observed mortality or serious injury, and therefore did not resolve the questions of *the overall levels of risk* in the different fisheries and how those levels of risk compare to each other."[273] Yet the Appellate Body did not reverse the panel for failing to make the fishery-by-fishery comparisons of the type Mexico urges here, indicating that the Appellate Body did not reverse for the reason that Mexico's argument suggests it did, but rather because the panel's finding did not assess *both* observed and unobserved harms.[274]

123. Similarly, the Appellate Body's analysis as to why it could not complete the analysis in the first proceeding also confirms that Mexico's appeal is based on a misreading of the phrase "different areas of the oceans." In that section of the report, the Appellate Body made clear that, given the new requirements imposed by the 2013 Final Rule, the panel was required to engage in "a more thorough understanding of the relative risk profile *outside* [the ETP large purse seine] fishery as compared to the risks to dolphins *within* that fishery, and, in particular, the risks associated with setting on dolphins."[275] The Appellate Body's focus on "the differences in regulatory treatment inside and outside the ETP large purse-seine fishery" makes sense given that the question is whether the regulatory requirements (as they apply both inside and outside the ETP large purse seine fishery) are commensurate with the risk.[276] Ultimately, the Appellate Body concluded that it could not complete the analysis, but again, not because the first compliance panel had failed to make ultimate findings on a fishery-by-fishery basis, but because the panel had not made an assessment of the *overall risk* of harms to dolphins.[277]

124. Finally, Mexico is incorrect that the Panels' assessment did not reflect the risk profiles of fishing methods "in different areas of the ocean" but, rather reflected an "average" risk profile of the tuna fishing methods other than setting on dolphins in all ocean areas.

125. In fact, as summarized in subsection (i), the Panels considered and assessed the level of observable harms to dolphins in each fishery for which there was probative evidence on the record.[278] On this basis, the Panels drew conclusions about the risk of observable harms posed

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[272] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.161 ("In reaching this finding, the Panel appears to have focused solely on its understanding that the unobserved harms differed as between setting on dolphins and other fishing methods.").

[273] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.161 (emphasis added); *see also id.* para. 7.248 (stating that in "focusing solely on the narrower difference in the respective risks attributable to unobserved harms," the panel "never resolved the question of *the overall levels of risk in the different fisheries*") (emphasis added).

[274] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.161.

[275] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.251 (emphasis added).

[276] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.251, 7.253.

[277] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.253 ("For similar reasons, the Panel's limited analysis in respect of the relative risk profiles in turn constrains our ability to complete the legal analysis in this regard.").

[278] *See supra* sec. III.C.1.a.i; *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.332-334, 7.365-367, 7.383-385, 7.396-398 (making findings concerning levels of observable harms caused by purse seine fishing other than by setting on dolphins in the ETP, the WCPO, the Indian Ocean, and the eastern tropical Atlantic Ocean);

by the different fishing methods.[279] As to unobservable harms, the Panels' conclusions that none of the other fishing methods is capable of causing the sort of unobservable harms caused by dolphin sets apply to each and all of the fisheries where these fishing methods are employed.[280] Based on these intermediate findings, and on other relevant evidence concerning the fishing methods, the Panels drew conclusions about the risk profile of each tuna fishing method "as used in different areas of the ocean."[281] Mexico provides no support for its assertion that the Panels' findings concerning the tuna fishing methods were based on "averages" or "sampling."[282]

126. Further, Mexico identifies no fishery that is "masked" or "hidden" by such alleged averaging.[283] In section V.C.1.a(2), Mexico asserts that certain fisheries are "high risk."[284]

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id. paras. 7.440-444 (making findings concerning the observable level of harm in the four gillnet fisheries for which there was probative evidence on the record) *id*. paras. 7.466-471, 7.475 (making findings on the level of observable harms caused by longline fishing in fisheries in the Pacific, Atlantic, and Indian Oceans); *id*. paras. 7.488-494, 7.521 (making findings on levels of observable harm caused by trawl fishing in certain fisheries and finding evidence did not support findings on other fisheries); *id*. para. 7.511 ("[T] here is no evidence of handlining causing observable mortalities to dolphins"); *id*. paras. 7.514-515 ("There is no report of any dolphins being killed or seriously injured as a result of pole and line fishing.").

[279] *See supra* sec. III.C.1.a.i; *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.401 (concluding, based on findings on levels of observable harms in purse seine fisheries using purse seine fishing other than by dolphin sets, that "this fishing method has a relatively low risk profile in terms of both observed and unobserved mortality and serious injury"); *id.* para. 7.520 ("We have found that gillnet fishing poses high levels of observable harms to dolphins in certain areas of the ocean, but does not pose the same harms in other areas" and, in particular, in a number of fisheries, "the observable harms caused by gillnet fishing remained clearly below those caused by setting on dolphins in the ETP"); *id.* para. 7.475 (concluding, based on their review of the evidence, "that some longline fisheries present no known risks of observable harms to dolphins while in the ones that do present some level of risk, such levels are, in general, relatively low"); *id.* para. 7.494 (finding, with respect to trawl fishing, that "the evidence suggests that observed mortalities are very low in some fisheries and moderate in others" and that levels of unobserved mortality or serious injury are not "likely to be very high"); *id.* para. 7.511 (handlining); *id.* paras. 7.514-515.

[280] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.335, 7.370, 7.386, 7.399, 7.401 (purse seine fishing other than by setting on dolphins in the ETP, the WCPO, the Indian Ocean, the eastern tropical Atlantic Ocean and overall), 7.457 (gillnet fishing), 7.480 (longline fishing), 7.494 (trawl fishing), 7.500-511 (handlining), 7.515 (pole and line), 7.518 (all fishing methods other than setting on dolphins).

[281] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.517, 7.525; *see id.* para. 7.402 ("[W]hile purse seine fishing without setting on dolphins poses some risks to dolphins, the risk profile of this fishing method as used in different areas of the ocean is relatively low"); *id.* para. 7.522; *id*. paras. 7.457, 7.518, 7.520 ("[G]illnet fisheries can be particularly harmful to dolphins, but are not necessarily so in all areas of the ocean"); *id.* paras. 7.480, 7.523 (finding that "the rate of dolphin mortalities caused by [longlining] has been consistently low, with many years in different fisheries registering no known mortality or captures of dolphins" and that longline fishing does not cause unobservable harms); *id.* paras. 7.493-494 (finding, with respect to trawling, that "the evidence suggests that observed mortalities are very low in some fisheries and moderate in others", that any "unobserved mortality and serious injury" is "not . . . likely to be very high", and that, therefore, "the evidence establishes that trawling may pose some risk to dolphins" but is "a low-to-moderate risk fishing practice"); *id.* para. 7.521; *id.* para. 7.511 ("[T]he risk profile of handlining fishing is low"); *id.* para. 7.516 ("[O]n the basis of the evidence before us, we find that pole and line fishing poses no risk of observable or unobservable harms to dolphins. The risk profile of the fishery is accordingly very low.").

[282] *See* Mexico's Appellant Submission, para. 164.

[283] *See* Mexico's Appellant Submission, para. 164.

[284] *See* Mexico's Appellant Submission, paras. 168-170.

However, these assertions reflects Mexico's definitions of "high risk" (and misstatements of the Panels' analysis of the evidence), not the Panels' definition.[285] And Mexico's definition of high risk reflects arguments that the Panels rejected and that, as discussed throughout this submission are not consistent with the DSB recommendations and rulings in this dispute or with the objectives and structure of the dolphin safe labeling measure.[286] Therefore, none of the fisheries Mexico raises suggest that any fisheries were "masked" in the Panels' assessment.

127. Thus, contrary to Mexico's assertions, the Panels' analysis and assessment of risk profiles was appropriately designed and applied and reflected the risk profiles of the different tuna fishing methods, as used in different areas of the ocean. Mexico's appeal should be rejected.

b. Mexico's Claim that the Panels Erred in Using a "Single Benchmark" to Assess Whether the Measure Is Calibrated Should Be Rejected

128. In section V.C.1.b, Mexico claims that the Panels erred by analyzing whether the regulatory distinctions are calibrated by comparing the risks of harms to dolphins from setting on dolphins inside the ETP large purse seine fishery to the risks of harms to dolphins from other fishing methods used in different areas of the ocean. Mexico's appeal regarding the use of this "single benchmark" appears to apply primarily, if not exclusively, to the Panels' application of the calibration analysis to the eligibility criteria.[287] As explained below, the Panels' calibration analysis was entirely consistent with the applicable DSB recommendations and rulings. In contrast, Mexico's appeal is without support and should be rejected.

i. The Panels' Analysis

129. While Mexico only appeals particular paragraphs of the Panels' Reports,[288] Mexico's appeal appears to be a broad challenge to the Panels' calibration analysis. Accordingly, this section briefly reviews the Panels' analysis in this regard.

130. In Section 7.5.2 of their Reports, the Panels set out the applicable legal standard by following the Appellate Body's guidance in the first compliance proceeding. The Panels observed that the Appellate Body found that the calibration analysis– *i.e.*, the "assessment of

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[285] *See* Mexico's Appellant Submission, paras. 168-170 (referring to (1) Indian Ocean gillnet fisheries, (2) alleged absolute mortalities caused by longline fishing in the Pacific Ocean; (3) evidence concerning dolphin mortality relative to PBR in one longline fishery; and (4) alleged per set mortality in a North Atlantic trawl fishery). As discussed further below in the context of Mexico's subsequent argument repeating these assertions, only the Indian Ocean gillnet fisheries meet the Panels' definition of "high risk," and the Panels found that the 2016 measure appropriately addresses the risks to dolphins in that fishery. *See infra* secs. III.C.2.d-e. The Panel rejected Mexico's exhibit relating to alleged absolute mortalities caused by longline fishing in the Pacific Ocean and the exhibit Mexico cites in relation to the North Atlantic trawl fishery. *See infra* sec. III.C.2.d. The Panels fully explained their approach to Mexico's evidence relating to PBR. *See infra* secs. III.C.1.c.iii, III.C.2.d.

[286] *See, e.g., infra* sec. III.C.1.c.

[287] *See, e.g.*, Mexico's Appellant Submission, paras. 178, 179, and 181 (referring to permission to use the label).

[288] *See* Mexico's Appellant Submission, para. 191 (appealing the following paragraphs of the Panels' Reports: 7.517, 7.520-524, 7.169, 7.450, and 7.481).

whether . . . the differences in labelling conditions for tuna products containing tuna caught by large purse-seine vessels in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods in other fisheries, on the other hand, are 'calibrated' to the differences in the likelihood that dolphins will be adversely affected in the course of tuna fishing operations by different vessels, using different fishing methods, in different areas of the ocean" – is of "special relevance" in this dispute.[289] In the Panels' view, this, and other statements by the Appellate Body "make clear that … the appropriate legal standard for the Panels to apply is one that focuses on the relationship between the risks posed to dolphins by different fishing methods in different areas of the ocean, on the one hand, and the relevant regulatory distinctions, on the other hand."[290]

131. As to the assessment of the facts, the Panels noted that the Appellate Body's guidance indicated that the Panels "need[ed] to undertake an evaluation of the overall levels of *relative risks* or levels of harms attributable to different fisheries, including in respect of both observable and unobservable harms."[291] Specifically, the Panels determined:

> In our view, an assessment of the overall levels of relative risks attributable to different fisheries, including in respect of both observable and unobservable harms, entails a comparison of the different risks to dolphins arising from the use of different fishing methods in different parts of the ocean. In particular, it entails an assessment of *the risks to dolphins posed by the fishing method predominately used by Mexico* (i.e. setting on dolphins in the large purse seine fishery in the ETP), which is ineligible for the dolphin-safe label, in comparison with *the risks to dolphins posed by other fishing methods in different parts of the ocean*. As a basis to conduct this comparison, we observe that we will need to establish the risk profiles of the relevant fishing methods in different areas of the ocean, taking into account data on both observable and unobservable harms.[292]

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[289] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.84 (citing *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.101).

[290] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.102.

[291] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.147 (emphasis added).

[292] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.149 (emphasis added); *see also US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.146 (noting that, with regard to the eligibility criteria in particular, that the Appellate Body had criticized the first compliance panel's analysis, in part, because that panel "had not put itself in a position to conduct an assessment of whether the 2013 Tuna Measure was even-handed in addressing the respective risks of setting on dolphins in the ETP large purse-seine fishery versus other fishing methods outside that fishery") (citing *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.249); *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.146 ("The Appellate Body explained that this was because, in the panel's assessment of the relative harms posed to dolphins by setting on dolphins versus other fishing methods, the compliance panel focused almost exclusively on the unobserved harms associated with different fishing methods. … In other words, the Appellate Body faulted the first compliance panel for conducting a narrow assessment of the relative risks posed by different fishing methods, in particular, because it failed to consider the relative risks arising from observed mortalities and serious injuries to dolphins.").

132. The Panels then applied that legal standard to their assessment of the facts.[293] They "considered the evidence on the record in respect of setting on dolphins, purse seine fishing without setting on dolphins, gillnet fishing, trawl, longline fishing, pole and line, and handline fishing," taking into account "both observable and unobservable harms caused by each of these fishing methods in different parts of the ocean."[294] The Panels then "compare[d] the method of setting on dolphins to each of the other six methods," in light of the fact that the issue before the Panels is whether:

> [T]he 2016 Tuna Measure, under which tuna products obtained *from tuna caught by setting on dolphins* is ineligible for the dolphin-safe label whereas *tuna products obtained from tuna caught by the other six methods* cited above are conditionally eligible for that label, is calibrated to different levels of risks posed to dolphins by different fishing methods in different areas of the ocean.[295]

The Panels ultimately concluded "that, overall, the risk profile of setting on dolphins *is much higher* than that of each of the other six fishing methods used to catch tuna."[296]

133. These findings then carried over to the Panels' legal analysis as to whether the regulatory distinctions, and, ultimately, the measure as a whole is calibrated, and, as such, consistent with Article 2.1.[297] Thus, for example, the Panels premised their legal analysis of the eligibility criteria on their earlier finding that "setting on dolphins is significantly more dangerous to dolphins than are other fishing methods," ultimately finding that "the eligibility criteria are appropriately calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean" based on any number of considerations.[298] Similarly, with regard to the certification requirements, the Panels found that, "[i]n the light of the ETP's special risk profile," the Panels found that the difference in certification requirements are calibrated because the distinction addresses "the relative risks posed to dolphins in the ETP large purse seine fishery on the one hand and other fisheries on the other hand in a way that is calibrated to, tailored to, and commensurate with the risk profiles of those fisheries."[299]

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[293] *See also US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.195 (noting that "an evaluation of the overall levels of relative risks attributable to different fisheries" is "a comparative assessment of the different risk profiles").

[294] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.517.

[295] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.517 (emphasis added).

[296] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.525 (emphasis added).

[297] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.84 (citing *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.155).

[298] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.539-540.

[299] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.606; *see also id.* para. 7.611 ("For all of these reasons, our opinion is that the certification requirements in the 2016 Tuna Measure address *the relative risks posed to dolphins in the ETP large purse seine fishery* on the one hand and other fisheries on the other hand in a way that is calibrated to, tailored to, and commensurate with the risk profiles of those fisheries. Accordingly, we consider that the different certification requirements are calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.") (emphasis added).

ii. Mexico's Appeal

134. As noted above, Mexico argues here that the Panels erred by analyzing whether the regulatory distinctions are calibrated by comparing the risks of harms to dolphins from setting on dolphins inside the ETP large purse seine fishery to the risks of harms to dolphins from other fishing methods used in different parts of ocean. Mexico argues that this use of "a single benchmark" is erroneous for three reasons.

135. First, Mexico claims that constructing the calibration analysis in such a way "nullifies the calibration analysis."[300] In Mexico's view, this is so "because, by definition, the risk profile of the fishery targeted by the measure can never better such a benchmark. A benchmark cannot be used to objectively assess the circumstances that constitute the benchmark itself."[301] Mexico claims that the Panels' analysis "is not focused on the overall relative risks or levels of harm to dolphins caused by different fishing methods in different areas of the oceans," but rather "whether the relevant regulatory distinctions are 'calibrated' to the relative risks to dolphins associated with the AIDCP dolphin-encirclement method in the ETP."[302] Instead, Mexico insists that the Panels were required to use "an independent and objective" benchmark, although Mexico considers that no single benchmark can be used for all fisheries.[303]

136. Second, Mexico alleges that the Panels erred by not assessing "each fishing method/ocean area" individually.[304] Mexico begins by re-asserting its position that the "mere fact" that risk to dolphins outside the ETP large purse seine fishery is lower than inside the fishery, does not mean that the regulatory distinctions are calibrated.[305] After making reference to mortality figures in particular fisheries, Mexico appears to simply repeat its earlier argument set out in section V.C.1.a of its appellant submission that the Panels erred in not finding the eligibility criteria inconsistent with Article 2.1 because it is not designed to determine eligibility on a fishery-by-fishery basis.[306]

137. Third, Mexico alleges that the Panels "erroneously narrowed the risk profile criteria" by focusing on the "kinds of harm" caused by setting on dolphins.[307] Specifically, Mexico contends that the Panels "further ingrain[ed] this single benchmark into the Panels' calibration analysis"

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[300] Mexico's Appellant Submission, sec. V.C.1.b(1) (heading), paras. 175-176.

[301] Mexico's Appellant Submission, para. 176.

[302] Mexico's Appellant Submission, para. 177.

[303] Mexico's Appellant Submission, paras. 179-180 ("Due to the differences in adverse effects that a given fishing method can cause in different ocean areas, it is impossible to apply a single benchmark across all fisheries for this calibration assessment.").

[304] Mexico's Appellant Submission, sec. V.C.1.b(2) (heading).

[305] Mexico's Appellant Submission, 181; *see also id.* ("If those regulatory distinctions permit tuna products to use the dolphin-safe label when, in fact, those products contain tuna that has been caught in a manner that adversely affects dolphins, the distinctions cannot be said to be even-handed.").

[306] *See* Mexico's Appellant Submission, paras. 184-185.

[307] Mexico's Appellant Submission, sec. V.C.1.b(3) (heading).

by focusing on those harms that are "unique" to setting on dolphins.[308] After mischaracterizing certain factual findings of the Panels, Mexico noted that the Panels had distinguished between different "kinds" of unobservable harms.[309] In Mexico's view, this analysis "resulted in the Panels omitting a comparative assessment of observable harms caused in various ocean areas where the fishing methods in those areas did not cause the same "kinds" of unobservable harms."[310] Specifically, the Panels' analysis "exclude[s] certain kinds of harms and certain harmful fishing methods from a direct comparison with the relative overall risks or levels of harm associated with the AIDCP-compliant dolphin encirclement fishing method in the ETP."[311]

iii. Mexico's Appeal Should Be Rejected

138. As noted above, Mexico's appeal in section V.C.1.b of its submission is yet another attempt to undermine the Panels' calibration analysis without directly challenging the factual findings that serve as the foundation for that analysis (as Mexico has not made DSU Article 11 appeals of those factual findings). Mexico claims that the Panels erred in comparing the risks of harms to dolphins from setting on dolphins inside the ETP large purse seine fishery to the risks of harms to dolphins from other fishing methods used in different parts of the ocean. Instead, of using this "single benchmark," Mexico claims that the Article 2.1 analysis *required* the Panels to have made the comparison using a variety of "independent and objective" benchmarks.[312] Each of Mexico's three arguments is without support, and Mexico's appeal should be rejected.

139. First, Mexico is wrong to argue that the Panels' approach "nullifies the calibration analysis" when comparing the relative risks to dolphins from setting on dolphins in the ETP large purse seine fishery and from other fishing methods in different parts of the ocean.[313] As the Panels recounted in their explanation of the applicable legal standard, the Appellate Body explicitly – and repeatedly – called for the Panels to undertake *this very analysis*.

140. The Appellate Body has stated that "'even-handedness' is a relational concept, and must be tested through a comparative analysis," in light of the fact that "[r]egulatory distinctions by definition treat groups of products differently."[314] "[I]t is only through scrutiny of the treatment accorded to all *the groups that are being compared* that a proper assessment of even-handedness can be made."[315]

141. Accordingly, "the treatment of *both groups* between which the measure's regulatory

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[308] Mexico's Appellant Submission, para. 186.

[309] *See* Mexico's Appellant Submission, para. 188.

[310] Mexico's Appellant Submission, para. 188.

[311] Mexico's Appellant Submission, para. 189; *see also id.* para. 190 ("The Panels' approach means that mortalities and serious injury can be inflicted on dolphins as long as they do not constitute the same 'kinds' of harm that have been attributed to the AIDCP-compliant dolphin encirclement method in the ETP.").

[312] *See* Mexico's Appellant Submission, paras. 179-180.

[313] Mexico's Appellant Submission, sec. V.C.1.b(1) (heading), paras. 175-176.

[314] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.125.

[315] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.125 (emphasis added).

treatment differs has to be appreciated."[316] Such an analysis "depends not only on how the risks associated with this method of fishing are addressed, but also on whether the risks associated with other fishing methods in other fisheries are addressed, commensurately with their respective risk profiles, in the labelling conditions that apply in respect of tuna caught in such other fisheries."[317] For this reason, the Appellate Body has stated that the comparison is between the "labelling conditions for tuna products containing tuna caught by large purse-seine vessels in the ETP, on the one hand, and for tuna products containing tuna caught in other fisheries," on the other hand, necessitating a comparison of those respective differences in risk.[318]

142. Under this analysis, if the Panels found that the labeling conditions differed *between* the ETP large purse seine fishery *and* other areas of the ocean but that the risks posed were the same, the Panels would have rightly determined the measure not to be calibrated.[319] Indeed, *it is on this basis* that the Appellate Body in the original proceeding found that the original measure was inconsistent with Article 2.1.[320] (Mexico, notably, does not claim that finding is in error.) Not surprisingly, Mexico itself has argued that the ETP large purse fishery is a proper comparator to determine whether the regulatory distinctions are even-handed, both in the previous compliance proceeding[321] and before the Panels.[322] Indeed, Mexico appears to argue in its appellant submission that the proper calibration analysis for the certification and tracking and verification requirements relies on a comparison between the regulatory requirements applicable in the ETP

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[316] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.126 (emphasis added).

[317] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.126.

[318] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.101; *see also id.* para. 7.251 (stating that the panel was required to engage in "a more thorough understanding of the relative risk profile *outside* [the ETP large purse seine] fishery *as compared* to the risks to dolphins *within* that fishery, and, in particular, the risks associated with setting on dolphins") (emphasis added); *id.* para. 7.249 (criticizing the first compliance panel's analysis for not putting that panel "in a position to conduct an assessment of whether the 2013 Tuna Measure was even-handed in addressing the respective risks of setting on dolphins in the ETP large purse-seine fishery *versus* other fishing methods outside that fishery") (emphasis added).

[319] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.160 ("If, for example, the Panel established that the risks posed to dolphins in the different fishing areas and by the different fishing methods are the same, then it may properly have reached the conclusion that treating them differently is not 'even-handed.'").

[320] *See 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.") (internal quotes omitted); *see also US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.122-123 (discussing same).

[321] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.112 ("Mexico sought to establish that tuna fishing methods other than setting on dolphins have substantial adverse effects and that dolphins face risks of mortality or serious injury from tuna fishing outside the ETP that *are equal to or greater than those posed to dolphins by fishing within the ETP*.") (emphasis added) (citing *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.111-112 that referred Mexico's Second Written Submission, paras. 248, 263).

[322] *See* Mexico's First Written Submission, para. 256 ("If the eligibility criteria *were properly calibrated*, they would result in the lowest risk profile of the five fishing methods being designated as 'eligible' (i.e., *AIDCP-compliant dolphin encirclement*) and the others being designated as 'ineligible.'") (emphasis added).

large purse seine fishery and those applicable in other fisheries.[323]

143. Therefore, Mexico's insistence that the Panels erred in these compliance proceedings by comparing the relative overall risk to dolphins from setting on dolphins in the ETP large purse seine fishery with the risks to dolphins from other fishing methods in other parts of the ocean is wholly without merit.[324]

144. Further, none of Mexico's explanations as to why the Panels' analysis "nullifies the calibration analysis" have any basis. Thus, as noted above, Mexico argues that by including the risks of setting on dolphins in the ETP large purse seine fishery, the Panels have rendered the second step of Article 2.1 *inutile* "because, by definition, the risk profile of the fishery targeted by the measure can never better such a benchmark."[325] But Mexico misunderstands the analysis. The question that the comparison seeks to answer is whether the respective regulatory requirements that apply to *both groups* of products – *i.e.*, tuna products produced from setting on dolphins in the ETP large purse seine fishery and tuna products produced from other fishing methods in different parts of the ocean – address the respective risks.[326] And it is not correct that the comparison mandates a particular outcome for tuna product produced from setting on dolphins in the ETP large purse seine fishery. The fact that such tuna product is ineligible for the label is entirely supported by the evidence on the record, as the Panels correctly found[327] (and which Mexico has not challenged).[328]

145. Second, Mexico is wrong to claim that the Panels erred by not assessing "each fishing

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[323] *See supra* sec. III.B.1 (addressing Mexico's argument in this regard and citing Mexico's Appellant Submission, para. 110 ("In the context of assessing the "calibration" of the relevant regulatory distinctions, this means that, for tuna caught in ocean areas with insufficient regulation, unreliable reporting, IUU fishing and transshipment at sea, stricter certification requirements and tracking and verification requirements are justified (and required) on the basis that they are calibrated to the higher relative risks of harms to dolphins. Consistent with this reasoning, tuna caught in ocean areas *with strong regulation, reliable reporting, no IUU fishing and no transshipment* may be subject to requirements that are less strict in some respects.") (emphasis added)).

[324] The Appellate Body's analysis of the determination provisions provides further evidence for this point. There, the Appellate Body stated that, to ensure even-handed treatment of different fisheries, the benchmark for applying the determination provisions should refer to the ETP large purse seine fishery. *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.257. But it would be entirely incongruent to require that the regulatory distinctions, including the certification requirements, be analyzed through a comparison that did not include the ETP large purse seine fishery, but then assess the consistency of the determination provisions, which "trigger a requirement *to provide certification* by observers," based on a comparison with the ETP large purse-seine fishery. *Id.* para. 7.254. In this regard, we note that Mexico has *not appealed* the Panels' finding that the ETP large purse seine fishery is the proper comparator for the determination provisions. *See generally* Mexico's Appellant Submission, para. 266 (discussing the 20-year average relied on by the Panels but not appealing the Panels' findings in this regard).

[325] Mexico's Appellant Submission, para. 176.

[326] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.122-123 (discussing Appellate Body's analysis in the original proceeding).

[327] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.532-547.

[328] *See* Mexico's Appellant Submission, para. 5 ("Mexico disagrees with the prior findings that tuna caught by AIDCP-compliant setting on dolphins in the ETP can be ineligible for the dolphin-safe label. However, this appeal does not focus on the denial of the label for Mexican tuna products. Rather, this appeal focuses on the access to the label that the measure grants to tuna products containing tuna that is not dolphin-safe.").

method/ocean area" individually.[329] As noted above, Mexico's argument in this regard appears to be identical to the argument it makes in section V.C.1.b of its appellant submission. Accordingly, this argument is without merit for the reasons explained above in Section III.C.1.a.iii, namely that the approach Mexico insists is required directly conflicts not only with the design, architecture, and revealing structure of the U.S. measure, but also with the Appellate Body's analysis in the first compliance proceeding.[330]

146. Third, Mexico is wrong to claim that the Panels "erroneously narrowed the risk profile criteria" in their assessment of the risk profile in its discussion of the "kinds of harm" caused by setting on dolphins.[331] To the extent that this argument relates to Mexico's "single benchmark" argument at all, Mexico has failed to establish that the Panels erred in their characterization or ultimate treatment of the evidence regarding the different harms to dolphins that different fishing methods are capable of causing.

147. The Panels considered, consistent with the Appellate Body's guidance, that in assessing the overall risk profiles, "*all variables* apt for measuring the nature and degree of observed and unobserved harms *are in principle relevant* to the determination of the risk profiles."[332] In the Panels' view, such variables would include: "the number of observed mortalities and serious injuries," the "nature and extent of any unobservable harms caused by different fishing methods," the "nature and extent of the interaction with dolphins of the fishing method," and "any other indicators that are helpful in describing the risks to dolphins arising from the use of different fishing methods in different areas of the ocean."[333] The Panels then considered all the relevant variables with respect to each of the fishing methods, based on the evidence presented by the parties.

148. Mexico's assertion that the way the Panels grouped the different types of harm caused by different fishing methods caused the Panels to "disregard[]" the effects of "ghost fishing" by gillnets and longline gear is incorrect.[334] In fact, the Panels found that Mexico's evidence concerning the risks of "ghost fishing" "[were] relevant to [their] assessment of the risk profile of gillnet fishing."[335] The Panels found that such harms "are not the *kind* of unobservable harms caused by setting on dolphins" that "may be inflicted even in cases where no dolphin is caught in

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[329] Mexico's Appellant Submission, sec. V.C.1.b(2) (heading).

[330] Additionally, we note that Mexico's assertion concerning the Irish trawl fishery is not supported by the evidence on the record. In fact, the Panels rejected the probative value of the exhibit to which Mexico refers and found that it does not suggest the risk profile of the trawl fishery in question. *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.490. Mexico's assertion concerning the WCPO purse seine fishery likewise does not reflect the best evidence, or the Panels' findings, on the current risk profile of that fishery.

[331] Mexico's Appellant Submission, sec. V.C.1.b(3) (heading).

[332] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.169 (emphasis added).

[333] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.169; *see also id.* para. 7.170 ("Bearing in mind our obligation to conduct an objective assessment of the matter, we will rely to the greatest extent possible on a quantitative analysis, and recur to a qualitative assessment in cases where this seems to be the most reasonable avenue to properly gauge and describe the risks at issue.").

[334] *See* Mexico's Appellant Submission, para. 188.

[335] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.449.

the net."[336] Nevertheless, such harms were potentially relevant as "observable" harms that "might typically not be *observed*" in connection with a particular gear deployment.[337] This does not mean, however, that the Panels considered that Mexico had shown that ghost fishing actually caused such harms at a significant level. In fact, the Panels found that, while some evidence suggested that "ghost fishing linked to gillnets poses some risks to dolphins, . . . its extent is unclear."[338] Indeed, the report Mexico presented itself stated, as the Panels found, that "the absolute numbers of marine mammals involved are relatively small."[339] These same findings applied in the context of longline fishing.[340]

149. Accordingly, Mexico's claim that the Panels' analysis "exclude[d] certain kinds of harms and certain harmful fishing methods from a direct comparison" with the harms caused by setting on dolphins in the ETP large purse seine fishery is without merit and should be rejected.[341] The Panels did not ignore any relevant evidence of harms to dolphins caused by tuna fishing – they simply did not agree with Mexico's interpretation of the evidence on ghost fishing.

150. Additionally, we note that Mexico "maintains its position" that, contrary to the Panels' findings, the evidence does not show that setting on dolphins can cause unobservable effects.[342] The purpose of this statement is unclear, as Mexico has not appealed the Panels' finding on this issue. We note, however, that both the original panel and the first compliance panels found that "the chase itself," which is an essential part of setting on dolphins, may cause "various adverse impacts . . . beyond observed mortalities" and that these may include "cow-calf separation, . . . as well as muscular damage, immune and reproductive system failures, and other adverse health consequences.[343] The Appellate Body rejected all of Mexico's DSU Article 11 appeals concerning these findings in the first compliance proceeding.[344] The Panels, based on a review of the evidence on the record, confirmed that "this evidence . . . establishes that setting on dolphins causes unobservable harms."[345] The Panels also found that "all dolphins chased and encircled in the ETP" – approximately 6 million dolphins per year – are "at risk of suffering unobservable harms."[346]

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[336] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.450.

[337] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.450.

[338] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.448.

[339] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.448.

[340] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.480.

[341] Mexico's Appellant Submission, paras. 189-190.

[342] *See* Mexico's Appellant Submission, paras. 187-188; in particular, *id.* n.231 (making the general observation – without making an appeal – that Mexico "maintains its position" that the previous DSB recommendations and rulings regarding the unobservable harms that setting on dolphins causes are based on "speculative hypotheses" and are without "conclusive evidence").

[343] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.260.

[344] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.269.

[345] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.308.

[346] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.310.

c. Mexico's Claim that the Panels Relied on Deficient or Incomplete Risk Factors Should Be Rejected

151. In section V.C.1.c of its appellant submission, Mexico appeals paragraphs 7.200-206 and 7.211-214, paragraph 7.473, paragraph 7.195, and paragraphs 7.107-110.[347] In these paragraphs, the Panels: (1) accept the U.S. argument that it was appropriate to adopt a per set methodology to compare harms across different fisheries;[348] (2) reject Mexico's proposed PBR metric;[349] (3) reject Mexico's proposed "absolute levels of adverse effects" metric;[350] and (4) reject Mexico's argument that the "reliability" of other applicable certification and tracking systems are elements of the "risk profile of different fisheries."[351]

152. Mexico claims that each of the Panels' analyses and findings amount to legal error, although Mexico's first claim of legal error as to the per set metric appears to be a mischaracterized DSU Article 11 challenge. In any event, as discussed below, all of Mexico's arguments are without merit and should be rejected. The United States begins with a summary of the Panels' analysis and then addresses each of Mexico's four appeals thereafter.

i. The Panels' Analysis

153. Section 7.7 of the Panel Reports sets out the factual findings of the Panels. The first issue that the Panels considered in this section was "the appropriate methodology" to use in conducting the Article 2.1 analysis set out by the Appellate Body in the first compliance proceeding, namely "an evaluation of the overall levels of relative risks associated with different fisheries, including in respect of both observable and unobservable harms."[352] The Panels first summarized the approaches presented by the parties and then analyzed the appropriateness of the possible alternatives and decided on their approach.

154. As the Panels, explained, the United States argued for a "mixed qualitative and quantitative assessment based, in part, on a standardized per-gear-deployment assessment of observed dolphin mortalities in different fisheries.[353] Mexico, on the other hand, argued that the

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[347] Mexico's Appellant Submission, para. 225. The United States observes that Mexico further claims to appeal paragraph 7.256 of the Reports where the Panels found that the risk caused by setting on dolphins "provide a kind of benchmark against which the degree of risk caused by other fishing methods in other areas of the ocean is assessed." However, Mexico advances no arguments concerning this appeal in section V.C.1.c of its appellant submission. To the extent that Mexico's citation to this paragraph relates to Mexico's arguments in section V.C.1.b of its appellant submission, the United States has fully addressed Mexico's arguments in the previous section of this submission.

[348] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.200-206, 7.211-214. We have assumed that Mexico's reference to "7.211-114" is a typographical error. *See* Mexico's Appellant Submission, para. 225.

[349] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.473.

[350] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.195.

[351] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.107-110.

[352] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.164; *see US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.161.

[353] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.166-167, 7.196-199.

assessment must be based on one of two "standardized benchmarks," either on numbers of observable dolphin mortalities relative to PBR for each dolphin stock affected by a fishery[354] or on the "overall adverse effects" caused by tuna fishing by different methods (either globally or in different areas).[355] However, with respect to the certification and tracking and verification requirements, Mexico argued that the Panels must also consider the levels of "regulatory oversight" in different countries.[356] The Panels agreed that they should use a "standardized benchmark so that comparisons across studies are meaningful and adequate" and proceeded to assess the benchmarks proposed by the parties.[357]

155. With respect to a PBR methodology, the Panels noted that, by its nature, PBR "is more concerned with the sustainability of a stock than with the effects of fishing on individual dolphins."[358] The 2016 measure, by contrast, is "concerned with the protection of the well-being of dolphins" and "informing consumers whether the tuna used in . . . particular tuna products was caught in a set that harmed dolphins" and not directly with "the protection of the population levels of dolphins."[359] Therefore, it is "difficult to reconcile" a PBR methodology with the objectives of the 2016 measure, because the metric "tolerates the existence of mortalities" – potentially high levels of mortalities – if they are sustainable from a population perspective.[360] Conversely, such a metric could give great importance to very low levels of mortality if the PBR of an affected stock was low.[361] The metric also "sits uncomfortably with the design and structure" of the measure, which distinguishes in part based on fishing method (not possible with PBR) and is "concerned with the mortality and serious injury of individual dolphins, on a per set basis, rather than with the overall sustainability of dolphin stocks."[362] Therefore, the Panels declined to use a PBR methodology to assess overall relative risk profiles in general and later declined to rely on such a methodology in the context of the two particular fisheries.[363]

156. With respect to the "absolute levels of adverse effects" methodology, the Panels noted that the Appellate Body has "already clarified" that the correct legal analysis requires "an evaluation of the *overall levels of relative risks* attributable to different fisheries, including in

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[354] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.172, 7.175-177. Mexico did not specify what the relationship between observable dolphin mortalities and PBR for each affected stock should be for a fishery to be considered high risk. *Id.* The cut-off point clearly is not PBR, since Mexico has argued that fisheries where mortality is "close to" PBR for any stock should be treated as high risk. *E.g.*, *id.* para. 7.473. As noted below, Mexico does not propose a standard in its appellant submission either. Mexico's Appellant Submission, para. 215.

[355] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.172, 7.175-177.

[356] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.107.

[357] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.171.

[358] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.185.

[359] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.186-187.

[360] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.188-189.

[361] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.473.

[362] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.190.

[363] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.473.

respect of both observable *and* unobservable harms."[364] A methodology that relies on "the absolute levels of adverse effects on dolphins" is not appropriate to a "comparative assessment" of risk profiles of fisheries because it would not "deal with the issue of how to compare the levels of adverse effects on dolphins arising from different fishing methods in different areas of the ocean, or contextualize them in light of the relative extent and intensity to which different fishing methods are used."[365] The Panels therefore declined to rely on this methodology.

157. With respect to a per set methodology, the Panels found that the evidence on the record showed that the UN Food and Agriculture Organization (FAO) regarded a per set methodology based on observer data extrapolated to a fishery overall as one of the two "most common methods" used to estimate bycatch in tuna fisheries.[366] The evidence also showed that "several RFMOs," including the IATTC, the WCPFC, and the IOTC use this methodology.[367] The Panels therefore concluded that the methodology "is a scientifically accepted metric widely used by RMFOs and scientists around the world for assessing risk levels in various fisheries."[368]

158. With respect to Mexico's arguments, the Panels found that Mexico submitted "no evidence showing that the differences between fisheries have an important impact on the comparison of dolphin mortalities or serious injuries on a per set basis, which would render such comparison scientifically unsound or would lead to an unreasonable result."[369] To the contrary, the "per set methodology uses a standard metric, that is, a unit of effort in each of the fisheries, that may contribute in controlling for the differences across fishing methods."[370] Additionally, in contrast to a PBR methodology, the per set metric "sits comfortably with the design and structure" of the 2016 measure, components of which are "generally applied on a per gear deployment basis."[371] The Panels also noted that a per set approach would be "only one of the inputs in establishing the risk profile of a fishery," as levels of observable mortalities do not cover all aspects of a fishery's risk profile.[372] On this basis, the Panels found it was appropriate to rely in part on a per set methodology in assessing the overall relative risk levels of different fisheries, while relying on other "available data" when per set data are not available.[373]

159. The Panels then conducted an extensive analysis of Exhibit US-179 Rev., which is "a compilation of the data of the main exhibits on the record regarding harms caused to dolphins by

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[364] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.195.

[365] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.195.

[366] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.206.

[367] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.207-209.

[368] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.210.

[369] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.211.

[370] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.211.

[371] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.213.

[372] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.212.

[373] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.214.

different fishing methods in different areas of the ocean."[374] The Panels devoted twenty-four paragraphs to summarizing and analyzing Mexico's various attempts to undermine the reliability of Exhibit US-179 Rev., ultimately finding that all of Mexico's arguments lacked merit.[375] On this basis, the Panels concluded that, "as a general matter," it could, and would, rely on the information set out in Exhibit US-179 Rev. in their "assessment of the overall levels of relative risks posed to dolphins by different fishing methods in different areas of the ocean."[376] None of the Panels' findings concerning the reliability of Exhibit US-179 Rev., or the Panels' subsequent findings confirming the reliability of different data points set out therein, have been appealed.[377]

160. As discussed previously, the Panels had already rejected Mexico's arguments that the risk profiles should reflect "the reliability of applicable systems."[378]

ii. Mexico's Claim Concerning Reliance on Per Set Methodology Should Be Rejected and Is Not Properly Raised as a Legal Appeal

161. In section V.C.1.c(1) of its appellant submission, Mexico argues that the Panels erred in "relying on the per set methodology" to evaluate risk profiles, while "ignoring the weaknesses" of that approach and in "disregarding the other measurements even when per set data was not available."[379] Under this general rubric, Mexico devotes a significant portion of its argument to summarizing factual criticisms of Exhibit US-179 Rev. that the Panels rejected.[380] Mexico also summarizes the Panels' rejection of its argument that a per set metric cannot be used to compare levels of dolphin mortality across fisheries.[381] Mexico then alleges that the Panels "disregarded" the per set metric in assessing the risk profile of certain gillnet fisheries although, at the same time, alleging that, because per set mortality levels were "available only for a few minor tuna gillnet fisheries," the Panels "relied on a very small sample as the basis for its analysis of the risk profile of gillnet fishing."[382] Mexico also alleges that the Panels "identified a trawl fishery with a much higher per 1,000 set number than the ETP" but then "relied on anecdotal information to conclude that trawl fishing has a 'low-to-medium' risk profile."[383]

162. Mexico's arguments in this section are incorrect and should be rejected. First, the Panels did not "ignor[e]" any "weaknesses" of a per set metric. Second, the Panels did not "disregard

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[374] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.217. The exhibit consists of three tables, including one showing "the observed mortality, per set, of dolphins in various fisheries." *Id.* para. 7.218.

[375] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.219-243.

[376] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.243.

[377] *See* Mexico's Appellant Submission.

[378] *See supra* secs. III.B.1, III.B.2.

[379] Mexico's Appellant Submission, paras. 195, 201.

[380] *See* Mexico's Appellant Submission, paras. 197-198.

[381] Mexico's Appellant Submission, para. 199.

[382] Mexico's Appellant Submission, para. 200.

[383] Mexico's Appellant Submission, para. 200.

other measurements" relevant to the overall risk profile of different fishing methods in different ocean areas. Third, Mexico's arguments do not constitute legal claims, but rather claims that relate to the Panels' appreciation of the facts and evidence on the record.

163. First, Mexico has put forward no evidence that the Panels "ignor[ed]" even any *alleged* weaknesses of a per set methodology, let alone any actual weaknesses.

164. With respect to the Panels' assessment of Exhibit US-179 Rev., Mexico does not identify even a single criticism that the Panels "ignored." Indeed, Mexico concedes that "[t]he Panels rejected ***all*** of Mexico's arguments and found that every aspect of the U.S. chart was reliable."[384] Mexico has not appealed any of these findings.[385]

165. With respect to Mexico's argument that the Panels "ignored" its argument concerning cross-fishery comparison of per set data, Mexico fails to show that the Panels ignored Mexico's argument or that the argument established a "weakness" in the per set approach. As Mexico acknowledges, the Panels fully addressed Mexico's argument on this point and rejected it.[386] Specifically, the Panels found that Mexico had identified "no evidence" suggesting that comparison across fisheries is "scientifically unsound or would lead to an unreasonable result."[387] The Panels agreed with Mexico that fishing methods differ in various ways, but disagreed that this undermined the appropriateness of a per set comparison. This was because, as the Panels explained, although fishing methods differ,

> [O]bservable dolphin mortalities and injuries caused by tuna sets are comparable across fisheries for purposes of assessing the relative risk to dolphins posed by different fishing methods in different parts of the ocean and the operation of the Tuna Measure because they refer to the same unit of fishing effort consisting of a single operation of the fishing gear used in the particular fishery. Thus, regardless of the duration, type of gear or other variables that may describe a fishing method, a per set comparison focuses on a common denominator among fishing methods: a unit of effort.[388]

166. Thus, while the Panels stated that a per set approach "may be" "imperfect," the reasons underlying their statement were *not* those alleged by Mexico, which the Panels rejected.[389]

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[384] Mexico's Appellant Submission, para. 198 (emphasis added); *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.219-243; *see also id.* paras. 7.347-364.

[385] *See* Mexico's Appellant Submission; Mexico's Notice of Appeal.

[386] Mexico's Appellant Submission, para. 199.

[387] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.211.

[388] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.211.

[389] In this regard, we note that Mexico is incorrect that the method has not been used for cross-fishery comparisons or that the Panels "acknowledged" that this was the case. *See* Mexico's Appellant Submission, para. 199. In fact, the Panels simply found that "that the mere fact that this might not have happened in the past is not enough to conclude that it would be inappropriate to do so in this particular case." *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.211. Thus, the Panels did not find that cross-fishery comparisons of per set data had not happened in the past but, rather, that whether it had or not was not determinative of whether it would be appropriate to conduct such comparisons in this dispute. And, in fact, scientists have compared per set levels of

Rather, the Panels noted that a per set metric "[does] not describe all the relevant aspects of the risk posed to dolphins by a particular fishing method."[390] Therefore, a per set analysis was "only one of the inputs" in the Panels' analysis of the "overall risk profile" of different fisheries. Additionally, as the Panels explained, they had to consider "other factors, such as the level of interactions with dolphins, the necessity for a particular method to interact with dolphins, and the existence and extent of unobservable harms."[391] As with Mexico's arguments concerning the Panels' review of Exhibit US-197 Rev, therefore, Mexico identified no "weakness" in the per set metric before the Panels and now identifies no "weakness" that the Panels "ignored."

167. Second, Mexico is incorrect that the Panels "largely disregarded" a per set measurement in their assessment of the risk profile of gillnet or trawl fishing in different ocean areas.[392] As the Panels themselves explained, they relied on per set data so far as it was available but did not decline to consider the risk profile of a fishery simply because no per set data for that fishery were available. Rather, in that situation, the Panels looked to other relevant and probative evidence to make their assessment.[393]

168. With respect to trawl fishing, Mexico is wrong to suggest that the Panels ignored relevant per set data or did not rely on per set data in their assessment. First, Mexico is wrong that the Panels "identified a trawl fishery with a much higher per 1,000 set number than the ETP."[394] In fact, the Panels explicitly found that the exhibit underlying Mexico's assertion, a Greenpeace article from 2004 describing events in 1999 and 2001, was "not . . . very probative."[395] Also, the exhibit did not actually present per set data. Rather, the Panels, in the course of their extremely thorough analysis of the evidence, calculated a per set figure, even though they found that the exhibit was not probative of the risk profile of the North Atlantic Irish trawl fishery.[396] Further, the evidence that the Panels found "most detailed" concerning trawl fishing consisted of per set observer data from *the very same Irish trawl fishery* a decade later (2010-2012).[397] Based on that evidence, and on per set data from an Australian trawl fishery, as well as scientific reports about the risk profile of trawl fishing in general, the Panels concluded that "the evidence suggests that observed mortalities are very low in some fisheries and moderate in others."[398]

169. With respect to gillnet fishing, Mexico's assertions appear to be contradictory. Mexico asserts both that the Panels "largely disregarded" the per set measurement for gillnet fisheries

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mortality across fisheries, as is clear from Exhibits MEX-28 and US-126. *See* U.S. Response to Panels' Question 7, para. 27 n.65.

[390] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.212.

[391] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.212.

[392] Mexico's Appellant Submission, para. 200.

[393] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.214.

[394] Mexico's Appellant Submission, para. 200.

[395] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.490, 7.494.

[396] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.490.

[397] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.491.

[398] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.489-493.

and that they relied too much on the per-deployment data that was available, which related to "a few minor tuna gillnet fisheries."[399] In fact, the Panels did exactly what they stated they would do, which was to rely on per set data so far as possible but to look to other relevant evidence where per set data was not available.[400] Therefore, the Panels relied on per set data when assessing the risk profile of the Northern Australia gillnet fishery, the California drift gillnet fishery, and the California set gillnet fishery but relied on absolute numbers of dolphin mortalities and an estimate that per set mortalities would be high in their assessment of the Indian Ocean Mixed-Target gillnet fisheries.[401]

170. Further, Mexico's suggestion that the Panels' analysis was based on "a very small sample" of gillnet fisheries is entirely unsupported by Panel findings or evidence.[402] In fact, gillnet fishing is not a major fishing method used to produce tuna and, in particular, is not used to produce tuna for the global tuna product market.[403] Consequently, as the Panels noted, it is not surprising that there is not much evidence on tuna gillnet fisheries.[404] Indeed, even the evidence that exists relates to fisheries that target multiple species, not just tuna.[405]

171. For all these reasons, Mexico has failed to show as a substantive matter that the Panels erred by relying on the per set methodology or in "inconsistently" departing from it.

172. Third, as is obvious from Mexico's arguments, Mexico's challenge here pertains to the Panels' appreciation of the facts, and Mexico errs in circumventing the standard of Article 11 of the DSU by simply claiming such errors are legal without a basis. The Appellate Body has been clear that there is a meaningful difference between issues that should be raised as legal appeals and issues that should be raised under DSU Article 11.[406] If the arguments raised in a claim of appeal "implicat[e] a panel's appreciation of the facts [or] evidence," the claim falls under DSU Article 11, while "the consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision" is properly a legal appeal.[407]

173. In this regard, appellants should not be able to evade the standard of Article 11 by simply characterizing allegations regarding the objectivity and factual basis of a panel's assessment as

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[399] Mexico's Appellant Submission, para. 200.

[400] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.433-434.

[401] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.441-443.

[402] *See* Mexico's Appellant Submission, para. 200.

[403] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.432; U.S. Second Written Submission, n.269.

[404] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.432.

[405] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.419 (referring to the Indian Ocean Mixed-Target Gillnet Fisheries); NMFS, California/Oregon Drift Gillnet Observer Program Observed Catch, (Exhibit USA-198) (showing that many species are targeted, including swordfish and mola); NMFS, California Set Gillnet Observer Program Observed Catch, (Exhibit USA-199) (showing that many species are targeted, including halibut, seabass, and mackerel).

[406] *EC – Fasteners (China) (Article 21.5) (AB)*, para. 5.46; *China – GOES (AB)*, para. 183.

[407] *EC – Fasteners (China) (Article 21.5) (AB)*, para. 5.46; *China – GOES (AB)*, para. 183; *US – Upland Cotton (AB)*, para. 399; *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 385.

legal appeals.[408] Mexico has not raised a DSU Article 11 appeal of any of the Panels' findings referred to in this section,[409] despite the facts that its arguments all concern the Panels' appreciation of the facts and evidence and that similar arguments in previous disputes have been considered as claims under Article 11 of the DSU.[410] Finally, in light of the arguments made above, Mexico has utterly failed to establish that the Panels' failed to make an "make an objective assessment of the matter before it, including an objective assessment of the facts of the case" for purposes of Article 11 of the DSU.[411]

174. For all these reasons, Mexico's arguments in section V.C.1.c(1) should be rejected.

iii. The Panels Were Correct Not To Rely on PBR to Evaluate Risk Profiles

175. In section V.C.1.c(2) of its submission, Mexico appeals paragraph 7.473 of the Reports, arguing that the Panels erred in "rejecting the use of PBR in evaluating risk profiles" of different fishing methods and fisheries.[412] As the Appellate Body will recall, PBR refers to "the maximum number of animals that may be removed from [a marine mammal] stock (such as dolphins) without affecting that stock's optimum sustainable population."[413]

176. Mexico begins its appeal by claiming that the Panels erred in declining to rely on a PBR methodology because such an approach was in conflict with the approach taken in previous proceedings.[414] In Mexico's view, the original panel "considered the concept of 'adverse effects' on dolphins to include harms threatening the sustainability of dolphin populations."[415] Next, Mexico claims that excluding the sustainability of dolphin populations is "arbitrary" in light of the objectives of the measure, arguing that the Panels' "did not adequately explain" why harms "threatening [a] dolphin population . . . could be considered not to be adversely affecting

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[408] *See Canada – Wheat Exports and Grain Imports (AB)*, paras. 176-178; *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 385.

[409] *See* Mexico's Appellant Submission; Mexico's Notice of Appeal.

[410] *See, e.g., India – Solar Cells (AB)*, paras. 5.27-29 (considering a claim that "the Panel failed to consider 'the fundamental characteristics of solar cells and modules' and disregarded India's argument that solar cells and modules 'are indistinguishable from solar power generation', and hence failed to make an objective assessment of the matter before it"); *id.* paras. 5.30-31 (considering a claim that the panel "erred by summarily dismissing [the appellant's] argument that solar cells and modules can be characterized as 'inputs' for solar power generation"); *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.210 (considering a claim that the panel "arriv[ed] at a factual finding that is unsupported by the evidence on the record").

[411] As explained further in Section III.C.4.f.i below, to establish a successful claim under DSU Article 11, an appellant must show that the panel committed "an egregious error that calls into question [its] good faith." *See EC – Hormones (AB)*, para. 133. In particular, a panel "does not err simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it." *See US – Tuna II (Mexico) (AB)*, para. 272; *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.191.

[412] Mexico's Appellant Submission, paras. 202-216.

[413] *US – Tuna II (Article 21.5 – Mexico) (Panels)*, para. 7.175.

[414] Mexico's Appellant Submission, paras. 205-211.

[415] Mexico's Appellant Submission, para. 207.

dolphins."[416] In this regard, Mexico alleges that the Panels "made no attempt to justify" their decision not to rely on evidence allegedly showing the existence of "mortalities that *do* endanger the population of dolphins in particular fisheries."[417] Finally, Mexico suggests that the Panels' "characterization" of the objectives of the measure is wrong because it is "contradicted" by the measure itself.[418] In Mexico's view, if the Panels' finding on the objectives were correct, any fishing method "capable of harming a dolphin" must be ineligible for the label.[419] As explained below, Mexico's arguments should be rejected.

177. Mexico's first argument that the Panels erred in their conclusion regarding the applicability of PBR to this dispute because such a conclusion is inconsistent with previous reports in this dispute is without merit.

178. In fact, the Panels adopted the correct approach here, and one consistent not only with the obligation to "make an objective assessment of the matter," but with the DSB recommendations and rulings applicable in this dispute as well. As the Panels explained, relying on a PBR metric is not compatible with addressing the "overall levels of relative risks" to *dolphins* in different fisheries because it focuses, not on the "likelihood that dolphins would be adversely affected in the course of tuna fishing operations," but on the effect that dolphin mortalities have on a particular dolphin stock.[420] Thus, huge numbers of dolphin mortalities in one fishery may be tolerated while *de minimis* levels in another are deemed unacceptable. For much the same reason, a PBR approach is not compatible with the objective of the 2016 measure being to protect "individual dolphins" rather than "dolphin populations,"[421] which has been established to be a legitimate objective.[422] Further, a PBR methodology "sits uncomfortably with the design and structure" of the 2016 measure, which draws distinctions in part based on fishing *method* and which requires certification and tracking on a per set basis, thus depending on the frequency of fatal interactions and not on effects on the "sustainability of dolphin stocks."[423]

179. Such an approach is entirely consistent with the approach of the Appellate Body in the first compliance proceeding, which found – consistent with the DSB recommendations and rulings in the original proceeding – that whether the measure is even-handed depends on whether its distinctions are calibrated to the "observed and unobserved adverse effects *on dolphins*"

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[416] Mexico's Appellant Submission, paras. 212-213.

[417] Mexico's Appellant Submission, para. 215.

[418] Mexico's Appellant Submission, para. 214.

[419] Mexico's Appellant Submission, para. 216.

[420] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.188-189, 7.473.

[421] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.186-187.

[422] *US – Tuna II (Mexico) (Panel)*, para. 7.444 (finding that "the objectives of the US dolphin safe provisions, as described by the United States and ascertained by the Panel, are legitimate" for purposes of Article 2.2); *US – Tuna II (Mexico) (AB)*, paras. 334-339 (rejecting Mexico's appeal in this regard); *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.541 (finding that the objectives of the measure fall within under Article XX(g)); *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.284 (noting that Mexico did not challenge this finding on appeal).

[423] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.190.

caused by tuna fishing by different methods in different ocean areas.[424] The Appellate Body, again citing the original proceeding, also explained the critical inquiry as whether the distinctions of the measure are "calibrated to the *likelihood* that *dolphins would be adversely affected* in the course of tuna fishing operations in different fisheries."[425] Several times, the Appellate Body criticized the first compliance panel for failing to assess the "respective risks to dolphins," in terms of "observed and unobserved" mortality and serious injury in different fisheries.[426] By contrast, the Appellate Body *never* faulted the panel for not assessing the risks to dolphin populations nor ever mentioned dolphin populations as part of the Article 2.1 analysis.[427]

180. Thus, the Panels' approach is not only correct, it is consistent with – indeed is strongly supported by – the previous DSB recommendations and rulings applicable to this dispute.

181. Additionally, Mexico's specific claim that the Panels' reasoning is inconsistent with the original panel's analysis is incorrect. Mexico asserts that the original panel "considered the risks or levels of harm to dolphins . . . in terms of dolphin 'populations.'"[428] In support of this assertion, Mexico cites the Appellate Body's statement in the original proceeding that "the *risks* faced by dolphin populations in the ETP are *not* [unique]."[429] However, neither this paragraph nor the underlying paragraphs of the panel report support Mexico's argument. Indeed, the remainder of the paragraph refers to harm "to *dolphins*" not to dolphin populations, as do the paragraphs of the original panel report.[430] In particular, paragraph 7.552, explains that a report on "the most significant threats to cetaceans . . . contains multiple examples of *numerous dolphins* being killed annually in other fisheries."[431] Thus, it is far from clear that the original panel is referring to "dolphin populations" in the sense of dolphin stocks. Rather, the more natural reading, in context, is that the original panel was referring simply to risks to groups of dolphins in different areas.

182. This interpretation is confirmed by the surrounding paragraphs of the Appellate Body report in the original proceeding. In those paragraphs, the Appellate Body explained that the relevant assessment of the measure is whether it "addresses" the "observed and unobserved adverse effects on dolphins" of setting on dolphins and other fishing techniques.[432] In describing the appropriate analysis, the Appellate Body repeatedly reiterated that the relevant inquiry is whether the "adverse effects *on dolphins*" or the "risks *to dolphins*" are addressed and specifies that the relevant "adverse effects" are "mortality (observed or unobserved)" arising from various

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[424] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.110, 7.122, 7.162, 7.245-251 (emphasis added).

[425] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.101, 7.157, 7.239, 7.288, 7.325, 7.330 (emphasis added).

[426] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.161-162; *see also id.* paras. 7.243-244, 7.245-247, 7.248-251.

[427] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.101, 7.108-111, 7.155-157, 7.245-253.

[428] *See* Mexico's Appellant Submission, para. 207.

[429] *See* Mexico's Appellant Submission, para. 208 (citing *US – Tuna II (Mexico) (AB)*, para. 288).

[430] *US – Tuna II (Mexico) (AB)*, para. 288 (citing *US – Tuna II (Mexico) (Panel)*, para. 7.552, 7.617).

[431] *US – Tuna II (Mexico) (Panel)*, para. 7.552.

[432] *See US – Tuna II (Mexico) (AB)*, paras. 287-289.

fishing methods.[433] The Appellate Body in the first compliance proceeding confirmed that this is the appropriate analysis.[434] Thus, the paragraphs Mexico cites do not support this contention and, read in context, refute it.

183. The other paragraphs of the original panel report that Mexico cites similarly do not support the assertion that the original panel considered the sustainability of dolphin populations as part of the "adverse effects" on dolphins relevant to the calibration analysis. First, the original panel was not conducting an Article 2.1 analysis *at all*; it was conducting an Article 2.2 analysis that the Appellate Body reversed but relied on, in part, in its own Article 2.1 analysis.[435] Therefore, the first articulation of the "adverse effects" relevant to the calibration analysis was in the Appellate Body report in the original proceeding. And in that report, the Appellate Body made it clear that the relevant analysis is whether the measure "addresses the adverse effects *on dolphins*," described as "mortality (observed or unobserved)," arising from different fishing methods in different ocean areas.[436] Second, many of the paragraphs Mexico cites[437] simply confirm that the objective of the 2016 measure is reducing "observed and unobserved mortalities and serious injuries to individual dolphins" and that, to the extent population sustainability "may be considered" an objective of the measure, it is "indirect," *i.e.*, due to a relationship between reducing "adverse effects" on individual dolphins and conserving dolphin populations.[438]

184. Thus, Mexico's argument that the Panels' finding was inconsistent with the original panel report should be rejected.

185. Mexico's second argument – that not relying on a PBR methodology was "arbitrary" in light of the objectives and structure of the 2016 measure and that the Panels' failed to explain

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[433] *See US – Tuna II (Mexico) (AB)*, paras. 285, 287, 289, 292-293, 295-297.

[434] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.250-253.

[435] *See US – Tuna II (Mexico) (AB)*, paras. 282-297, 407(c).

[436] *See US – Tuna II (Mexico) (AB)*, para. 297.

[437] *See* Mexico's Appellant Submission, paras. 209-210.

[438] *See US – Tuna II (Mexico) (Panel)*, paras. 7.419-420 (rejecting Mexico's argument that the measure's objective was, "in fact, to preserve dolphin stocks" and quoting the U.S. explanation that the measure is seeking "generally to reduce the adverse effects of setting on dolphins," which "*might also be considered* as seeking to conserve dolphin populations"); *id.* paras. 7.485-486 (quoting the same U.S. response to a question and concluding that "the adverse effects on dolphins targeted by the [measure] . . . relate to observed and unobserved mortalities and serious injuries to individual dolphins in the course of tuna fishing operations" and that the U.S. objectives "also incorporate, at least *indirectly*, considerations regarding the conservation of dolphin stocks"); *id.* para. 7.490 (reiterating that the "adverse effects on dolphins" targeted by the U.S. measure "encompass observed as well as unobserved deaths and injuries, with the understanding that . . . this *may be considered* to also seek to conserve dolphin populations"); *id.* paras. 7.550-551 (stating that the original measure seeks to "address adverse effects of fishing techniques on dolphins in the form of observed or unobserved mortality" and that this "intention . . . is not subordinated to considerations relating to the conservation of depleted dolphin stocks"); *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.528 (noting the final of the original panel that the "adverse effects on dolphins targeted by the [measure] . . . relate to observed and unobserved mortalities and serious injuries to individual dolphins in the course of tuna fishing operations" and "[i]n addition … to the extent that addressing such adverse effects 'might also be considered as seeking to conserve dolphin populations', the US objectives also incorporate, at least indirectly, considerations regarding the conservation of dolphin stocks").

their approach – is also without merit.[439] In fact, the Panels fully explained the basis of their decision not to rely on a PBR methodology or on evidence relating to PBR in areas of the Pacific and Atlantic oceans in light of the objectives and structure of the measure.

186. First, Mexico is wrong that the Panels did not explain why the effect of mortalities on a dolphin stock is distinct from the "adverse effects on dolphins" that must be assessed as part of the calibration analysis.[440] As the Panels found, because "[a] PBR methodology prioritizes the sustainability of the population rather than the well-being of individual dolphins,"[441] it would "overlook mortalities that do not endanger the population of dolphins in a particular fishery," as well as all "unobservable effects that do not have population-level consequences."[442] On the other hand, "the PBR level of a particular dolphin stock is not necessarily indicative of the number of dolphins killed" in a particular fishery.[443] Therefore, if PBR stocks are low "even a few mortalities per year" might affect sustainability, even if the "likelihood" of an individual dolphin suffering mortality or serious injury in that fishery is very small.[444] Therefore, effects on dolphin stocks are not the same as – or even necessarily correlated with – the adverse effects on *dolphins* that the appropriate calibration assessment concerns.

187. Second, Mexico is wrong that the Panels failed to explain why they decided not to rely on a PBR metric to assess the Hawaii and Atlantic longline fisheries.[445] In fact, the Panels' explanation that, where PBR for a particular stock is very low the relationship between observable mortalities and PBR is "not necessarily indicative" of the level of dolphin mortality, related specifically to these two fisheries (both of which have exhibited very low levels of observable dolphin mortality).[446] Therefore, as the Panels explained, the PBR evidence Mexico raised was not "apposite for . . . determining . . . the risks facing dolphins at an *individual* level," as relevant to the calibration analysis.[447] Similarly, Mexico is wrong that the Panels' "disregarded the Appellate Body's direction" in coming to this conclusion.[448] Rather, as discussed above, the Appellate Body in both previous proceedings emphasized that the key assessment concerns "the likelihood that *dolphins* would be adversely affected in the course of

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[439] *See* Mexico's Appellant Submission, para. 213; *see also id.* para. 215.

[440] *See* Mexico's Appellant Submission, para. 213.

[441] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.188.

[442] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.189.

[443] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.473.

[444] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.473.

[445] *See* Mexico's Appellant Submission, para. 215.

[446] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.473; *see also id.* para. 7.469 (finding that annual levels of dolphin mortalities per 1,000 sets in the Hawaii and Atlantic longline fisheries was between 0 and 2.76 mortalities between 2009 and 2016).

[447] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.473. Further, the content of Mexico's evidence on this point shows that Mexico never made clear how the Panels should take PBR into account. For the Atlantic longline fishery, Mexico's evidence does not suggest that dolphin mortalities are above PBR and thus unsustainable. *See* Exhibit MEX-95, p. 3. Nevertheless, Mexico suggests that fishery should have been deemed ineligible based on the evidence Mexico presented. *See* Mexico's Appellant Submission, para. 215.

[448] Mexico's Appellant Submission, para. 215.

tuna fishing operations in different fisheries" or, in other words, the risk "to dolphins" in terms of "observed and unobserved" mortality and injury.[449] The Appellate Body has never suggested that the calibration analysis depends on the effect of dolphin mortalities on dolphin stocks.[450]

188. Third, Mexico is wrong to assert that the Panels did not explain the relationship between declining to adopt a PBR approach and the objectives and structure of the measure.[451] As the Panels explained, relying on a PBR methodology – both in general and in the context of specific fisheries – is inconsistent with the appropriate assessment in this dispute, namely, whether the distinctions of the measure are calibrated to "the overall levels of relative risks" to dolphins posed by different fishing methods in different areas of the ocean.[452] This assessment takes into account the objectives of the 2016 measure, as established by previous panels and the Appellate Body in previous proceedings in this dispute.[453] Additionally, the fact that a PBR metric would overlook large numbers of dolphin mortalities in some fisheries, while penalizing fisheries that might actually cause very low levels of dolphin mortalities would be inconsistent with the measure's focus on protecting "individual dolphins" rather than dolphin populations.[454] And as explained above, the Panels also explained why a PBR approach is inconsistent with the "design" and "structure" of the measure, while the approach the Panels adopted is appropriate.[455]

189. Thus, the Panels fully explained why declining to rely on a PBR methodology is consistent with the objectives and structure of the 2016 measure.

190. Mexico's third argument, that the Panels erred in "characterize[ing]" the objectives of the 2016 measure in a manner that is "contradicted" by the measure itself, is wrong and should be rejected.[456]

191. As an initial mater the United States observes that Mexico makes this argument despite not choosing to appeal the substance of the Panels' finding that the measure is concerned with the risks facing dolphins "at an individual level, rather than at a population level."[457] This is clear not only from Mexico's appellant submission, which does not cite the relevant paragraphs

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[449] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.110, 7.122, 7.162, 7.245-251; *see also id.* paras. 7.161-162, 7.243-244, 7.245-247, 7.248-251.

[450] In this regard, the Appellate Body's statement that it "[did] not exclude" that reference to an "objective indicator" such as PBR "might assist" in the calibration assessment does not support Mexico's assertion. *See US – Tuna II (Article 21.5 – Mexico) (AB)*, n.827. It does not suggest that PBR is the best metric that could be employed, let alone the only possible metric or an essential component, as Mexico claims.

[451] Mexico's Appellant Submission, para. 212-213.

[452] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.189.

[453] *See supra* secs. III.A.2.c, III.B.2.b.

[454] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.186.

[455] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.190 (explaining the a PBR approach "sits uncomfortably with the design and structure" of the 2016 measure, which draws distinctions in part based on fishing *method* and which requires certification and tracking on a per set basis, thus depending on the frequency of fatal interactions and not on effects on the "sustainability of dolphin stocks").

[456] Mexico's Appellant Submission, para. 214.

[457] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.186-187.

in the Reports,[458] but from Mexico's notice of appeal as well, which claims that the Panels erred in "rejecting the use of [PBR] data . . . to supplement [their] analysis," and does not state that Mexico is appealing the Panels' findings on the measure's objectives.[459]

192. Indeed, if Mexico were going to appeal the substance of the Panels' finding on the objective of the 2016 measure, it would have to have done so in a DSU Article 11 appeal, which it has not done. The Panels' finding concerning the objective of the measure is a factual finding as to the measure's purpose and structure. The Panels then used this finding as a basis for their legal analysis of which metric would be appropriate to use in assessing risk.[460] Mexico's arguments that the finding is wrong are based on the Panels' appreciation of previous factual findings in the dispute or on the assertion that the finding is unsupported by the evidence concerning the measure itself.[461] Therefore, as discussed in the preceding section, Mexico's assertions on this issue "implicat[e] a panel's appreciation of the facts [or] evidence" and, as such, should be assessed under DSU Article 11.[462] As Mexico has raised no such claim of appeal, there is no basis for the Appellate Body to reconsider this finding by the Panels.

193. Further, the aspect of the measure Mexico raises does not undermine the Panels' finding. The potential for tuna caught under the AIDCP to become eligible for the label had it been shown that setting on dolphins was not affecting depleted dolphin populations in the ETP was part of every previous iteration of the measure.[463] Therefore, it was included in the analysis of the original and first compliance panels, as well as the Appellate Body in both proceedings, when they found that the objective of the measure concerned the protection of "individual dolphins" rather than population sustainability.[464] Mexico introduced no new evidence suggesting that those previous findings were incorrect.

194. Mexico's assertion that, if the Panels' characterization were "tru[e]," any fishing method "capable of harming a dolphin" must be ineligible is also incorrect.[465] As the Panels' explained, the per set nature of the certification and tracking and verification requirements, combined with the nature of the potentially eligible fishing methods, means that the harms posed by most fishing methods can be addressed without making them *per se* ineligible.[466] Mexico puts forward no argumentation contradicting the Panels' analysis on this point, merely pointing out that they

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[458] *See* Mexico's Appellant Submission, para. 225.

[459] Mexico's Notice of Appeal, para. 8(c).

[460] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.186-187; *id.* paras. 7.188-190.

[461] *See* Mexico's Appellant Submission, paras. 207-211, 214.

[462] *EC – Fasteners (China) (Article 21.5) (AB)*, para. 5.46; *China – GOES (AB)*, para. 183; *US – Upland Cotton (AB)*, para. 399; *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 385.

[463] *See US – Tuna II (Mexico) (Panel)*, para. 4.22; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 3.16.

[464] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.527; *see US – Tuna II (Mexico) (Panel)*, para. 7.550; *see id.* para. 7.735.

[465] *See* Mexico's Appellant Submission, para. 216.

[466] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.189; *id*. paras. 7.703-717.

raised this argument before the Panels and that it was rejected.[467]

195. For all these reasons, Mexico's arguments in section V.C.1.c(2) should be rejected.

iv. The Panels Were Correct Not To Rely on "Absolute Levels of Dolphin Mortalities and Serious Injuries" to Evaluate Risk Profiles

196. In section V.C.1.c(3) of its appellant submission, Mexico claims that the Panels erred in rejecting Mexico's argument that, if the Panels did not rely on a PBR methodology, they should rely on "absolute levels of adverse effects."[468] Specifically, Mexico argues that because of the Panels' approach, "tuna caught in an ocean area where tuna fishing is causing tens of thousands of deaths per year could be found eligible for the dolphin-safe label" because no dolphins were killed or seriously injured in certain sets.[469] Mexico asserts that the omission of this factor "contradicts the two objectives of the label."[470]

197. For the reasons explained in the Panel Reports, Mexico's argument should be rejected. As the Panels explained, and as described in the previous section, the Appellate Body in the original and first compliance proceedings made it clear that, in this dispute, the appropriate assessment under Article 2.1 requires an "evaluation of the *overall levels of relative risks* attributable to different fisheries, including in respect of both observable *and* unobservable harms."[471] Thus, it is clear that the correct analysis (1) must assess "observable and unobservable harms" (*i.e.*, "overall" harms), and (2) must be "relative" among the risks of different fisheries. The fact that the Appellate Body also referred numerous times to the "likelihood" of adverse effects on dolphins as central to appropriate analysis also confirms that the assessment of fisheries' risk profiles must be relative.[472]

198. Mexico's proposed absolute effects metric is neither comprehensive nor relative. First, it considers only observable harms and therefore is incompatible with an "overall" assessment of risk.[473] Second, it is incompatible with a "relative" assessment – and an assessment of the "likelihood" of harms in different fisheries – because it does on *not* "contextualize" the adverse effects on dolphins in different fisheries based on the different sizes and effort levels of fisheries.[474] Thus, a fishery with a few vessels would be compared directly with a fishery comprising thousands of vessels. The "absolute" numbers of dolphin mortalities might be

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[467] *See* Mexico's Appellant Submission, para. 216, n.276.

[468] Mexico's Appellant Submission, paras. 217-219.

[469] Mexico's Appellant Submission, para. 218.

[470] Mexico's Appellant Submission, para. 219.

[471] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.195; *see US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.161-162, *id.* paras. 7.243-244, *id.* paras. 248-251.

[472] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.101, 7.157, 7.239, 7.288, 7.325, 7.330.

[473] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.193; Mexico's Appellant Submission, para. 218; U.S. Second Written Submission, para. 127.

[474] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.195.

greater in the second fishery, even if dolphins were hardly ever killed or even seen in the fishery, simply due to its far greater size.[475] As the Panels recognized, the comparisons generated by this metric are neither fair not consistent with the analysis set out by the Appellate Body.[476]

199. Additionally, Mexico's argument in its appellant submission further illustrates another problem with this proposed metric, namely that Mexico does not identify – and never has identified – how fishing "method/area" should be defined.[477] Before the Panels, Mexico variously proposed that mortalities caused by each of the fishing methods on a global basis,[478] harms caused by "different fishing methods in different ocean regions,"[479] and harms in different "fisher[ies]" should be aggregated.[480] Mexico never defined or explained the "ocean regions" or "fisheries" that should be assessed and did not suggest that comparability in size should be a consideration.[481] To the contrary, in applying this metric, Mexico consistently compared the dolphin mortalities caused by the 80-90 vessels setting on dolphins with those caused by thousands of other vessels around the world or in far larger "ocean regions" or "fisheries."[482] In this way, setting on dolphins perversely benefits, as compared to other methods, from the fact that it has been banned almost everywhere in the world.[483]

200. For all these reasons, the Panels did not err in declining to rely on Mexico's "absolute levels of dolphin mortalities and serious injuries" metric in their evaluation of risk profiles.

v. The Panels Were Correct Not To Rely on Alleged Differences in Accuracy to Evaluate Risk Profiles

201. In section V.C.1.c(4) of its appellant submission, Mexico claims that the Panels erred by "rejecting the risks created in certain ocean areas by insufficient regulatory oversight." Mexico asserts that "dolphins will be at a greater relative risk of harms from that fishing method in ocean areas that have insufficient regulatory oversight" than in regions that do not.[484] Moreover, Mexico asserts that these "risk factors are directly relevant to the calibration of the certification and tracking and verification labelling conditions."[485] On this basis, Mexico claims that the

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[475] *See* U.S. Second Written Submission, para. 128.

[476] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.195.

[477] *See* Mexico's Appellant Submission, para. 218.

[478] Mexico's First Written Submission, paras. 240-257; Mexico's Second Written Submission, para. 63.

[479] Mexico's Second Written Submission, para. 3; Mexico's Response to Panels' Question 79, para. 111.

[480] Mexico's Comments on U.S. Response to Panels' Question 53, para. 122.

[481] *See* Mexico's First Written Submission, paras. 240-257; Mexico's Second Written Submission, para. 63; Mexico's Response to Panels' Question 79, para. 111; Mexico's Comments on U.S. Response to Panels' Question 53, paras. 120-122.

[482] *See* Mexico's First Written Submission, paras. 240-257; Mexico's Second Written Submission, para. 63; Mexico's Response to Panels' Question 79, para. 111; Mexico's Comments on U.S. Response to Panels' Question 53, para. 122.

[483] *See* U.S. Second Written Submission, para. 129.

[484] Mexico's Appellant Submission, para. 220.

[485] Mexico's Appellant Submission, para. 220.

Panels' finding that "the risks of inaccurate certification, reporting, and/or record-keeping were 'not risks that affect dolphins themselves'" and thus were not part of the "risk profiles of different fisheries"[486] amounted to legal error. Mexico also alleges that the omission of "reliability of reporting as a criterion in the risk profiles of fishing areas contradicts the objectives of the measure" because there is "greater risk" that harms to dolphins "will be unreported in unreliable fisheries than in reliable fisheries" and, therefore, that harms to dolphins in "unreliable fisheries will not be discouraged by the measure."[487]

202. Mexico appears to make two arguments in this section – that "insufficient regulatory oversight" itself *causes* greater risk of harm to dolphins and that "insufficient regulatory oversight" must be included in the risk profiles of fisheries because it can affect the reliability of reporting of harms to dolphins. The first of these arguments was fully addressed in Section III.B.1 above. The second argument was fully considered and rejected by the Panels, as described above.[488] As they explained, the risk of inaccurate certification or tracking "are not risks that affect dolphins themselves" and thus do not form part of the "risk profile" for dolphins of tuna fishing by different methods in different ocean areas, as described by the Appellate Body in the first compliance proceeding.[489] Rather, the risk of inaccurate certification or tracking may be relevant to assessing whether the distinctions of the 2016 measure are calibrated to the risk profiles of different fisheries.[490]

203. For these reasons, and those discussed above, Mexico's arguments should be rejected.

2. The Panels Correctly Found that the Eligibility Criteria, in Context as Part of the Whole Measure, Are Calibrated

204. In section V.C.2.a of its appellant submission, Mexico appeals paragraphs 7.538-547, which set out the Panels' legal analysis of whether the eligibility criteria of the 2016 measure are calibrated to the risks to dolphins posed by "different fishing methods in different areas of the ocean,"[491] and the finding that the eligibility criteria are so calibrated.[492]

205. Mexico claims that the Panels' analysis and conclusion constitute legal error and puts forward three arguments in this regard: (1) that the Panels' analysis was "limited to justifying the ineligibility" of setting on dolphins;[493] (2) that the Panels wrongly failed to assess the risk

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[486] Mexico's Appellant Submission, para. 222.

[487] Mexico's Appellant Submission, para. 223.

[488] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.109-113.

[489] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.110.

[490] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.119-124.

[491] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.540; *see also id.* paras. 7.532-546.

[492] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.547.

[493] Mexico's Appellant Submission, sec. V.C.2.a.

profiles of different ocean areas;[494] and (3) that the Panels' analysis "omitted relevant factors."[495] Additionally, Mexico attempts to undermine the factual findings of the Panels that the eligibility criteria draw distinctions based on fishing methods.[496]

206. All of Mexico's arguments are without merit and should be rejected. First, subsection (a) sets out the relevant analysis and conclusions of the Panels. Subsection (b) shows that Mexico's attempt to undermine the Panels' factual findings concerning the nature and content of the eligibility criteria is inappropriate and incorrect. Subsection (c) shows that, contrary to Mexico's argument, the Panels' analysis of the eligibility criteria encompassed both the ineligibility of setting on dolphins *and* the potential eligibility of the other relevant fishing methods. Subsection (d) shows that Mexico's arguments that the Panels failed to conduct the necessary analysis of the risk profiles of the relevant fishing methods, including as used in different ocean areas, is likewise in error. Finally, subsection (e) shows that, for reasons discussed in previous sections, Mexico's argument that the Panels' analysis omitted critical factors should be rejected.

a. The Panels' Analysis

207. At the outset of the Panels' analysis of the eligibility criteria, the Panels explain, quoting the Appellate Body, that the eligibility criteria are the "substantive conditions for access to [a] dolphin-safe label.'"[497] The Panels described these "substantive conditions for access" as: (1) "all tuna products containing tuna harvested by . . . two methods of fishing: (i) large-scale driftnet fishing on the high seas; and (ii) vessels using purse seine nets to encircle or 'set on' dolphins anywhere in the world" are "disqualifie[d] from being labelled"; and (2) "all other tuna products, that is, those containing tuna harvested by all other fishing methods, are potentially eligible for the dolphin-safe label, but become ineligible if they contain tuna caught in a set or other gear deployment during which a dolphin was killed or seriously injured."[498] As the Panels recognized earlier, these conditions are unchanged from the 2013 measure.[499]

208. The Panels then began their calibration assessment by analyzing the risk profiles of the different fishing methods between which the eligibility criteria distinguish. In conducting this assessment, the Panels relied on their previous assessment in Section 7.7.2 of the Reports of the "relative risk profiles" of setting on dolphins and of other "fishing methods in different areas of the ocean."[500] In particular, the Panels recalled three previous conclusions, based on the evidence on the record: (1) "setting on dolphins poses a much higher risk of observed dolphin mortality and serious injury, on a per set basis, than other fishing methods"[501]; (2) "setting on dolphins is more likely than other fishing methods to cause unobserved mortality and serious

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[494] Mexico's Appellant Submission, sec. V.C.2.b.

[495] Mexico's Appellant Submission, sec. V.C.2.c.

[496] Mexico's Appellant Submission, para. 226, n.285.

[497] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.532; *see id.* para. 7.19.

[498] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.50; *see id.* para. 7.532.

[499] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.50.

[500] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.540.

[501] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.544. 7.564.

injury"[502]; and, (3) "setting on dolphins causes a unique kind of unobservable harm that by its nature cannot be certified" while the potentially eligible fishing methods do not.[503]

209. Based on these findings, the Panels concluded that the eligibility criteria "are appropriately calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean."[504] They explained that setting on dolphins was different from the potentially eligible fishing methods because not only did it cause much higher levels of observable harms to dolphins[505] but also, unlike the potentially eligibility fishing methods, it "causes a unique kind of unobservable harms . . . whose realization cannot be definitively established."[506] Therefore, for tuna produced by setting on dolphins, "a certification, even by an independent observer, that no dolphins were killed or seriously injured in a set on dolphins could not indicate, with any degree of certainty, that the tuna caught in that set was dolphin-safe."[507] For tuna produced by the potentially eligible fishing methods, by contrast, "it is generally possible to distinguish between tuna caught in a set in which dolphins were harmed, and tuna caught in a set in which dolphins were not harmed."[508]

210. On this basis, the Panels found that the "eligibility criteria are calibrated" in light of "the significant difference in risk between setting on dolphins, on the one hand, and the fishing methods that are conditionally qualified for the label, on the other hand."[509]

b. Mexico's Attempt to Undermine the Panels' Factual Findings Concerning the Eligibility Criteria Should Be Rejected

211. In its appellant submission, Mexico asserts that the eligibility criteria draw distinctions based on fisheries, *i.e.*, on "fishing methods in . . . [particular] ocean areas."[510] Mexico offers no support for this assertion from the record in this dispute. On the contrary, Mexico acknowledges that "[t]he Panels were of the . . . view that the eligibility criteria drew distinctions based on different fishing methods *and not on different fishing areas*."[511] However, Mexico asserts that this finding was "erroneous" and claims that, in fact, the eligibility criteria draw fishery-based distinctions.[512] In short, Mexico puts forward a new argument about the nature of the eligibility criteria and seeks to reverse findings of the Panels on that basis, without making an appeal. This

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[502] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.543.

[503] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.544.

[504] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.540.

[505] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.541-543.

[506] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.544.

[507] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.544.

[508] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.546.

[509] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.706.

[510] Mexico's Appellant Submission, para. 226, n.285.

[511] Mexico's Appellant Submission, n.285 (emphasis added).

[512] Mexico's Appellant Submission, n.285.

argument is inappropriate and should be rejected. Mexico is also substantively incorrect.

212. The original and first compliance proceedings established that the U.S. measure "condition[s] access to a dolphin-safe label upon certain requirements that vary depending on the fishing method by which tuna contained in the tuna product is harvested, the ocean area where it is caught, and the type of vessel used."[513] They also established that different aspects of the measure distinguish based on different variables or combinations thereof and, in particular, that the eligibility criteria "disqualify[] from access to that label all tuna products containing tuna harvested by two methods of fishing: (i) large-scale driftnet fishing on the high seas; and (ii) vessels using purse-seine nets to encircle or 'set on' dolphins anywhere in the world."[514] The Panels in these proceedings found that the "disqualification of tuna products containing tuna caught by setting on dolphins" was unchanged from the original measure and the conditional eligibility of tuna "harvested by all other fishing methods" was unchanged from the 2013 measure.[515] Thus, the Panels found that the eligibility requirements of the 2016 measure "draw distinctions on the basis of . . . different fishing methods," specifically between setting on dolphins, on the one hand, and the potentially eligible fishing methods, on the other.[516]

213. Mexico's attempt to persuade the Appellate Body to reverse this finding of the Panels (in a manner inconsistent with the findings reflected in the DSB recommendations and rulings) is inappropriate and should be rejected. In the absence of a claim of appeal, there is no basis to reevaluate a panel's findings.[517] Consequently, there is no basis for the Appellate Body to reconsider that finding.

214. Further, there is no basis to find that the Panels' findings on the nature and content of the eligibility criteria are incorrect as a substantive matter. As discussed above, the findings of the Panels and Appellate Body in previous proceedings establish that the eligibility criteria distinguish between setting on dolphins and large-scale high-seas driftnet fishing, on the one hand, and the potentially eligible fishing methods. Before the Panels, Mexico did not argue that

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[513] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 6.8.

[514] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 6.9 (citing *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 3.35-36; *US – Tuna II (Mexico) (AB)*, para. 174; *see also id.* para. 7.287 ("With respect to the eligibility criteria, the Panel noted that the main regulatory distinction of the amended tuna measure does not concern different countries, but rather different fishing methods, and that it is the fishing method of setting on dolphins that is regulated differently and more tightly than other fishing methods. The Panel noted, moreover, that tuna products containing tuna caught in instances where a dolphin was killed or seriously injured are ineligible to be labelled dolphin safe regardless of what fishing method was used, and regardless of where or how the tuna was caught.").

[515] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.50 ("The disqualification of tuna products containing tuna caught by setting on dolphins thus formed part of, and is unchanged as compared to, both the original and the 2013 Tuna Measure. Second, all other tuna products, that is, those containing tuna harvested by all other fishing methods, are potentially eligible for the dolphin-safe label, but become ineligible if they contain tuna caught in a set or other gear deployment during which a dolphin was killed or seriously injured.") (citing *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 6.9).

[516] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.568; *see id.* 7.532.

[517] *See* DSU, article 17.6 ("An appeal shall be limited to issues of law covered in the panel reports and legal interpretations developed by the panel."); *id.* article 17.12 ("The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.").

the 2016 IFR changed the basis on which the eligibility criteria draw distinctions. To the contrary, Mexico agreed that "[t]he eligibility criteria in the 2016 tuna measure designate two tuna fishing methods as ineligible for catching dolphin safe tuna," while "tuna caught using all [other] fishing methods" are conditionally eligible.[518] Even in its appellant submission, Mexico advanced no reason why the eligibility criteria regarding setting on dolphins and the potentially eligibile fishing methods – the critical aspect of the measure for this dispute – do not distinguish based on fishing methods.[519]

215. Indeed, although Mexico's description of how the eligibility criteria operate attempts to portray them as fishery-based, it actually illustrates that the Panels' characterization is correct. Mexico states that the eligibility criteria designate as ineligible "(i) AIDCP-compliant setting on dolphins in the ETP, (ii) non-AIDCP-compliant setting on dolphins in all other fishing areas."[520] In fact, however, non-AIDCP compliant dolphin sets in the ETP would also be ineligible to produce dolphin safe tuna, as would regulated setting on dolphins outside the ETP (if there were a tuna-dolphin association strong enough to make that possible).[521] Additionally, Mexico states that tuna produced by "all other fishing methods in all other ocean areas are eligible for the label", but points to no substantive contribution that the phrase "in all other ocean areas" provides.[522] It is clear, therefore, that the Panels' formulation of how the eligibility criteria draw distinctions is accurate. Mexico's arguments to the contrary should be rejected.

c. Mexico's Argument that the Panels' Assessment Was Incomplete Should Be Rejected

216. In section V.C.2.a(1) of its appellant submission, Mexico claims that the Panels' assessment of whether the eligibility criteria are calibrated constitutes legal error because it was "incomplete and limited to justifying the ineligibility of the AIDCP-compliant dolphin set method."[523] Mexico asserts that this reflects other errors by the Panels, namely: (1) assessing the risk profile of setting on dolphins compared to "other fishing methods" rather than other fisheries individually; and (2) using dolphin sets in the ETP as a "benchmark" to compare other fishing

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[518] Mexico's First Written Submission, paras. 226-227 ("The eligibility criteria in the 2016 tuna measure designate two tuna fishing methods as ineligible for catching dolphin-safe tuna: (i) encircling dolphins with a purse seine net, irrespective of whether or not it is done in a manner compliant with the AIDCP dolphin-safe requirements; and (ii) high seas driftnet fishing. No other tuna fishing methods are designated either *de jure* or *de facto* as ineligible. This means that tuna caught using all [other] fishing methods . . . are eligible to use a dolphin-safe label in the U.S. market."); Mexico's Second Written Submission, para. 53 ("The eligibility criteria specify which fishing methods are prohibited from being used to catch tuna that can be designated as dolphin-safe. Only two methods are currently ineligible, dolphin encirclement and high seas driftnet fishing. All other tuna fishing methods are eligible to catch tuna that could be designated as dolphin-safe provided that the other labelling conditions are met.").

[519] *See* Mexico's Appellant Submission, para. 228, n.285. Mexico's argumentation relates entirely to high-seas driftnet fishing. However, Mexico puts forward no facts that are inconsistent with the Panels' findings and were not on the record in the previous proceedings. *See id.*

[520] Mexico's Appellant Submission, para. 228.

[521] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.50; 50 CFR Sections 216.91(a)(1)(iii), (a)(3)(i) and (a)(3)(ii)(A), (Exhibits US-2, MEX-2).

[522] Mexico's Appellant Submission, para. 228.

[523] *See* Mexico's Appellant Submission, paras. 230-234.

methods.[524] However, Mexico's main point appears to be that the Panels limited their analysis of the eligibility criteria to the ineligibility of dolphin sets under the AIDCP and "completely omitted any discussion or assessment" of whether granting conditional eligibility to "tuna caught by other fishing methods in other ocean areas was calibrated."[525] Mexico asserts that if the eligibility criteria and the measure were even-handed, "tuna caught by fishing methods in ocean areas where dolphins are adversely affected would be ineligible for the label."[526]

217. Several of these arguments appear to repeat, without addition, arguments made in other sections of Mexico's appellant submission and addressed in other sections of this submission. Mexico's argument that the measure must be calibrated only to the risk profile of fisheries, not of fishing methods, was addressed above,[527] as was Mexico's argument concerning using dolphin sets in the ETP as a benchmark.[528] Mexico's assertion that tuna caught in any fishery where "dolphins are adversely affected" seems to refer to Mexico's arguments that the measure must be calibrated based on PBR or on "absolute levels of dolphin mortalities," which were likewise addressed above.[529] Therefore, this section focuses on rebutting Mexico's assertion that the Panels' analysis of the eligibility criteria did not encompass the conditional eligibility of tuna produced by fishing methods other than setting on dolphins and large-scale high seas driftnets.

218. Contrary to Mexico's claim, it is clear that the Panels' analysis and conclusion was *not* limited to the ineligibility of setting on dolphins but also encompassed the conditional eligibility of tuna caught by the other fishing methods.

219. First, the Panels' framing of their analysis in Section 7.8.2 shows that they were assessing all components of the eligibility criteria. At the beginning of the section, the Panels define the eligibility criteria as including the ineligibility of tuna caught by setting on dolphins *and* the "provisional" eligibility of tuna caught by other fishing methods.[530] This accords with the Panels' earlier definition of the eligibility criteria as comprising "several substantive conditions for access to a dolphin-safe label," namely: (1) "all tuna products containing tuna harvested by . . . large-scale driftnet fishing on the high seas; and . . . vessels using purse seine nets to encircle or 'set on' dolphins anywhere in the world"[531] are "disqualifie[d] from being labelled"; and (2) "tuna harvested by all other fishing methods, are potentially eligible . . . but become ineligible if they contain tuna caught in a set or other gear deployment during which a dolphin was killed or seriously injured."[532] The Panels also summarized the arguments of the parties addressing both

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[524] *See* Mexico's Appellant Submission, paras. 230-231.

[525] Mexico's Appellant Submission, para. 232.

[526] Mexico's Appellant Submission, para. 234.

[527] *See supra* sec. III.C.1.a.

[528] *See supra* sec. III.C.1.b.

[529] *See supra* sec. III.C.1.c.iii-v.

[530] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.532. As the Panels found, neither party argued that the ineligibility of tuna caught by large-scale high-seas driftnets, as compared to the potential eligibility of other fishing methods, was not even-handed. *See id.* n.936.

[531] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.50.

[532] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.50.

of these aspects of the eligibility criteria.[533]

220. Second, the body of the Panels' analysis also makes it clear that the Panels were analyzing both aspects of the eligibility criteria. The Panels began their analysis by recalling their findings on "the relative risk profiles of setting on dolphins, on the one hand, and other fishing methods."[534] They recalled that "setting on dolphins is significantly more dangerous to dolphins than are other fishing methods," based on the evidence of "the existence and extent of observable harms, unobservable harms, and interaction with dolphins."[535] In particular, the Panels recalled that "because every dolphin set chases and encircles dolphins, every dolphin is at risk of both observable harms and unobservable harms, which, because of their nature, cannot be certified," while this is not the case with other fishing methods, which "cause observable harms at a much smaller magnitude" and "do not cause the same kinds of unobservable harms."[536] Thus, the Panels focused from the start on ***the difference*** between setting on dolphins and the potentially eligible fishing methods.

221. Throughout their analysis, the Panels continued to emphasize that it was *the comparison* between setting on dolphins and other fishing methods that rendered the eligibility criteria, as a whole, calibrated to risk. They emphasized that "on a per set basis, setting on dolphins is more likely to kill or seriously injure a dolphin than any other fishing method."[537] They recalled that, while "fishing methods other than setting on dolphins can be, and often are, carried out without any dolphin interactions, and thus do not pose any risks to dolphins," "setting on dolphins routinely and systematically interacts with dolphins, meaning that there is a higher likelihood than in respect of other fishing methods that dolphins will be killed or seriously injured, even if such mortality or injury is not in fact observed."[538] Finally, they emphasized that setting on dolphins poses a unique "risk of harms whose realization cannot be definitively established," such that "certification, even by an independent observer, that no dolphins were killed or seriously injured in a set on dolphins could not indicate, with any degree of certainty, that the tuna caught in that set was dolphin-safe."[539] By contrast, for the potentially eligible fishing methods, "it is generally possible to distinguish between tuna caught in a set in which dolphins were harmed, and tuna caught in a set in which dolphins were not harmed."[540]

222. Thus, Mexico is incorrect that the Panels' assessment was "limited" to the ineligibility of tuna produced by setting on dolphins. Rather, the Panels' entire analysis was focused on a comparative assessment of the risk profiles of the ineligible and potentially eligible fishing methods. In this analysis, the Panels identified three aspects of setting on dolphins that made it "particularly harmful" and that justified its categorical ineligibility for the label – consistently

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[533] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.533-536, 7.537-538.

[534] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.539-540.

[535] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.539.

[536] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.539.

[537] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.541.

[538] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.543.

[539] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.544, 7.546.

[540] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.546.

high levels of per set mortality, consistently high interaction levels such that dolphins are endangered in every set, and the possibility in every set of unobservable harms that, by nature, cannot be certified. The Panels explicitly found that none of the potentially eligible fishing methods exhibits any of these characteristics. Based on these differences, the categorical ineligibility of tuna caught by setting on dolphins was appropriate to ensure that tuna caught by harming dolphins was not wrongly certified as dolphin safe.[541] However, similar ineligibility was not necessary for tuna caught by other methods to be truthfully certified "dolphin-safe."[542]

223. Third, the Panels' subsequent analysis and descriptions of Section 7.8.2 confirm that their analysis and conclusions in that section covered both the prohibitive and permissive aspects of the eligibility criteria. In analyzing the 2016 measure as a whole, the Panels recalled their previous finding that "the eligibility criteria are calibrated because of the significant difference in risk between setting on dolphins, on the one hand and the fishing methods that are conditionally qualified for the label, on the other hand."[543] Thus, it was the "difference" in risk between setting on dolphins and the conditionally qualified fishing methods that the Panels had assessed and found to be "calibrated."

224. Further, as the Panels made clear, their assessment of the appropriateness of the eligibility criteria must be viewed in combination with their findings on the certification and tracking and verification requirements (including the determination provisions), which are the "means of enforcing" the ineligibility of tuna caught by setting on dolphins or with a dolphin death or serious injury.[544] In particular, the Panels subsequently concluded that observers in the ETP large purse seine fishery and captains in other fisheries are "generally . . . reliable"[545] to make certifications concerning the activities of their vessels, including "certify[ing] the dolphin-safe status of a set or other gear deployment."[546] On this basis, the Panels concluded that the certification requirements "enforce the eligibility criteria" and "address the relative risks posed to dolphins in the ETP large purse seine fishery on the one hand and other fisheries on the other."[547] The Panels also found that the tracking and verification regimes for tuna caught inside and outside the ETP provide meaningful and enforceable segregation and tracking requirements.[548]

225. These findings further explain the Panels' conclusion that the potential eligibility of lower risk fishing methods and the ineligibility of setting on dolphins is calibrated to the relative risks the fishing methods pose. For tuna caught other than by setting on dolphins – due to the lower risk profile of these fishing methods, in terms of the frequency and nature of the risks they

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[541] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.544-545.

[542] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.546 ("[I]n respect of tuna caught other than by setting on dolphins, it is generally possible to distinguish between tuna caught in a set in which dolphins were harmed, and tuna caught in a set in which dolphins were not harmed.").

[543] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.706.

[544] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.707.

[545] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.579.

[546] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.589.

[547] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.710.

[548] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.638-645, 7.675

pose – the statement of a "reliable" certifier that no dolphin was killed or seriously injured in a set or gear deployment can contribute to achieving the objectives of the 2016 measure.[549] For setting on dolphins, however, even the most reliable certifier "could not indicate, with any degree of certainty, that the tuna caught in that set was dolphin-safe."[550]

226. For these reasons, it is clear that the Panels' analysis and conclusions set out in paragraphs 7.532 to 7.347 of the Panel Reports encompassed both the ineligibility of tuna produced by setting on dolphins and the conditional eligibility of tuna caught by other fishing methods. Mexico's arguments in section V.C.2.a(1) are in error and should be rejected.

d. Mexico's Argument that the Panels Failed to Assess the Risk Profiles of Different Ocean Areas Reflects an Incorrect Interpretation of Calibration and Should Be Rejected

227. In section V.C.2.a(2) of its submission, Mexico claims that, in the Panels' analysis of whether the eligibility criteria are calibrated, the Panels "failed to assess the risk profiles of different ocean areas."[551] Mexico appears to make two assertions as part of this argument. First, Mexico asserts that the Panels "based their conclusions on a comparison between setting on dolphins in the ETP and all other fishing methods" *and not* on factual findings concerning particular fisheries where these fishing methods are used.[552] Mexico argues that the Panels made "reference[s]" to certain fisheries, but the references were "selective" and, therefore, "incomplete."[553] Mexico also claims that factual findings of the Panels concerning particular fisheries were "disregarded" or "did not form part of the reasoning" for their conclusions on the eligibility criteria.[554] Second, Mexico suggests that a "proper calibration assessment" must have been based entirely on a fishery-specific analysis, *i.e.*, properly calibrated eligibility criteria *cannot* distinguish among fishing methods but must distinguish only among fisheries.[555]

228. Mexico's argument that properly calibrated eligibility criteria *cannot* distinguish based on fishing method simply repeats arguments made in section V.C.1.a of Mexico's submission and addressed in Section III.C.1.a above. As explained in that section, the calibration analysis reflects the U.S. argument in the original proceeding that "its measure was even-handed because the distinctions that it drew between different tuna fishing methods and different areas of the oceans could be explained or justified by differences in the risks associated with such fishing

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[549] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.711.

[550] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.544, 7.546.

[551] *See* Mexico's Appellant Submission, paras. 235-240.

[552] Mexico's Appellant Submission, paras. 236-238.

[553] Mexico's Appellant Submission, para. 236.

[554] Mexico's Appellant Submission, paras. 237-238.

[555] Mexico's Appellant Submission, para. 239 (arguing that "for [certain] fishing methods and ocean areas, there are regular and substantial dolphin mortalities and serious injury" and that "[a]llowing tuna caught in a sub-set of gear deployments in such areas to bear the dolphin-safe label promotes tuna fishing in these ocean areas with methods that are clearly harmful to dolphins and thereby contradicts the objectives of the measure"); *id.* para. 240 ("A proper calibration assessment would have concluded that granting eligibility for the label to tuna caught by the above fishing methods in the above ocean areas is not calibrated").

methods and areas of the oceans."[556] The Appellate Body in the original and first compliance proceedings analyzed whether the distinctions of the measure were "calibrated" to the risks to dolphins "arising from different fishing methods in different areas of the ocean."[557] The measure's eligibility criteria have always distinguished based on fishing method, [558] and there has never been a suggestion that such a distinction is, *per se*, not even-handed. To the contrary, the Appellate Body has repeatedly emphasized that a calibration analysis must consider *both* fishing method and ocean area, as appropriate to the relevant regulatory distinction.[559]

229. Mexico's second argument – that the Panels' conclusions concerning the eligibility criteria did not reflect, and indeed were inconsistent with, their findings on the risk profile of individual fisheries other than the ETP large purse seine fishery – is likewise incorrect and should be rejected. In fact, the Panels' analysis of and conclusions on the eligibility criteria were based on, and appropriately reflected, their *previous* factual findings and conclusions concerning the risks to dolphins posed by all the tuna fishing methods, as used in all the fisheries for which there was evidence on the record. Thus, the Panels' references to a few specific fisheries were *examples* of the basis for their conclusions, not the basis itself. The Panels did not "omit" any of their previous findings from their assessment of the eligibility criteria. Additionally, Mexico misstates several of the alleged "findings" of the Panels concerning various fisheries.

230. First, Mexico's argument that the Panels mentioned an "incomplete" selection of fisheries in their analysis of the eligibility criteria is misplaced because, in fact, the Panels' analysis of risk profiles in Section 7.8.2 was based on their earlier factual findings and conclusions on the risk profiles of different fishing methods in different ocean areas.

231. The Panels said so explicitly at the outset of Section 7.8.2, "recall[ing]" their "earlier finding that setting on dolphins is significantly more dangerous to dolphins than are other fishing methods"[560] The Panels also described the relevant previous findings as on the "relative risk profiles of setting on dolphins . . . and other fishing methods," based on the evidence "concerning the existence and extent of observable harms, unobservable harms, and interaction with dolphins."[561] This description makes it clear that the "previous" factual findings on which the Panels relied were those set out in Section 7.7.2 because, in that section, the Panels assessed

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[556] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.98.

[557] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.108, 7.109, 7.111, 7.126, 7.152, 7.155.

[558] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.50; *see id.* para. 7.706.

[559] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.126 ("Whether a regulatory distinction that involves a denial of access to the dolphin-safe label in respect of setting on dolphins is even-handed depends not only on how the risks associated with this method of fishing are addressed, but also on whether the risks associated with other fishing methods in other fisheries are addressed, commensurately with their respective risk profiles, in the labelling conditions that apply in respect of tuna caught in such other fisheries."); *id.* para. 7.161 ("[W]e do not consider that, in examining the eligibility criteria, the Panel's analysis reflects that it did assess and take due account of the different risks associated with tuna fishing in different oceans and using different fishing methods in a way that would have enabled it properly to evaluate the parties' arguments regarding the even-handedness of the amended tuna measure's regulatory distinctions."); *id.* para. 7.349.

[560] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.539.

[561] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.539-540.

the "overall risk profiles for dolphins of different fishing methods in different areas of the ocean."[562] Further, the Panels considered, for each fishing method, all evidence on the record as to "the number of observed mortalities and serious injuries, the nature and extent of any unobservable harms caused by different fishing methods in different areas of the ocean, the nature and extent of the interaction with dolphins of the fishing method in a given area of the ocean," and any other relevant evidence.[563]

232. Moreover, the Panels based their conclusion on the eligibility criteria on three previous factual "conclusions"[564]: (1) "based on the data on the record," setting on dolphins poses a "much higher risk of observed dolphin mortality and serious injury, on a per set basis, than other fishing methods";[565] (2) due to differences in the rates of dolphin interactions between dolphin sets and other methods, "there is a higher likelihood . . . that dolphins will be killed or seriously injured" even if no mortality is observed;[566] and (3) that dolphin sets, but not the other fishing methods, cause unique, unobservable harms independent of direct harms inflicted by interaction with fishing gear.[567] All these "conclusions" reflect the Panels' findings in Section 7.7.2.

233. In Section 7.7.2, the Panels examined, for each fishing method, the evidence as to (1) observed dolphin mortalities and serious injuries, on a per set basis where possible,[568] (2) rates of dolphin interaction (as a proxy for possible levels of observable but unobserved harm),[569] and (3)

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[562] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.169; *see id.* paras. 7.256 (stating that the Panels would assess "the risks of setting on dolphins" compared to "the degree of risk caused by other fishing methods in other areas of the ocean"), 7.517 (explaining, in the conclusion to Section 7.7.2: "Above, we have made findings about the risk profiles of individual fishing methods as used in different areas of the ocean. . . . We recall that the issue before us is whether the 2016 Tuna Measure, under which tuna products obtained from tuna caught by setting on dolphins is ineligible for the dolphin-safe label whereas tuna products obtained from tuna caught by the other six methods cited above are conditionally eligible for that label, is calibrated to different levels of risks posed to dolphins by different fishing methods in different areas of the ocean. Therefore, in providing a comparative assessment of the risk profiles of the seven methods analysed in these Reports, we will compare the method of setting on dolphins to each of the other six methods.").

[563] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.169; *see id.* paras. 7.270-311 (setting on dolphins), 7.320-402 (purse seine fishing without setting on dolphins), 7.431-457 (gillnet fishing), 7.466-481 (longline fishing), 7.486-494 (trawl fishing), 7.496-511 (handling fishing), and 7.514-516 (pole and line fishing).

[564] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.540.

[565] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.541.

[566] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.543.

[567] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.544, 7.546; *see also id.* para. 7.547; *see also supra* secs. III.C.2.a, III.C.2.c (explaining that these conclusions were central to the Panels' ultimate finding that the eligibility criteria are calibrated).

[568] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.279-282 (setting on dolphins); 7.329-332, 7.337-365, 7.372-383, 7.388-396 (purse seine fishing without setting on dolphins in the ETP, the WCPO, the Indian Ocean, and the eastern tropical Atlantic Ocean); 7.436-444 (gillnet fishing); 7.466-475 (longline fishing); 7.488-493 (trawl fishing); 7.499, 7.511 (handlining); 7.514-515 (pole and line fishing).

[569] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.283-285 (setting on dolphins); 7.333-334, 7.366-367, 7.384-385, 7.397-398 (purse seine fishing without setting on dolphins in the ETP, the WCPO, the Indian Ocean, and the eastern tropical Atlantic Ocean); 7.436-444 (gillnet fishing); 7.471 (longline fishing); 7.493 (trawl fishing); 7.499, 7.511 (handlining); 7.514-515 (pole and line fishing).

the existence of unobservable harms.[570] The Panels' assessment covered all the evidence on the record on fishing methods in general and as applied in particular fisheries. (Notably, Mexico has not argued that the Panels ignored any of its evidence on any fishing method or particular fishery in their assessment in Section 7.7.2.) Based on this review of the evidence, the Panels concluded: (1) setting on dolphins caused 91.15 observed dolphin mortalities per 1,000 sets from 2009-2015,[571] and the potentially eligible fishing methods cause levels of observed dolphin mortality and serious injury that are, on a per set basis, "clearly below those caused by setting on dolphins,"[572] "low,"[573] or zero[574]; (2) due to "the intensity and length of the interactions" with dolphins present, setting on dolphins "likely" causes more dolphin mortalities and serious injuries "than are observed" and this "likelihood . . . is present in every set,"[575] while this is not the case with the potentially eligible fishing methods[576]; and, (3) "none of the other fishing methods causes to dolphins the kind of unobservable harms that setting on dolphins causes."[577]

234. Thus, the Panels' analysis and conclusions in Section 7.8.2 are based on their factual findings in Section 7.7.2. Most importantly, the three "conclusions" on which the Panels rely in Section 7.8.2 are conclusions the Panels drew in Section 7.7.2, based on their extensive review of the factual record. Therefore, Mexico's argument that the Panels ignored certain "findings" or "ocean areas" in Section 7.8.2 mistakes the basis of the Panels' analysis.[578] In Section 7.8.2, the Panels summarized the critical findings and conclusions from Section 7.7.2 and gave particular "instance[s]" of relevant facts, but they did not attempt – or need – to reference every exhibit or fishery on the record on which their conclusions indirectly relied.[579] Rather, as they explained, they relied on the "conclusions" from their previous analysis, which *were* based on all the relevant evidence on the record. In this regard, Mexico even seems to acknowledge that all of the alleged "facts" or pieces of "evidence" it claims the Panels "ignored" in Section 7.8.2 formed

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[570] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.286-311 (setting on dolphins); 7.335, 7.368-370, 7.386, 7.399 (purse seine fishing without setting on dolphins in the ETP, the WCPO, the Indian Ocean, and the eastern tropical Atlantic Ocean); 7.445-456 (gillnet fishing); 7.475-480 (longline fishing); 7.494 (trawl fishing); 7.500-511 (handlining); 7.515 (pole and line fishing).

[571] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.519.

[572] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.520 (gillnet fishing).

[573] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.521 and 7.494 (trawl fishing), 7.522 and 7.401 (purse seine fishing without setting on dolphins), 7.523 and 7.481 (longline fishing).

[574] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.511, 7.516, 7.524 (handline and pole and line fishing).

[575] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.285, 7.519.

[576] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.401 and 7.522 (purse seine fishing without setting on dolphins), 7.520 (gillnet fishing), 7.481 and 7.523 (longline fishing), 7.494 and 7.521 (trawl fishing), 7.511, 7.516, 7.524 (handline and pole and line fishing).

[577] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.518.

[578] *See* Mexico's Appellant Submission, paras. 236-237.

[579] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.541.

part of the Panels' assessment of the evidence in Section 7.8.2.[580]

235. Accordingly, Mexico's argument that the Panels' analysis and conclusions in Section 7.8.2 did not reflect its factual findings concerning the risk profile of different fisheries is wrong and should be rejected.

236. Additionally, we note that in paragraph 237 of its appellant submission Mexico misstates several of the "findings" and pieces of "evidence" that it claims the Panels "ignored," as follows:

- In the fifth bullet point, Mexico suggests that the Panels found that there are gillnet fisheries other than the Indian Ocean gillnet fisheries that cause levels of observable harms greater than those caused by dolphin sets in the ETP.[581] This is not the case: the Indian Ocean gillnet fisheries are the only extant fisheries that the Panels found causes levels of dolphin mortality higher than (or close to) those caused by dolphin sets in the ETP.[582]

- In the sixth bullet point, Mexico presents as a fact its own argument concerning Exhibit MEX-34.[583] The Panels did not confirm Mexico's interpretation of this exhibit, and, indeed, relied on more recent and scientific evidence concerning the Pacific longline fishery in question in their conclusion that "the dolphin mortality rate . . . in longline fisheries is consistently low."[584]

- In the seventh bullet point, Mexico again presents its own arguments on the relationship between levels of dolphin mortality and PBR in the Hawaii and Atlantic longline fisheries as a factual finding of the Panels.[585] But the Panels did not make the finding Mexico attributes to them and, indeed, rejected Mexico's interpretation of the evidence it presented as showing that longlining is having "adverse effects on *dolphins*," as distinct from dolphin *stocks*.[586] Having considered all the evidence on these and other longline fisheries, the Panels found that "longline fishing presents a relatively low level of observable harms to dolphins."[587]

- In the eighth bullet, Mexico claims that the Panels "identified" a certain level of dolphin

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[580] *See* Mexico's Appellant Submission, para. 237, n.292-304 (citing to paragraphs of Section 7.7.2 discussing the exhibits and alleged facts Mexico claims the Panels "completely omitted from their assessment of the eligibility criteria").

[581] Mexico's Appellant Submission, para. 237 (fifth bullet).

[582] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.441 (referring to mortalities caused by "large scale drift nets in the high seas during the 1980s and early 1990s that led to the 1992 UN moratorium on the practice" and to the Indian Ocean gillnet fisheries).

[583] Mexico's Appellant Submission, para. 237 (sixth bullet).

[584] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.467-470.

[585] Mexico's Appellant Submission, para. 237 (seventh bullet).

[586] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.473 (emphasis added).

[587] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.475.

mortality in a North Atlantic trawl fishery.[588] In fact, as discussed above, the Panels noted that, if the figures in the exhibit were "taken at face value," they "would" suggest a certain level of per set mortality but rejected the probative value of the exhibit on the grounds that it "is popular rather than scientific, does not identify the source of its data, and neither does it indicate whether these dolphins were killed in tuna fisheries."[589]

- In the ninth bullet, Mexico suggests the Panels made findings on each of the listed fisheries, but that is not the case. Some of the exhibits Mexico cites refers to fisheries that no longer exist or that existed in the 1980s.[590] The Panels did not make a finding on the level of dolphin mortality in African gillnet fisheries[591] or in the Moroccan driftnet fishery (target species unknown), although they noted the figure in Exhibit MEX-21.[592] The Panels directly addressed Mexico's evidence on the Eastern North Atlantic pair trawl fishery and did not find that it caused "massive absolute dolphin mortalities" or that Mexico's evidence related to a single fishery.[593]

237. With respect to Mexico's first four bullet points concerning gillnet fishing, the Panels analyzed the evidence Mexico describes in the context of all the evidence before it concerning gillnet fishing.[594] As such, it was part of the basis of the Panels' ultimate conclusion that gillnet fishing "can be particularly harmful to dolphins, but [is] not necessarily so in all areas of the ocean,"[595] and of the three conclusions that the Panels reached in Section 7.7.2 and on which they relied in their analysis and conclusion in Section 7.8.2.

238. For these reasons, Mexico's argument should be rejected.

e. Mexico's Argument that the Panels' Assessment Omitted Relevant Factors Reflects an Incorrect Interpretation of Calibration and Should Be Rejected

239. In section V.C.2.a(3) of its appellant submission, Mexico argues that the Panels' analysis of whether the eligibility criteria are calibrated is in error because the Panels "failed to include relevant factors in the risk profiles of the fishing methods and ocean areas."[596] Specifically, Mexico argues that the Panels erred by: (1) focusing on the kinds of unobservable harms caused by setting on dolphins and thereby "excluded adverse effects caused by other fishing methods in

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[588] Mexico's Appellant Submission, para. 237 (eighth bullet).

[589] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.490.

[590] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.424 (referring to "a formally operating Chinese Taipei shark and tuna gillnet fishery"); *id.* n.779 (referring to data from Sri Lankan gillnet fisheries dating from "a two-year period in the mid-1980s).

[591] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.424, n.779.

[592] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. n.778.

[593] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.489.

[594] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.438-441.

[595] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.457, 7.520.

[596] Mexico's Appellant Submission, para. 241.

other ocean areas"[597]; (2) omitting "important measurements of adverse effects, including dolphin stock sustainability and absolute levels of mortalities"[598]; and (3) omitting factors relating to the "regulatory reliability of different ocean areas."[599]

240. The arguments repeat, without addition, arguments that Mexico raised in other sections of its appellant submission and that the United States has addressed above. Specifically, Mexico's argument that the Panels' focus on "kinds of harm" "erroneously narrowed the risk profile criteria" they assessed (including Mexico's arguments concerning ghost fishing) repeat the argument in section V.C.1.b(3) of Mexico's appellant submission[600] and addressed in Section III.C.1.b.iii above. Mexico's argument that the Panels erred by not including (or relying exclusively on) a PBR metric or on "absolute levels of mortalities" repeats the arguments raised in sections V.C.1.c(2)-(3) of Mexico's submission[601] and addressed in Sections III.C.1.c.iii-iv above. Finally, Mexico's argument that the Panels declined to consider factors allegedly relevant to "insufficient regulatory oversight" in various fisheries repeats the argument raised in section V.C.1.c(4) of Mexico's submission[602] and addressed in Section III.C.1.c.v above.

241. Therefore, for all the reasons described in those previous sections, Mexico's argument that the Panels' analysis of the eligibility criteria is incomplete and in error should be rejected.

3. The Panels Correctly Found that the Certification Requirements, in Context as Part of the Whole Measure, Are Calibrated

242. In section V.C.2.b of its appellant submission, Mexico appeals paragraphs 7.571, 7.572 and 7.603, 7.607-608, and 7.609 and 7.710 of the Panel Reports.[603] These paragraphs form part of Section 7.8.3 of the Panel Reports, in which the Panels found that the certification requirements of the 2016 measure are "calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean."[604] In the particular paragraphs at issue, the Panels: (1) recall and rely on their previous factual findings concerning comparative risk profiles;[605] (2) identify the "special risk profile" of the ETP large purse seine fishery, as compared to other fisheries;[606] (3) find that differences in the sensitivity of the certification mechanisms in different fisheries is not necessarily inconsistent with the objectives of the measure;[607] and, (4) conclude that the determination provisions "complement" the certification

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[597] Mexico's Appellant Submission, para. 242.

[598] Mexico's Appellant Submission, paras. 243-245.

[599] Mexico's Appellant Submission, para. 246.

[600] *Compare* Mexico's Appellant Submission, para. 242 *with id.* paras. 186-190.

[601] *Compare* Mexico's Appellant Submission, paras. 243-245 *with id.* paras. 202-219.

[602] *Compare* Mexico's Appellant Submission, para. 246 *with id.* paras. 220-224.

[603] Mexico's Appellant Submission, para. 267.

[604] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.548-611.

[605] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.571.

[606] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.572, 7.603.

[607] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.607-608.

requirements and "help to establish a mechanism for enforcing the eligibility criteria" that is properly calibrated to the risk to dolphins in different fisheries.[608]

243. Mexico claims that the Panels' analysis and findings in these paragraphs constitute legal error. Mexico first argues that the Panels' reliance on their previous evaluation of risk profiles of different fishing methods constituted legal error due to errors in the evaluation that Mexico raised previously.[609] Second, Mexico argues that the Panels' erred by failing to analyze the risk profiles of the relevant ocean areas, namely the ETP large purse seine fishery on the one hand, and "other ocean areas," on the other.[610] Third, Mexico asserts that the Panels erred in finding that the measure could be calibrated if it "allow[ed] higher margins of error outside the ETP."[611] Finally, Mexico argues that the Panels erred in finding that the determination provisions "resolve problems with the measure's calibration."[612]

244. This section shows that all of Mexico's arguments should be rejected. First, subsection (a) summarizes the relevant analysis and findings of the Panels. Subsection (b) then explains that the Panels did not err in relying on their previous (correct) evaluation of the comparative risk profiles of different fishing methods. Subsection (c) shows that, in fact, the Panels' analysis of the certification requirements was correctly based on their previous analysis of and conclusions on the "relative risks of harm to dolphins from different fishing techniques in different areas of the oceans."[613] Subsection (d) shows that the Panels' analysis and conclusions concerning margins of error did not constitute legal error. Finally, subsection (e) shows that the Panels analysis and conclusions concerning the determination provisions was not legal error.

a. The Panels' Analysis

245. The Panels began their analysis by recalling that the certification requirements "enforce the eligibility criteria with a view to achieving the objective of protecting dolphins from harmful fishing methods."[614] To that end, they require that "certain documentation" accompany tuna product marketed in the United States as dolphin-safe.[615] The documents required depend on the fishery in which the tuna was caught. The certification requirements distinguish between tuna caught inside and outside the ETP large purse seine fishery: tuna caught in the former fishery must be accompanied by a captain certification and an independent observer certification attesting that the two relevant eligibility criteria are met, while tuna caught in other fisheries generally needs only a captain certification.[616] However, an independent observer certification is

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[608] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.609, 7.710.

[609] Mexico's Appellant Submission, paras. 252-253.

[610] Mexico's Appellant Submission, paras. 254-260.

[611] Mexico's Appellant Submission, paras. 261-264.

[612] Mexico's Appellant Submission, paras. 265-266.

[613] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.548.

[614] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.708.

[615] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.549.

[616] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.549 ("[T]una caught in the ETP large purse seine fishery must be accompanied by a certification from the vessel captain and an independent observer that (a) no

also required for tuna caught in a fishery that has been designated as having "a regular and significant association between dolphins and tuna" or "a regular and significant mortality or serious injury of dolphins."[617]

246. The Panels then summarized relevant findings from the first compliance proceeding. There, the Appellate Body reversed the panel's analysis and conclusions because it had failed to analyze "the respective risks [to dolphins]" posed by the "relevant fisheries" and "whether such risks were addressed in an even-handed manner by the different certification requirements."[618] However, the Appellate Body did not fault certain substantive aspects of the panel's analysis, including that setting on dolphins is practiced "consistently or systematically" only "inside the ETP" and that widespread reliance on captain certifications by domestic and international regimes demonstrates "the general reliability of captains' certifications."[619] The Panels also recalled the first compliance panel's finding that relying on captain statements outside the ETP large purse seine fishery was not *per se* inappropriate but that the United States had not shown captains were necessarily equipped to accurately make the dolphin safe certifications.[620]

247. The Panels then began their analysis of the certification requirements of the 2016 measure by establishing the risk profiles of the relevant fisheries. They first confirmed that setting on dolphins "is only practised routinely and systematically in the ETP."[621] They then recalled their previous factual finding, based on "the evidence on the record," that "setting on dolphins is a particularly dangerous fishing method that is liable to cause observable and unobservable harms to dolphins at rates significantly in excess of those caused by other fishing methods."[622] They explained that, while "not all large purse seine vessels in the ETP actually do set on dolphins," the ETP has a "special risk profile," compared to other fisheries, because it is the only fishery in the world where: (1) there exists "both the technical and legal possibility of setting on dolphins," and (2) "dolphin sets occur in a consistent and systematic manner."[623] In contrast, the risk profile of other fisheries is generally "relatively low" because setting on dolphins is not possible and "other fishing methods pose relatively fewer risks to dolphins, and in

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dolphins were killed or seriously injured during the sets in which the tuna was caught, and (b) none of the tuna was caught on a trip using a purse seine net intentionally deployed on, or used to encircle, dolphins.").

[617] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.549 ("For tuna caught outside the ETP large purse seine fishery, a certification from the vessel captain that '[n]o purse seine net or other fishing gear was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna were caught, and that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught' is required," and an observer certification is required in fisheries designated under the determination provisions).

[618] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.550; *see US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.165.

[619] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.551, 7.554.

[620] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.555-556.

[621] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.570.

[622] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.571.

[623] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.572.

many cases do not interact with dolphins at all."[624]

248. The Panels then analyzed whether the certification requirements are "appropriately calibrated" to the risks to dolphins inside and outside the ETP large purse seine fishery.[625] They confirmed the finding of the first compliance panel that, "because 'the nature and degree of the interaction [with dolphins] is different in quantitative and qualitative terms'" in the ETP large purse seine fishery than in other fisheries, "requiring an independent observer in the [former] fishery but not in other fisheries is *prima facie* calibrated to the difference between the risk profile of the ETP large purse seine fishery . . . and other fisheries."[626] Next, analyzing whether the certification requirements were actually calibrated to this difference in risk, the Panels found that the new captain training requirement imposed by the 2016 IFR provides "meaningful information concerning key aspects of the certification process that would assist captains to understand and properly carry out their [certification] responsibility."[627] They also found that the requirement is "embedded within a sufficiently enforceable regulatory framework."[628]

249. On this basis, the Panels found that the 2016 IFR "narrow[ed] the differences between the certification requirements that apply in the ETP large purse seine fishery and other fisheries."[629] They noted that remaining differences still "may make it easier or more likely for dolphin-safe certifications made only by captains to be inaccurate," compared to certifications "by captains and observers."[630] But, as they explained, this does not "deprive[] the certification requirements of calibration."[631] Rather, the "significantly higher risk profile of the ETP large purse seine fishery *vis-à-vis* other fisher[ies]" means that using a "more sensitive detection mechanism" is even-handed, provided the variation in intensity is rationally connected to the difference in risk.[632] The Panels rejected Mexico's claim that any difference in the sensitivity of the certification mechanism means a difference in label accuracy. They explained that this is not necessarily the case because other factors, namely "the risk profile of a fishery," also affect the accuracy of the label.[633] Thus, while an "observer may be needed" in high-risk fisheries, a

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[624] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.603; *see also id.* para. 7.606 (contrasting the "special risk profile" of "the ETP large purse seine fishery" and the "relatively lower risk profiles" of "other fisheries").

[625] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.573-611.

[626] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.568, 7.578-580.

[627] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.589, 7.595.

[628] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.595.

[629] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.595.

[630] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.599.

[631] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.600.

[632] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.601-603 (adopting the minority panelist's analysis from the first compliance proceeding that, "[p]rovided that there is a rational connection between the variation in intensity and the difference in risk, I would not find that the implementation of different detection mechanisms lacks even-handedness or is otherwise discriminatory").

[633] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.607.

captain certification may be sufficient "in fisheries where the risk profile is relatively low."[634]

250. Finally, the Panels noted that the determination provisions supplement the certification requirements by ensuring that the same requirements are imposed "in fisheries where the same degree of risk prevails."[635] Specifically, if a fishery is determined to have a "regular and significant tuna-dolphin association (similar to that in the ETP), or . . . regular and significant dolphin mortality or serious injury" an independent observer certification is required.[636] As the Panels found, a fishery is designated under the second prong of the determination provisions if it is determined to cause, on a per set basis, levels of dolphin mortality and serious injury at least equal to those caused by dolphin sets in the ETP from 1997 to 2017.[637] This application of the determination provisions "help[s] to ensure that similar situations are now treated similarly under the 2016 Tuna Measure."[638] Indeed, it is more dolphin-protective for fisheries outside the ETP large purse seine fishery because using average dolphin mortality levels from 1997 to 2017 as a benchmark means that fisheries may be designated based on lower levels of observable dolphin harms than resulted in the imposition of the AIDCP requirements.[639]

251. For these reasons, the Panels concluded that the certification requirements, in the context of the 2016 measure as a whole, "address the relative risks posed to dolphins in the ETP large purse seine fishery on the one hand and other fisheries on the other hand in a way that is calibrated to, tailored to, and commensurate with the risk profiles of those fisheries" and thus are even-handed.[640]

b. Mexico's Argument that the Panels Wrongly Relied on Their Evaluation of Risk Profiles Should Be Rejected

252. In section V.C.2.b(1) of its appellant submission, Mexico argues that the Panels erred in relying on their "erroneous evaluation" of the "comparative risk profiles of the different fishing methods" in their analysis of the certification requirements.[641] On this basis, Mexico appeals the paragraph of the Panel Reports referring to and relying on the previous finding that "setting on dolphins is a particularly dangerous fishing method that is liable to cause observable and unobservable harms to dolphins at rates significantly in excess of those caused by other fishing

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[634] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.607-608.

[635] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.610.

[636] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.610. As noted elsewhere, the tracking and verification requirements applicable for tuna product produced from a designated fishery will also change. *Id.* paras. 7.674, 7.681.

[637] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.694. In this regard, we note that there is a typographical error at paragraph 7.698 of the Panels Reports, which refers to 2007 instead of 2017. However, the correct year is clear from paragraph 7.694 and from the underlying exhibit. *See* Dolphin Mortalities Per Set Due to ETP Dolphin Sets and in Other Fisheries (Exhibit USA-111).

[638] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.692.

[639] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.699.

[640] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.611.

[641] Mexico's Appellant Submission, paras. 252-253, 267(i) (citing paragraph 7.571 of Panel Reports).

methods."[642] Mexico puts forward no new arguments in this section but simply cites to those made above both "generally and in relation to the eligibility requirements."[643]

253. Mexico's argument in this section relies entirely on the previous arguments that the Panels' analysis of the risk profile of different fishing methods in different ocean areas was flawed and that the Panels therefore erred in relying on it in their analysis of the regulatory distinctions of the 2016 measure.[644] These arguments were fully addressed in Sections III.C.1.a and III.C.2.d.

c. Mexico's Argument that the Panels Failed to Conduct an Appropriate Analysis of Ocean Areas Should Be Rejected

254. In section V.C.2.b(2) of its appellant submission, Mexico argues that the Panels failed to analyze "the risk profiles of ocean areas" and, specifically, "to compare the ETP ocean area to other ocean areas."[645] In support of this argument, Mexico claims, first, that, in their analysis of the risk profile of the ETP large purse seine fishery, the Panels failed to "address" the fact that, in any year, not all participating vessels are necessarily issued a dolphin mortality limit (DML) authorizing them to set on dolphins in that year.[646] Second, Mexico claims that the Panels failed to "consider whether particular non-ETP fisheries . . . should be given different risk profiles" and not, as Mexico alleges, classified as "low risk" because of low mortality levels in other fisheries using the same gear type.[647] Third, Mexico claims that the Panels also failed to address that observer certifications are required in seven U.S. fisheries that may not be "high risk."[648]

255. All of Mexico's arguments in section V.C.2.b(2) should be rejected because the Panels appropriately analyzed whether the certification requirements, in the context of the measure as a whole, are calibrated to "the risks to dolphins arising from the use of different fishing methods in different areas of the ocean" and correctly found that they are.[649] Both Mexico's general claim that the Panels failed to analyze the risk profiles of the relevant ocean areas (the ETP large purse seine fishery and other fisheries) and Mexico's specific arguments about the three considerations that the Panels allegedly ignored are incorrect. Rather, the Panels conducted the appropriate analysis, as set out by the Appellate Body in the previous compliance proceeding.

256. As an initial matter, Mexico's general claim that the Panels erred by "not conducting a comparison based on ocean areas and instead compared the large purse seine fishery in the ETP

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[642] Mexico's Appellant Submission, paras. 252-253, 267(i); *see US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.571.

[643] Mexico's Appellant Submission, para. 252.

[644] *See* Mexico's Appellant Submission, para. 252; *id.* sections V.C.1.a, V.C.2.a(2).

[645] Mexico's Appellant Submission, paras. 254, 267(ii).

[646] Mexico's Appellant Submission, paras. 256-257.

[647] Mexico's Appellant Submission, para. 259.

[648] Mexico's Appellant Submission, para. 258.

[649] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.548.

only to other fishing methods on a global basis" is incorrect.[650] Mexico's suggestion is that the Panels' analysis of the risk profile of the ETP large purse seine fishery and other fisheries was based on global averages concerning different fishing methods and not a review of individual fisheries.[651] That is not the case. Rather, as discussed above, in Section 7.7.2 of their Reports, the Panels thoroughly reviewed all the evidence on the record concerning the seven tuna fishing methods, including all the evidence concerning particular fisheries and, on this basis, drew conclusions about the risk profile of each of the tuna fishing methods, as used in each and all of the ocean areas for which there was evidence on the record.[652]

257. Specifically, the Panels concluded that setting on dolphins in the ETP had a much higher risk profile than the other tuna fishing methods used inside and outside the ETP. Based on the evidence, the Panels found that setting on dolphins in the ETP: (1) caused 91.15 observed dolphin mortalities per 1,000 sets from 2009-2015,[653] (2) likely causes more dolphin mortalities and serious injuries "than are observed" due to "the intensity and length of the interactions" with dolphins that it requires (and "the likelihood of unobserved mortality or serious injury is present in every set"),[654] and (3) causes unobservable harms due to the chase itself.[655] With respect to the six other fishing methods, the Panels found that, for each of them except gillnet fishing, the rates of observable dolphin harms in ***every*** fishery for which there was reliable evidence on the record were far lower than the rate of observable harm caused by setting on dolphins in the ETP.[656] For gillnet fishing, the Panels found that the risks of observable harms were low or nonexistent in some fisheries and high in certain others.[657] In terms of unobservable harms akin

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[650] Mexico's Appellant Submission, paras. 254, 267(ii).

[651] Mexico's Appellant Submission, paras. 254, 259 (arguing that some fisheries were classified as "'low risk' because there is a fishery using the same method elsewhere in the world that is believed not to cause significant mortalities").

[652] *See supra* secs. III.C.1.a, III.C.2.d.

[653] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.285, 7.519.

[654] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.279-280, 7.519.

[655] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.309, 7.518.

[656] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.332-334, 7.365-367, 7.383-385, 7.396-398 (making findings concerning levels of observable harms caused by purse seine fishing other than by setting on dolphins in the ETP, the WCPO, the Indian Ocean, and the eastern tropical Atlantic Ocean); *id.* para. 7.401 (concluding, based on these findings, that "this fishing method has a relatively low risk profile in terms of both observed and unobserved mortality and serious injury"); *id.* paras. 7.466-471, 7.475 (making findings on the level of observable harms caused by longline fishing in fisheries in the Pacific, Atlantic, and Indian Oceans and concluding "that some longline fisheries present no known risks of observable harms to dolphins while in the ones that do present some level of risk, such levels are, in general, relatively low"); *id.* para. 7.523 (finding based on the fishery-specific evidence on the record that longlining "causes much less observable harm to dolphins, compared to setting on dolphins in the ETP"); *id.* paras. 7.488-494, 7.521 (making findings on levels of observable harm caused by trawl fishing in certain fisheries, finding that evidence did not support findings on certain other fisheries, and concluding that "the evidence suggests that observed mortalities are very low in some fisheries and moderate in others" and that levels of unobserved mortality or serious injury are not "likely to be very high"); *id.* para. 7.521 ("[T]rawling poses a much smaller level of risk of observable harms to dolphins, compared to setting on dolphins in the ETP"); *id.* para. 7.511 ("[T] here is no evidence of handlining causing observable mortalities to dolphins"); *id.* paras. 7.514-515 ("There is no report of any dolphins being killed or seriously injured as a result of pole and line fishing.").

[657] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.440-444, 7.520 ("We have found that gillnet fishing poses high levels of observable harms to dolphins in certain areas of the ocean, but does not pose the same

to those caused by the chase itself in dolphin sets, the Panels found that none of the other fishing methods caused such harms in any fishery.[658] On this basis, the Panels found that each of the other fishing methods, as used in the ocean areas for which there was evidence on the record, has a risk profile for dolphins that is relatively low compared to setting on dolphins in the ETP.[659]

258. And, as the Panels explained, these factual findings from Section 7.7.2 on the risk profile of different fishing methods in the ocean areas for which evidence was available were the basis for the analysis in Section 7.8.3 of whether the certification requirements were calibrated to the risks to dolphins posed by tuna fishing. The Panels made this clear at the outset of their analysis of the certification requirements by "recall[ing]" their conclusions, based on the evidence on the record, that "setting on dolphins is a particularly dangerous fishing method that is liable to cause observable and unobservable harms to dolphins at rates significantly in excess of those caused by other fishing methods."[660] The Panels reiterated this basis throughout Section 7.8.3 by referring back to the "relatively low" risk profiles of fisheries where fishing methods other than setting on dolphins are used.[661] Finally, the Panels noted that the determination provisions exist to "complement" the general certification requirements by imposing an additional independent observer requirement on any fisheries that met the standard of being high-risk.[662]

259. Thus, the Panels' analysis of the certification requirements appropriately reflected and was based on their analysis of and conclusions concerning the "relative risks of harm to dolphins

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harms in other areas" and, in particular, in a number of fisheries, "the observable harms caused by gillnet fishing remained clearly below those caused by setting on dolphins in the ETP").

[658] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.335, 7.370, 7.386, 7.399, 7.401 (purse seine fishing other than by setting on dolphins in the ETP, the WCPO, the Indian Ocean, the eastern tropical Atlantic Ocean and overall), 7.457 (gillnet fishing), 7.480 (longline fishing), 7.494 (trawl fishing), 7.500-511 (handlining), 7.515 (pole and line), 7.518 (all fishing methods other than setting on dolphins).

[659] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.525 ("[G]iven that none of the six methods we have assessed causes the kinds of unobservable harms to dolphins that setting on dolphins causes, and considering the important differences between setting on dolphins and each of the other six methods with respect to observable harms to dolphins, we conclude that, overall, the risk profile of setting on dolphins is much higher than that of each of the other six fishing methods"); *see id.* para. 7.402 ("[W]hile purse seine fishing without setting on dolphins poses some risks to dolphins, the risk profile of this fishing method as used in different areas of the ocean is relatively low"); *id.* para. 7.522; *id.* paras. 7.457, 7.518, 7.520 ("[G]illnet fisheries can be particularly harmful to dolphins, but are not necessarily so in all areas of the ocean"); *id.* paras. 7.480, 7.523 (finding that "the rate of dolphin mortalities caused by [longlining] has been consistently low, with many years in different fisheries registering no known mortality or captures of dolphins" and that longline fishing does not cause unobservable harms); *id.* paras. 7.493-494 (finding, with respect to trawling, that "the evidence suggests that observed mortalities are very low in some fisheries and moderate in others", that any "unobserved mortality and serious injury" is "not . . . likely to be very high", and that, therefore, "the evidence establishes that trawling may pose some risk to dolphins" but is "a low-to-moderate risk fishing practice"); *id.* para. 7.521; *id.* para. 7.511 ("[T]he risk profile of handlining fishing is low"); *id.* para. 7.516 ("[O]n the basis of the evidence before us, we find that pole and line fishing poses no risk of observable or unobservable harms to dolphins. The risk profile of the fishery is accordingly very low.").

[660] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.571.

[661] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.603, 7.606, 7.608.

[662] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.609-610.

from different fishing techniques *in different areas of the oceans*."[663] Therefore, Mexico's general argument in this section is incorrect. Further, as discussed below, the three specific arguments Mexico advanced in section V.C.2.b(2) of its appellant submission are also incorrect.

260. First, Mexico is wrong that the Panels did not correctly analyze the risk profile of the ETP large purse seine fishery because they did not account for vessels that may not set on dolphins.[664] In fact, the Panels explicitly addressed this fact. They explained that, while not all large purse seine vessels in the ETP "actually do set on dolphins," what gives the fishery "its special risk profile" is the fact that only in that fishery is there a "technical and legal possibility of setting on dolphins" and only in that fishery does setting on dolphins "occur in a consistent and systematic manner."[665] Thus, what makes the ETP large purse seine fishery particularly high-risk for dolphins is not the fact that *every* vessel sets on dolphins but the fact that some (indeed, many) do so on a consistent and systematic basis. Further, every vessel has the legal and technical possibility of doing so. This is why the Panels found the fishery to have a "special risk profile" and why the AIDCP requires *all* large purse seine vessels in the ETP to carry observers, regardless of whether they have a DML or intend to set on dolphins.[666]

261. Mexico's assertions concerning vessels that do not apply for a DML in a year do not undermine this analysis or conclusion. As the Panels correctly found (in a factual finding that has not been appealed), all large purse seine vessels in the ETP have the "technical and legal possibility" of setting on dolphins.[667] A vessel may not be able to do so legally on a given day, because, for example, it does not have a DML for that year or has already reached its DML, but the legal possibility exists in the future. Similarly, a vessel conceivably may not have the technical capability to set on dolphins on any given day if it has *chosen* not to bring the necessary equipment. However the technical possibility exists, due to the nature of the vessels and the tuna-dolphin association in the area. Thus, Mexico is wrong that there is any "gap" in the Panels analysis of the risk profile of the ETP large purse seine fishery.

262. Additionally, Mexico's factual assertions in connection with this argument were not raised before the Panels and have no basis in the record. First, Mexico's claim that vessels without DMLs do not carry equipment critical for setting on dolphins[668] was not raised before the Panels and is unsupported by evidence. Under the AIDCP, large purse seine vessels without DMLs are not required to carry equipment that would enable them to set on dolphins *consistent with the AIDCP*.[669] But there is no evidence that such equipment is necessary to setting on

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[663] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.165, 7.229 (emphasis added); *see also id.* paras. 7.165, 7.229.

[664] Mexico's Appellant Submission, paras. 256-257.

[665] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.572; *see also id.* para. 7.606 ("As we have established above, the ETP large purse seine fishery has a special risk profile that sets it apart from other fisheries. This is due both the intense tuna-dolphin association and the fact that only in the ETP is setting on dolphins, which is particularly harmful to dolphins, possible and permitted on a consistent and systematic manner.").

[666] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.572, 7.578.

[667] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.572.

[668] *See* Mexico's Appellant Submission, para. 257 (claiming this is "an uncontested fact").

[669] Agreement on the International Dolphin Conservation Program, Annex VIII, para. 2 (Exh. US-5).

dolphins in general or that vessels without DMLs do not, in fact, carry it. Second, Mexico's suggestion that vessels either set on dolphins or do not – and that the fishery can be divided into vessels with and without DMLs[670] – also was not made before the Panels and has no support in the record. In fact, there is no such clear division. Vessels with DMLs may not set on dolphins during particular trips either because they choose not to or if they have reached their DML for the year. Further, DMLs can be transferred or changed mid-year, so the fact that a vessel was not given a DML does not mean that it can never legally set on dolphins that year.[671]

263. Second, Mexico is wrong that the Panels failed to "consider" whether "particular non-ETP fisheries . . . should be given different risk profiles" and that certain fisheries were classified as "low risk" based evidence on other fisheries using the same gear type.[672] In fact, the Panels did analyze whether any "particular" fisheries other than the ETP large purse seine fishery should not be classified as "low risk." They did so in Section 7.7.2 in their analysis of all the available fishery-specific evidence on the record and again in the context of the determination provisions.[673] In Section 7.7.2, they found that the only high risk fisheries shown by evidence on the record to exist today were gillnet fisheries in the Indian Ocean.[674] In their assessment of the determination provisions, they recalled their previous factual findings and confirmed that, other than the Indian Ocean gillnet fisheries, all other fisheries on which there was evidence on the record "have a relatively lower risk profile than the ETP large purse seine fishery."[675] The

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[670] *See* Mexico's Appellant Submission, para. 256.

[671] *See* AIDCP, "Report on the International Dolphin Conservation Program," Doc. MOP-28-05, at 2-3, Oct. 18, 2013 (Exh. MEX-8); AIDCP, "Report on the International Dolphin Conservation Program," Doc. MOP-32-05, at 2-3, Oct. 20, 2015 (Exh. US-14).

[672] *See* Mexico's Appellant Submission, para. 259.

[673] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, sec. 7.7.2; *id.* paras. 7.700-7.701.

[674] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.332-334, 7.365-367, 7.383-385, 7.396-398, 7.401-401 (evaluating all purse seine fisheries for which there was evidence on the record and concluding: "[W]hile purse seine fishing without setting on dolphins poses some risks to dolphins, the risk profile of this fishing method *as used in different areas of the ocean* is relatively low") (emphasis added); *id.* paras. 7.441-457 (evaluating all the evidence on the record on gillnet fishing and finding that "gillnet fisheries . . . have caused, in some circumstances and in certain regions, levels of observable harms greater than those caused by setting on dolphins in the ETP," identifying the Indian Ocean Mixed-Target Gillnet Fisheries, but concluding that "gillnet fisheries can be particularly harmful to dolphins, but are not necessarily so in all areas of the ocean"); *id.* paras. 7.466-481, 7.475 (evaluating all longline fisheries for which there was evidence on the record and concluding "that some longline fisheries present no known risks of observable harms to dolphins while in the ones that do present some level of risk, such levels are, in general, relatively low" and that there is no risk of unobservable harms); *id.* paras. 7.488-494, 7.521 (evaluating all the evidence on the record concerning trawl fisheries and concluding that "observed mortalities are very low in some fisheries and moderate in others," that levels of unobserved mortality or serious injury are not "likely to be very high," and that the evidence shows trawling "to be a low-to-moderate risk fishing practice"); *id.* paras. 7.499-511 (evaluating all the evidence on the record concerning handline fishing and concluding: "there is no evidence of handlining causing observable mortalities to dolphins" or "unobservable harms to dolphins"); *id.* paras. 7.514-516 ("[O]n the basis of the evidence before us, we find that pole and line fishing poses no risk of observable or unobservable harms to dolphins.").

[675] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.700-701 ("[I]n our view, the United States' submissions throughout these proceedings show that the United States has considered the available evidence of risks to dolphins arising from the use of different fishing methods in different areas of the ocean, and has concluded that the vast majority of the world's fisheries have a lower risk profile than the ETP large purse seine fishery. We have reviewed the evidence on the record and come to a similar conclusion. . . . [O]ur review of the evidence on the

Panels thus conducted exactly the analysis Mexico claims they omitted.

264. Third, Mexico is wrong that the Panels erred in not addressing the observer certification requirements on the seven U.S. domestic fisheries.[676] Mexico has never put forward any argument that the additional observer requirement imposed on some U.S. vessels in U.S. fisheries renders the 2016 measure not even-handed; nor has Mexico suggested a reason that the Panels' omitting to mention the issue would render their analysis legally in error.[677] The Panels found that the certification requirements appropriately address the risks to dolphins posed by tuna fishing in the ETP large purse seine fishery and other fisheries.[678] The fact that the measure imposes additional requirements on U.S. vessels in certain U.S. fisheries above and beyond what is otherwise required does not undermine this conclusion.[679] And it certainly provides no basis for finding that the 2016 measure is not even-handed towards Mexico or any other WTO Member.

265. For these reasons, Mexico's arguments are incorrect and should be rejected.

d. Mexico's Argument that the Panels' Reasoning Concerning Margins of Error Constituted Legal Error Should Be Rejected

266. Mexico claims in section V.C.2.b(3) of its submission that the Panels applied the wrong legal standard in assessing the certification requirements and that this led them to erroneously find that the measure can be calibrated "where it allows higher margins of error for certifications in all ocean areas other than the ETP."[680] Specifically, Mexico argues that the Panels were

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record concluded that other fisheries [besides 'certain Indian Ocean gillnet fisheries'] have a relatively lower risk profile than the ETP large purse seine fishery.").

[676] *See* Mexico's Appellant Submission, para. 258.

[677] *See* Mexico's Appellant Submission, para. 258 (simply alleging that the Panels "did not address" this circumstance" and claiming that this "raises questions").

[678] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.573-611.

[679] In this regard, Mexico's suggestion that the fisheries might be "high risk" is refuted by Panels' findings and the evidence on the record. The seven domestic fisheries at issue 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. Qualified and Authorized Notice, 79 Fed. Reg. at 40,719-20 (1st compliance proceeding Exh. US-113). Evidence on the record and unappealed findings of the Panels establish the low risk profile of the American Samoa longline fishery, the Atlantic pelagic longline fishery, the California drift gillnet fishery, and the Hawaii deep-set longline fishery. *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.469-471, 481 (longline fisheries); *id.* paras. 7.443, 7.457 (California drift gillnet fishery). Evidence on the record also establishes that rates of dolphin mortality in the Hawaii shallow-set longline fishery (primarily a swordfish fishery) ranges from 0 to 2.19 mortalities per 1,000 sets between 2009 and 2015), *see* NMFS, "Hawaii Shallow-Set Longline Annual Reports - 2006-2015" (Exh. US-139), well within the range of other longline fisheries found by the Panels to be low risk. *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.469-471, 481. Evidence on the record establishes that the other two fisheries, the Atlantic Bluefin purse seine fishery and the California pelagic longline fishery are Category III fisheries, meaning there is "a remote likelihood of or no known incidental mortality and serious injury of marine mammals." *See* NMFS, Proposed Rule: List of Fisheries for 2017, 81 Fed. Reg. 54,019, at 54,020, 54,030, and 54,035 (Aug. 15, 2016) (Exh. US-101).

[680] Mexico's Appellant Submission, para. 267(iii).

required to assess whether the certification requirements are "designed or applied in an arbitrary or unjustifiable manner" by examining whether the detrimental impact they cause "can be reconciled with, or rationally connected to, the objectives pursued by the measure," and they erred in not doing so.[681] In Mexico's view, this error is apparent from the Panels' failure to consider whether "tolerating error" – and tolerating differences in the "margin of error" – "can be reconciled with, or rationally connected to" the objectives of the measure.[682] Mexico suggests that if the Panels had conducted the correct analysis, they "may have found" that any difference in the "margins of error" means that the measure is inconsistent with Article 2.1.[683]

267. These legal arguments are redundant of those advanced in previous sections of Mexico's submission and addressed above. Mexico's claim that the Panels failed to correctly assess whether the detrimental impact caused by the measure is rationally connected to the objectives of the measure – and, in particular, the argument the Panels erred in finding that margins of error in certification or differences in the margin of error do not render the measure *per se* inconsistent with Article 2.1 – was explained in section V.B.2.c(1) of Mexico's submission and addressed in Section III.B.2 above. As explained, the Panels correctly interpreted and applied the calibration analysis described by the Appellate Body in the original and first compliance proceedings, and their approach to margins of error was consistent with that analysis.[684] Mexico puts forward no additional arguments in section V.C.2.b(3) that, given the applicable legal standard, the Panels incorrectly applied that standard in the context of the certification requirements.

268. We note, however, that in repeating these legal arguments, Mexico misstates the factual record as to the relative accuracy of labels for tuna caught in different fisheries. Mexico suggests that statements of the first compliance Panel establish that it may be more likely that tuna caught by vessels other than large purse seine vessels in the ETP will be inaccurately labelled as dolphin-safe."[685] That is not the case. First, the first compliance panel did not make that finding – or any "definitive finding" – on differences in the margin of error of the dolphin safe label for tuna caught inside and outside the ETP large purse seine fishery.[686] Second, the findings of the first compliance panel concerned the 2013 measure, which did not include the captain training requirement that the Panels found made a "meaningful" contribution to ensuring that captains are able to accurately make the dolphin safe certifications.[687] Thus, the statements of the first

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[681] Mexico's Appellant Submission, para. 264.

[682] Mexico's Appellant Submission, para. 264.

[683] Mexico's Appellant Submission, para. 264.

[684] *See supra* sec. III.B.2.b.

[685] Mexico's Appellant Submission, para. 263 (quoting *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.168).

[686] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.168-169 (stating that they did not make a "definitive finding" on whether "it may be more likely that tuna caught by vessels other than large purse seine vessels in the ETP will be inaccurately labelled as dolphin-safe than it is that tuna caught by large purse seine vessels in the ETP will be" and explaining that "a definitive finding on this point would require a complex and detailed analysis of all of the various factors that may lead to tuna being inaccurately labelled" that "is not necessary in the context of the present dispute").

[687] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.589, 7.595.

compliance panel that Mexico quotes do not apply to the 2016 measure.[688]

269. The statements of the Panels in these proceedings concerning margins of error also do not suggest that there are differences in label accuracy for tuna produced from the ETP large purse seine fishery and other fisheries. As discussed above, the Panels found that differences between captain and observer certifications "may make it easier or more likely for dolphin-safe certifications made only by captains to be inaccurate" than for certifications made by "captains and observers."[689] But they did not find that this means that the label resulting from an observer certification is necessarily more accurate than that resulting from a captain certification. That is because, as they explained, other factors, including "the risk profile of a fishery," also affect the label's overall accuracy.[690] Therefore a more sensitive mechanism does not necessarily mean a more accurate label. Indeed, this was an important factor in the Panels' ultimate conclusion that due to the "significantly higher risk profile of the ETP large purse seine fishery *vis-à-vis* other fisher[ies]," using a "more sensitive mechanism" in that fishery is appropriate.[691]

270. Thus, for the reasons set out in previous sections, Mexico's arguments should be rejected.

e. Mexico's Argument on the Panels' Analysis and Conclusions Concerning the Determination Provisions Should be Rejected

271. In section V.C.2.b(4) of its submission, Mexico claims that the Panels erred in finding that "the determination provisions contribute to the calibration" of the certification requirements.[692] First, Mexico argues that the Panels "failed to take fully into account" that – because the standard for "regular and significant mortality or serious injury of dolphins" reflects "a 20-year average of direct dolphin mortalities caused by dolphin sets in the ETP, beginning in 1997 and ending at the present day" – the determination provisions do not allow calibration of the certification requirements based on "reliability of reporting," danger to dolphin stocks, or "high amounts of dolphin mortalities . . . measured on an absolute basis."[693] Second, Mexico argues that the 20-year benchmark is "higher than the 91.15 figure on which the Panels elsewhere relied" and that the Panels "did not address this inconsistency."[694] Finally, Mexico suggests that, under the Panels' approach, all fisheries under the benchmark are "assumed" to pose no or *de minimis* risks to dolphins and that this is an "erroneous application" of calibration.[695]

272. All of Mexico's arguments are in error and should be rejected.

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[688] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.595.

[689] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.599.

[690] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.607.

[691] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.603-604.

[692] Mexico's Appellant Submission, para. 267(iv).

[693] Mexico's Appellant Submission, para. 266.

[694] Mexico's Appellant Submission, para. 266.

[695] Mexico's Appellant Submission, para. 266.

273. First, the Panels did not fail to take into account that the determination provisions are not based any of the three variables that Mexico raises. Rather, the Panels had already found that none of those variables was an appropriate basis to assess whether the measure, including the certification requirements, is calibrated to the risk profile for dolphins of tuna fishing by different fishing methods in different ocean areas.[696] The Panels' reasons for their decisions with respect to each variable are fully described in their Reports and, as shown in Sections III.C.1.c.iii-v above, were correct, in light of the appropriate Article 2.1 analysis, as set out in the previous Appellate Body reports in this dispute. Mexico advances no additional arguments why the determination provisions should be based on any of these variables.[697] Further, even if Mexico had done so, the previous compliance proceeding established that there is one appropriate calibration analysis concerning the measure as a whole, including all components thereof.[698]

274. Second, there was no "inconsistency" between the Panels' analysis of the determination provisions and their reliance in other parts of their Reports on the level of observed dolphin mortalities for 2009-2015. The Panels relied on the 2009-2015 rate of observed dolphin mortalities as part of their assessment of the risk profile of setting on dolphins in the ETP.[699] However, as the Panels noted, that level of dolphin mortalities reflects the decreases in observed deaths that have occurred since the La Jolla Agreement and AIDCP requirements incorporated by the U.S. measure went into effect and because of these requirements.[700] Therefore, they do not represent the level of "regular and significant" dolphin mortality that would justify additional requirements being imposed in the first place. As the Panels explained:

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[696] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.184-192 (rejecting "Mexico's argument that in our assessment, we should use a PBR methodology to assess the overall levels of relative risks attributable to different fisheries"); *id.* paras. 7.193-195 (concluding that "a methodology that takes the absolute levels of adverse effects on dolphins into account" would not be appropriate to the task of evaluating "the *overall levels of relative risks* attributable to different fisheries, including in respect of both observable *and* unobservable harms" because it would not "deal with the issue of how to compare the levels of adverse effects on dolphins arising from different fishing methods in different areas of the ocean, or contextualize them in the light of the relative extent and intensity to which different fishing methods are used, in such a way as to allow an *apples-to-apples* assessment of the relative harmfulness of different fishing methods as used in different areas of the oceans"); *id.* paras. 7.107-113, 7.119-124 (finding that the alleged risks of inaccurate certification or tracking and verification "are not part of the risk profiles of different fisheries, and accordingly the applicable legal standard does not require us to assess whether the different regulatory distinctions are calibrated to the different risks of inaccurate certification or tracking and verification that may exist in different fisheries," although such risks are relevant to the assessment of the requirements of the measure).

[697] Mexico's Appellant Submission, para. 266.

[698] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.166 (disagreeing with the panel's approach that the calibration test is irrelevant to the question of whether the tracking and verification requirements are even-handed "because those requirements regulate a situation that occurs after the tuna has been caught," and stating that such an approach "runs counter to our observations that an assessment of the even-handedness of the amended tuna measure must take account of the fact that its various elements – the eligibility criteria, the certification requirements, and the tracking and verification requirements – establish a series of conditions of access to the dolphin safe label that are cumulative and highly interrelated").

[699] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.279-280, 7.519, 7.541.

[700] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.699 (noting that "Mexico itself recognizes that the additional requirements imposed by the AIDCP have significantly reduced the extent of mortality and serious injury in the AIDCP.").

> In our view, to compare those lower mortalities and serious injuries, which are in part a *result* of the imposition of more stringent certification and tracking and verification conditions, with the risk profiles of fisheries not subject to similar conditions would not represent an apples-to-apples comparison. A true apples-to-apples comparison would be against the ETP large purse seine fishery *prior* to the adoption of the AIDCP.[701]

However, by setting a lower benchmark (capturing some of the decrease in observed mortalities due to the AIDCP) the measure takes a more dolphin-protective approach to fisheries not currently designated under the determination provisions.[702]

275. Additionally, even if the benchmark for "regular and significant" mortality under the determination provisions had been set at the 2009-2015 level, the application of the measure would be unchanged. As the factual findings of the Panels establish, no evidence on the record suggests that any fishery other than the Indian Ocean gillnet fisheries causes levels of dolphin mortalities close to the level caused by dolphin sets in the ETP from 2009-2015. As the Panels found, referring to the 2009-2015 figure: "[E]ven the highest observed mortalities per set in other fisheries are almost three times smaller than those occurring in the ETP large purse seine fishery by setting on dolphins."[703] The Panels also found, as mentioned above, that levels of observable but unobserved harms in fisheries other than the ETP large purse seine fishery were likely to be low.[704] Indeed, even if the benchmark for the determination provisions was set at the lowest ever level of observed dolphin mortalities in the ETP, no evidence that the Panels found to be reliable suggests any fishery other than the Indian Ocean gillnet fisheries should be designated.[705]

276. Finally, Mexico's assertion that, under the Panels' approach, any fishery below the "regular and significant" dolphin mortality or serious injury threshold is "assumed" to pose no or a *de minimis* risk to dolphins is likewise incorrect.[706] To the contrary, the Panels explicitly recognized that such fisheries may pose some risk of harm to dolphins but found that the certification requirements of the 2016 measure "address" those risks to dolphins "in a way that is calibrated to, tailored to, and commensurate with the risk profiles of those fisheries."[707] For the

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[701] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.699.

[702] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.699 (noting that "far from being arbitrary or lacking in even-handedness, the use of this conservative benchmark seems to be perfectly consistent with the objectives of the 2016 Tuna Measure").

[703] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.541 (referring to the WCPO purse seine fishery in 2007-2009, the Northern Australia gillnet fishery, the California drift gillnet fishery, and the California set gillnet fishery).

[704] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.401 and 7.522 (purse seine fishing without setting on dolphins), 7.520 (gillnet fishing), 7.481 and 7.523 (longline fishing), 7.494 and 7.521 (trawl fishing), 7.511, 7.516, 7.524 (handline and pole and line fishing).

[705] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.279 (showing that the lowest level of observed mortalities due to dolphin sets in the ETP was 69.46 mortalities per 1,000 sets); *id.* para. 7.541 (describing the "highest observed mortalities per set in" fisheries outside the ETP large purse seine fishery).

[706] Mexico's Appellant Submission, para. 266.

[707] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.608-611, 7.710.

reasons discussed in this section, that conclusion is correct.

277. Therefore, Mexico's arguments concerning the determination provisions, as they relate to the certification requirements, are incorrect and should be rejected.

4. The Panels Correctly Found that the Tracking and Verification Requirements, in Context as Part of the Whole Measure, Are Calibrated

278. In section V.C.2.c of its appellant submission, Mexico appeals paragraph 7.652, paragraphs 7.651-653 and 7.676, paragraph 7.673, paragraphs 6.57 and 7.675, paragraphs 7.674 and 7.713, paragraphs 7.653-663, and paragraph 6.57 of the Panel Reports. For the most part, these paragraphs are part of Section 7.8.4 of the Reports, in which the Panels found that the tracking and verification requirements of the 2016 measure are "calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean."[708]

279. In the paragraphs that Mexico appeals, the Panels: (1) recall and rely on their previous findings concerning the "risk profiles of the ETP large purse seine fishery and the other fisheries discussed [above]"[709]; (2) rely on their prior findings of "a substantial difference between the risk profiles of the ETP large purse seine fishery" and the other fisheries discussed in finding that the tracking and verification requirements are calibrated to risk[710]; (3) find that "any potential difference in the 'margin of error'" of the different tracking and verification "mechanism[s]" is "commensurate with differences in risk"[711]; (4) find that one of Mexico's exhibits is not relevant to the analysis and reject Mexico's related argument[712]; (5) find that the determination provisions "work together with the tracking and verification requirements to ensure that the 2016 Tuna Measure is calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean"[713]; and (6) analyze and compare the AIDCP and NOAA tracking and verification requirements as to depth, accuracy, and government oversight.[714]

280. Mexico claims that the Panels' analysis and findings constitutes legal error and error under Article 11 of the DSU. Mexico first argues that the Panels' reliance on their prior evaluation of risk profiles was legal error for the same reason as their reliance on that evaluation in analyzing the certification requirements, *i.e.*, that the prior risk profile assessments "did not distinguish between fishing areas."[715] Second, Mexico argues that the Panels failed to include "the sufficiency of regulatory oversight" and related factors in their analysis of the risk profiles

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[708] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.612-676.

[709] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.652.

[710] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.651-653, 7.676.

[711] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.672-673.

[712] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 6.57, 7.675. Paragraph 6.57 is also cited as Mexico's sixth claim of appeal in this section.

[713] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.674, 7.713.

[714] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.653-663.

[715] Mexico's Appellant Submission, paras. 273-274.

of different fisheries.[716] Third, Mexico argues that the Panels erred in finding that the determination provisions "resolve problems with the measure's calibration."[717] Fourth, Mexico argues that the Panels "applied a faulty analysis" in finding that differences between the tracking and verification requirements of the AIDCP and NOAA regimes was "narrowed" by the 2016 IFR.[718] Finally, Mexico argues that the Panels acted inconsistently with DSU Article 11 in their analysis of Exhibit MEX-127.[719]

281. As shown in this section, all of Mexico's arguments should be rejected. Subsection (a) first summarizes the Panels' analysis of the tracking and verification requirements. Subsection (b) addresses Mexico's first argument, which covers the first two sets of paragraphs that Mexico appeals, explaining that the Panels' reliance on their prior evaluation of risk profiles was not legal error. Subsection (c) shows that, as discussed in previous sections, the Panels did not omit any relevant factors in their assessment of whether the 2016 measure is calibrated to the risk profiles of different fishing methods in different ocean areas. It also addresses Mexico's appeal of paragraphs 7.672-673 of the Panel Reports. Subsection (d) shows that Mexico puts forward no reason as to why the Panels' analysis of the differences between the AIDCP and NOAA tracking and verification regimes constitutes legal error. Finally, subsection (e) shows that Mexico's claim under Article 11 of the DSU should be rejected.

a. The Panels' Analysis

282. As the Panels found, the tracking and verification requirements of the 2016 measure are, like the certification requirements, "tools that enforce the eligibility criteria with a view to achieving the objective of protecting dolphins."[720] To that end, they require that "dolphin-safe and non-dolphin-safe tuna, wherever and however caught, be segregated from the moment of catch through the entire processing chain."[721] However, the specific requirements for how tuna must be "segregated, tracked, and verified" differ depending on the fishery in which the tuna was caught.[722] Tuna produced from the ETP large purse seine fishery must be "track[ed] and verif[ied] . . . consistently with the AIDCP Tracking and Verification System."[723] Tuna produced from other fisheries generally is subject to "different regulations established under the 2016 Tuna Measure" (referred to as "the NOAA regime").[724] Additional requirements apply to tuna produced from a fishery designated under the determination provisions.[725]

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[716] Mexico's Appellant Submission, paras. 275-278.

[717] Mexico's Appellant Submission, paras. 279-280.

[718] Mexico's Appellant Submission, paras. 281-299.

[719] Mexico's Appellant Submission, paras. 300-305.

[720] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.707.

[721] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.613.

[722] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.613.

[723] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.613.

[724] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.613.

[725] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.644.

283. Prior to beginning their analysis, the Panels recalled relevant findings from the first compliance proceeding. The first compliance panel found, based on the evidence on the record, that there were differences between the AIDCP and NOAA tracking and verification regimes under the 2013 measure as to the "depth," "accuracy," and "degree of government oversight" of the two systems.[726] Having identified these differences, the panel found that the measure imposed a "significantly less burdensome" system on tuna caught outside the ETP large purse seine fishery than tuna caught inside it.[727] It then found that the measure was not even-handed because there was "no rational connection" between the "differential burden" and the measure's objectives.[728] The Appellate Body reversed the panel's legal analysis, finding it had erred by not assessing "the relative risks to dolphins from different fishing methods in different areas of the oceans" and whether the distinctions of the 2013 measure "were explained in light of the relevant risk profiles."[729] It also faulted the panel for not conducting a holistic analysis of the measure.[730] However, the Appellate Body did not fault the panel's approach to assessing the content of, and differences between, the AIDCP and NOAA regimes.[731]

284. Before beginning their own legal analysis, the Panels made a number of factual findings about the content of the AIDCP regime and the NOAA regime under the 2016 measure, including findings about differences between the two regimes. In particular, the Panels found:

- Segregation: The AIDCP regime requires that dolphin-safe and non-dolphin safe tuna "be kept in separate wells" and, when unloaded, "must be unloaded . . . into separate bins."[732] "Similarly," under the NOAA regime, dolphin safe and non-dolphin safe tuna must be "stored physically separate[ly]" on board the vessel and "may not be mixed in any manner or at any time during processing."[733]

- Record-Keeping: The AIDCP requires processors to "maintain records complete enough to allow the lot numbers of processed tuna to be traced back to the corresponding TTF number" and states that national programs "should undertake periodic spot checks and

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[726] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.614-619.

[727] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.619.

[728] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.619.

[729] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.620 (citing *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.169); *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.169 ("[W]e are of the view that, in applying the second step of the 'treatment no less favourable' requirement . . . the Panel was required to assess whether the certification and tracking and verification requirements are 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the oceans. Our review of the Panel Report reveals that the Panel's analysis failed to encompass consideration of the relative risks to dolphins from different fishing techniques in different areas of the oceans, and of whether the distinctions that the amended tuna measure draws in terms of the different conditions of access to the dolphin-safe label are explained in the light of the relative profiles.").

[730] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.621.

[731] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.622.

[732] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.641-642.

[733] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.641-642.

audits."[734] For the NOAA regime, the 2016 IFR added a requirement that "US processors and importers . . . collect and retain, for two years, information on each point in the chain of custody of the tuna or tuna product, including information on all storage facilities, trans-shippers, processors, and wholesalers/distributors" that is "sufficient for the NMFS to conduct a trace-back of any product marketed as dolphin-safe to verify that the tuna product in fact meets the dolphin-safe labelling requirements."[735] The information must be provided to NMFS upon request. NMFS may undertake "verification activities" such as inspections, monitoring of Form 370s, cannery audits, and retail market spot-checks.[736]

- Compliance: Under the AIDCP regime, "sanctions [for non-compliance], if any, are dependent upon the legal regime and enforcement of the national authorities."[737] Under the NOAA regime, "breach of the tracking and verification requirements may lead to the imposition of sanctions."[738] Sanctions "for offering for sale or export tuna products falsely labelled dolphin-safe may be assessed against any producer, importer, exporter, distributor, or seller who is subject to the jurisdiction of the United States."[739] Penalties are available under several different provisions of U.S. law.

- Government Oversight: Under the AIDCP regime, "tuna destined for export and using the AIDCP dolphin-safe label must be accompanied by a certification of its status issued by the competent national authority."[740] Under the NOAA regime, a government certification of dolphin safe status is required only for tuna caught in a fishery that "is designated under the determination provisions."[741] This was a difference that "remain[s]" between the AIDCP and NOAA regimes.[742]

285. Having made these factual findings, the Panels proceeded, in light of the Appellate Body's guidance, to assess whether the differences between the AIDCP and NOAA regimes are "calibrated to" "the difference in the risk profiles of the different fishing methods in different areas of the ocean."[743] The Panels recalled their previous analysis and conclusions in section 7.7.2 that "there is a substantial difference between the risk profiles of the ETP large purse seine fishery and the other fisheries discussed" in that section.[744] Then the Panels, relying on their previous factual findings and the evidence on the record, assessed the differences between the AIDCP and NOAA regimes as to depth, accuracy, and government oversight and whether those

[734] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.643.

[735] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.643.

[736] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.643.

[737] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.645.

[738] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.645.

[739] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.645.

[740] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.647.

[741] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.644.

[742] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.647.

[743] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.649.

[744] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.652.

differences are "calibrated" to these differences in risk.[745]

286. As to depth – the "point to which tuna can be traced back" – the Panels reviewed the evidence and found that the AIDCP regime requires that "dolphin-safe and non-dolphin-safe tuna must be loaded into different wells that are correctly designated."[746] Within those categories, tuna is not required to be segregated by well or by set. Thus, tuna can "potentially" be traced back to a particular set and well if there were only one dolphin safe set and dolphin safe well on a trip but not otherwise.[747] Under the NOAA regime, U.S. processors and importers are required to retain complete chain of custody information, to be given to NOAA on request, sufficient to trace tuna back "to the vessel and trip on which it was caught," and also to trace "any non-dolphin safe tuna loaded onto the harvesting vessel back to one or more storage wells or other storage locations for a particular fishing trip."[748] Thus, under both regimes it is possible to trace dolphin safe tuna from a particular trip "back to one or more wells in which it was stored"; therefore, there is "no longer any meaningful difference with respect to depth."[749]

287. As to accuracy – the "degree of confidence that a particular [certification] properly describes the lot of tuna to which it is assigned" – the Panels recalled that the first compliance panel found that the AIDCP required that TTFs "accompany particular catches of tuna throughout the fishing and production process" but that it was not clear how, under the NOAA regime, captain certificates were kept with lots of tuna *before* they arrived at the canning plant.[750] The Panels found that the new chain of custody record-keeping requirements, which cover "each point in the chain of custody" beginning with the harvesting vessel, "directly address" that concern.[751] Thus, the Panels identified no difference between the regimes as to accuracy.

288. Finally, on government oversight, the Panels noted that the "crucial point" on which the first compliance panel found the AIDCP and NOAA regimes differed was "the inability of the US government under the NOAA regime to go 'behind the documents' in order to verify the movements of the tuna prior to the arrival to the cannery."[752] The Panels found that the additional requirements of the 2016 IFR "address" this concern.[753] The chain of custody requirements and the requirement to give the documents to NMFS on request mean that the U.S. government now has the ability "to go 'behind the documents,' as NMFS will have the ability to check the information of the movement of the tuna, even before it arrives at the cannery."[754] The requirement also "bridge[s]" differences with the AIDCP regime, which requires chain of

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[745] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.653.

[746] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.654.

[747] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.654.

[748] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.655.

[749] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.657.

[750] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.657.

[751] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.657.

[752] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.659.

[753] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.661.

[754] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.662.

custody documents be "made available to national and regional authorities."[755] The Panels noted that the two regimes remain different as to government certifications of dolphin safe status, which are required for all dolphin safe tuna under the AIDCP regime and only for tuna caught in fisheries designated under the determination provisions under the NOAA regime.[756]

289. Based on these findings, the Panels concluded that the 2016 measure "narrowed" the difference between the AIDCP and NOAA regimes but that differences remain "regarding the extent of government oversight."[757] As under the certification requirements, the Panels found that "it may be calibrated to use a more sensitive mechanism in areas where risks are high but a less sensitive mechanism in areas where the risks are low."[758] In this regard, applying a "more sensitive" tracking and verification mechanism inside the ETP large purse seine fishery and a "less sensitive" mechanism outside it is reasonable in light of "the risk profile of the ETP large purse seine fishery compared to other fisheries."[759] Further, the Panels noted that, under the determination provisions, additional requirements are imposed to ensure that fisheries with "similar" risk profiles to the ETP large purse seine fishery are subject to similar requirements.[760] As noted above, the Panels subsequently found that the only fisheries that, based on the evidence on the record, meet the definition of "regular and significant" dolphin mortality or serious injury have been so designated.[761]

290. The Panels specifically addressed Mexico's argument that the NOAA regime requirements are meaningless due to countries' "deficient" regulatory practices and because, as Mexico argues, NOAA "lacks jurisdiction to audit foreign fishing vessels, carrier vessels, and foreign processors."[762] The Panels rejected this argument, explaining that the NOAA regime provides that breaches of the tracking and verification requirements can lead to sanctions "against any producer, importer, exporter, distributor, or seller who is subject to the jurisdiction of the United States."[763] Thus, as the Panels found, the 2016 measure provides the United States with the tools to "induce compliance" by importers, as well as U.S. processors.[764] For all these reasons, the Panels concluded that any potential differences in the "margin of error" of the AIDCP and NOAA tracking and verification mechanisms is "commensurate with the difference in risk" to dolphins posed by the ETP large purse seine fishery compared to other fisheries.[765]

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[755] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.663.

[756] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.667-668.

[757] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.670.

[758] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.671.

[759] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.671-672.

[760] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.674.

[761] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.700-701.

[762] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.675.

[763] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.675

[764] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.675.

[765] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.676.

b. Mexico's Argument that the Panels Wrongly Relied on Their Evaluation of Risk Profiles Should Be Rejected

291. In section V.C.2.c(1) of its appellant submission, Mexico argues that the Panels erred in relying on their previous "erroneous evaluation of risk profiles."[766] In particular, Mexico again claims that the Panels failed to consider ETP large purse seine vessels not setting on dolphins.[767] Mexico appeals the paragraphs of the Reports in which the Panels explain their reliance on their prior risk profile evaluations and find that the tracking and verification requirements "are calibrated to the differences in the risk profile of the ETP large purse seine fishery compared to other fisheries."[768]

292. The United States fully addressed in Sections III.C.1.a, III.C.2.d, III.C.3.b, and III.C.3.c Mexico's argument that the Panels' analysis in Section 7.7.2 of the Reports, on which the Panels explicitly rely in their analysis of the tracking and verification requirements,[769] did not include an analysis of the risk profile of the relevant ocean areas was addressed above. As explained in Section III.C.3.c in particular, the Panels in Section 7.7.2 reviewed all the evidence on the record on the tuna fishing methods, including all the evidence on particular fisheries and, on that basis, drew conclusions about the risk profile of each fishing method, as used in each and all of the ocean areas for which there was evidence on the record. The Panels also made findings concerning the risk profiles of individual fisheries, specifically that the only high risk fisheries (other than the ETP large purse seine fishery) shown by evidence on the record to exist currently are gillnet fisheries in the Indian Ocean.[770]

293. Further, the Panels did not fail to "address" the risk profile of the ETP large purse seine fishery overall. As in their analysis of the certification requirements, the Panels explained that what gives the ETP large purse seine fishery its unique risk profile is the fact that it "is the only fishery where large purse seine vessels can, technically and legally, set on dolphins in a routine and systematic manner."[771] That fact is not dependent on all large purse seine vessels in the fishery setting on dolphins every trip, or even every year.[772]

294. Mexico puts forward no additional arguments in section V.C.2.c(1) and, therefore, all of Mexico's arguments in this regard have been addressed above.

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[766] Mexico's Appellant Submission, paras. 273-274.

[767] Mexico's Appellant Submission, para. 274.

[768] Mexico's Appellant Submission, para. 306(i)-(ii).

[769] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.652.

[770] *Supra* sec. III.C.3.c (citing *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.332-334, 7.365-367, 7.383-385, 7.396-398, 7.401-401, 7.441-457, 7.466-481, 7.475, 7.488-494, 7.521, 7.499-511, 7.514-516, 7.700-701); *id.* paras. 7.700-701 (explaining that they Panels had "reviewed the evidence on the record" and concluded that, aside from "certain Indian Ocean gillnet fisheries," "other fisheries have a relatively lower risk profile than the ETP large purse seine fishery").

[771] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.652; *cf. supra* sec. III.C.3.c (addressing the same argument in the context of the Panels' analysis of the certification requirements).

[772] *See supra* sec. III.C.3.c.

c. Mexico's Arguments Concerning the Panels' Alleged Failure to Include "Relevant Calibration Criteria" and the Panels' Approach to Margins of Error Should Be Rejected

295. In section V.C.2.c(2) of its appellant submission, Mexico argues that the Panels erred in not including in their assessment of the risk profiles of different fisheries criteria "related to the accuracy of the label," including the "sufficien[cy] of regulatory oversight, the reliability of reporting, the existence of IUU fishing and the existence of transshipment."[773] Mexico refers to its previous arguments that this omission was legal error.[774] Mexico states that the Panels "dismissed" Mexico's argument that some countries are "deficient" in their oversight of fishing activities and that NOAA "lacks jurisdiction to audit foreign fishing vessels, carrier vessels, and foreign processors" and failed to consider certain evidence Mexico submitted.[775] Finally, Mexico states that its earlier arguments on the Panels' approach to "margins of error" apply equally to the Panels' analysis of the tracking and verification requirements.[776]

296. The United States has fully addressed in Sections III.B.1 and III.C.1.c.v Mexico's argument that the Panels erred by "omitting" from their calibration analysis factors relevant to the accuracy of dolphin safe labels. In section V.C.2.c(2), Mexico reiterates that the Panels rejected Mexico's argument that the even-handedness analysis had to be based on these factors but put forward no additional reason why the Panels' analysis was legal error. Similarly, Mexico's statement that the Panels dismissed their argument on other countries' regulatory regimes and NOAA's jurisdiction simply repeat statements made elsewhere and provide no basis for finding that the Panels' analysis was legal error.[777] Mexico's argument that the Panels declined to consider Exhibit MEX-127 in their analysis is addressed in subsection (e) below.[778]

297. Further, the United States has fully addressed in Sections III.B.2 and III.C.3.d Mexico's arguments regarding margin of error, and Mexico puts forward no additional arguments in section V.C.2.c(2). We note, however, that, as with the certification requirements, Mexico seems to misstate the findings of the Panels, suggesting that the Panels made findings concerning the "margin of error" of the dolphin safe *labels* attached to tuna caught in different fisheries. That is not the case. In the context of the tracking and verification requirements, as with the certification requirements, the Panels' findings concern the sensitivity of the tracking and verification "mechanism" and the associated "margin of error."[779] However, as the Panels explained, different margins of error in tracking and verification mechanisms do not necessarily mean that the labels for products subject to a more sensitive mechanism are more accurate than the labels on other products because "the risk of inaccurate labeling" is also "a function of the

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[773] Mexico's Appellant Submission, paras. 275-278.

[774] Mexico's Appellant Submission, paras. 275, 277, 278.

[775] Mexico's Appellant Submission, para. 276.

[776] Mexico's Appellant Submission, para. 278.

[777] *See* Mexico's Appellant Submission, paras. 221-224, 276.

[778] *See infra* sec. III.C.4.f.

[779] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.671-672.

risk to dolphins in a particular fishery."[780] As with the certification requirements, this was a factor supporting the Panels' finding that the differences in the tracking and verification requirements are "commensurate with" the "significant difference in the risk profile of the ETP large purse seine fishery compared to other fisheries that can produce dolphin-safe tuna."[781]

298. Thus, for the reasons described above, Mexico's arguments should be rejected.

d. Mexico's Argument on the Determination Provisions Should be Rejected

299. In section V.C.2.c(3) of its appellant submission, Mexico argues that the Panels "reasoning regarding the determination provisions repeats the same errors discussed above in relation to the Panels' reliance on the determination provisions to support the certification requirements."[782] Mexico puts forward no further argumentation.

300. As explained in Section III.C.3.e above, all of the arguments Mexico put forward as to why the Panels' finding that the determination provisions contribute to ensuring that the 2016 measure is calibrated to the risk to dolphins arising from different fishing methods in different ocean areas are incorrect and should be rejected. For the same reasons, therefore, Mexico's claim that the Panels' reasoning concerning the determination provisions contributing to the calibration of the tracking and verification requirements should also be rejected.

e. Mexico's Claim that the Panels Applied the Wrong Analysis to Conclude that Differences Between the AIDCP and NOAA Regimes Have Been Narrowed Should Be Rejected

301. In section V.C.2.c(4) of its appellant submission, Mexico argues that the Panels' analysis of the tracking and verification requirements constitutes legal error because, while the Panels "stated they would apply the same analytical framework as had been applied in the first compliance proceeding," the Panels "failed to consider all the relevant factors."[783] Specifically, Mexico argues that the Panels erred "in not considering relevant" in the same way as the first compliance panel: (1) the alleged "lack of evidence" that processors outside the ETP "are able to track the sources of their tuna to particular vessels and captains' certificates"; and (2) the alleged effect of transshipments on the reliability of tracking regimes.[784] Mexico also argues that the Panels "erred by failing to address all necessary facts."[785]

302. To support its appeal, Mexico claims to have identified errors in the Panels' analysis of the depth, accuracy, and government oversight of the NOAA and AIDCP regimes. For depth, Mexico argues that the Panels "did not comment" on the alleged lack of evidence that tuna

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[780] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.672.

[781] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.672-673.

[782] Mexico's Appellant Submission, paras. 279-280.

[783] Mexico's Appellant Submission, para. 285.

[784] Mexico's Appellant Submission, para. 299.

[785] Mexico's Appellant Submission, para. 299.

processors have "the actual practice" of tracing tuna "to the well in which it was stored."[786] For accuracy, Mexico argues that the Panels' "did not say anything" about the alleged "lack of evidence" that processors or importers "could actually provide reliable tracking documentation" or about "the problem of multiple intermediaries handling" tuna before it reaches the processor.[787] For government oversight, Mexico again argues that the Panels "did not address" the alleged "lack of evidence" that processors "could actually track tuna back to the well in which it was stored" or "ensure that certificates matched to specific lots of tuna."[788] Mexico also criticizes the Panels for finding that "penalty provisions for making false declarations under U.S. law" provide NOAA the "necessary tools" to enforce the NOAA tracking and verification regime when the previous compliance panel "gave those laws no weight."[789]

303. As shown in this section, Mexico's argument should be rejected. First, Mexico's appeal should be rejected because it addresses the Panels' evaluation of the evidence on the record and, as such, is not properly raised as a legal appeal. Second, to the extent Mexico is making a legal appeal, it puts forward no reason why the Panels' analysis of the differences between the NOAA and AIDCP tracking and verification regimes constitutes legal error. Finally, Mexico is wrong that the Panels "failed to address" the "factors" Mexico identifies with respect to the accuracy, depth, and government oversight of the AIDCP and NOAA tracking and verification regimes.

i. Mexico's Claim Is Not a Proper Legal Appeal

304. As discussed above, in most circumstances, "the issues raised by a particular claim [of appeal] will *either* be one of application of the law to the facts *or* an issue of the objective assessment of the facts and not both."[790] If the arguments raised in a claim of appeal "implicat[e] a panel's appreciation of the facts [or] evidence," the claim falls under DSU Article 11, while "the consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision" is properly raised as a legal appeal.[791] Past reports acknowledge that it may be difficult to "clearly distinguish[] between issues of legal application and issues of fact"[792] and state that where issues may be approached from either perspective, appellants are "free to determine how to characterize [their] claim on appeal," provided that the basis of the claim is clear.[793] But appellants should not be able to avoid the standard of the DSU Article 11 by characterizing as a legal appeal a claim that, in fact, addresses the Panels' assessment of the facts

[786] Mexico's Appellant Submission, para. 287.

[787] Mexico's Appellant Submission, para. 291.

[788] Mexico's Appellant Submission, para. 297.

[789] Mexico's Appellant Submission, para. 298.

[790] *EC – Fasteners (China) (Article 21.5) (AB)*, para. 5.46; *China – GOES (AB)*, para. 183.

[791] *EC – Fasteners (China) (Article 21.5) (AB)*, para. 5.46; *China – GOES (AB)*, para. 183; *US – Upland Cotton (AB)*, para. 399; *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 385.

[792] *China – GOES (AB)*, para. 183.

[793] *See Canada – Wheat Exports and Grain Imports (AB)*, para. 177.

or evidence on the record.[794]

305. In this regard, all of Mexico's arguments in section V.C.2.c(4) appear directed at the Panels' appreciation of the facts and evidence. Mexico's main arguments are that the Panels ignored the alleged "lack of evidence" on certain points, ignored evidence on transshipment, and weighed the evidence concerning certain U.S. laws and regulations differently than the first compliance panel.[795] All these arguments address whether the Panels made an objective assessment of the facts as to the depth, accuracy, and degree of government oversight of the NOAA regime and are aimed at undermining the finding that the "differences between the AIDCP and NOAA regimes 'have been considerably narrowed.'"[796] Although Mexico refers to the Panels' legal conclusion that "the remaining differences [are] calibrated to the differences in risk profiles" of fisheries, none of the arguments put forward in section V.C.2.c(4) appear to address that legal conclusion.[797] In this regard, we note that similar arguments in previous disputes have been considered under Article 11 of the DSU.[798]

306. In this proceeding, Mexico has claimed to raise only one DSU Article 11 claim, addressed below, concerning the Panels' appreciation of the evidence on processors' tracking and verification systems. Mexico elected not to make other appeals challenging the Panels' appreciation of the facts or evidence on the record, which underlies their finding that the 2016 IFR "considerably narrowed" the differences between the NOAA and AIDCP. Therefore, Mexico's other arguments concerning the Panels' appreciation of the facts and evidence on the record, advanced in section V.C.2.c(4) under the guise of a legal appeal, should be rejected.

ii. Mexico Identifies No Legal Error in the Panels' Analysis

307. Mexico argues in V.C.2.c(4) that the Panels erred because, although they "stated they would apply the same analytical framework" as the first compliance panel in comparing the AIDCP and NOAA regimes, the Panels did not consider the same "factors" in the same manner as the first compliance panel.[799] To the extent that Mexico has raised a legal appeal, therefore, the argument seems to be that the "factors" that the first compliance panel considered and the

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[794] *See Canada – Wheat Exports and Grain Imports (AB)*, paras. 176-178; *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 385.

[795] *See* Mexico's Appellant Submission, paras. 286-299.

[796] Mexico's Appellant Submission, para. 299.

[797] Mexico's Appellant Submission, para. 299; *see also id.* paras. 286-299.

[798] *See, e.g., EC – Fasteners (China) (Article 21.5) (AB)*, paras. 5.46-49 (considering a claim that a panel erred by not "refer[ing]" to a particular exhibit or not "attribute[ing] the same weight" to it as the appellant), 5.60-62 (considering a claim that "the Panel" erred by "not attributing proper weight to certain circumstances in reaching its finding"); *EU – Biodiesel (AB)*, para. 6.204 (considering a claim that the panel's "examination of the relevant elements [of the measure] was cursory"); *US – Washing Machines (AB)*, para. 5.242 (considering a claim that the panel "did not adequately review" and "key piece of evidence" submitted by the United States"); *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.210 (considering a claim that the panel "arriv[ed] at a factual finding that is unsupported by the evidence on the record"); *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 101 (considering a claim that the panel "failed to apply findings from the original panel report").

[799] Mexico's Appellant Submission, para. 285.

conclusions it drew were legally mandated by Article 2.1, such that there was no other way for the Panels to conduct a correct analysis of whether the tracking and verification requirements are consistent with that provision. This argument is incorrect and should be rejected.

308. The first compliance panel's analysis of the tracking and verification requirements under Article 2.1 was focused on comparing the difference in relative "burdens" imposed by the NOAA and AIDCP tracking and verification regimes.[800] Thus, any differences between the regimes – regardless of whether they contributed to their ability to segregate and track dolphin safe tuna – were relevant to the panel's analysis if they made one more burdensome than the other. For example, alleged differences in the "depth" of the regimes or the intrusiveness of government oversight were considered relevant *per se* because they affected the burden of the two regimes, regardless of whether they had any impact on whether the regimes were substantively different in their ability to track and verify dolphin safe tuna.[801] Indeed, the panel did not specifically analyze whether the NOAA regime, in context of the measure as a whole, was capable of addressing the risk to dolphins from tuna fishing outside the ETP.

309. The panel's analysis was reversed by the Appellate Body for that very reason. As the Appellate Body explained, the panel's analysis was incorrect because it focused on identifying and analyzing the difference in "burden" between the AIDCP and NOAA tracking and verification regimes,[802] rather than whether the measure, including the tracking and verification requirements, was "calibrated to the risks to dolphins arising from different fishing methods in different areas of the oceans."[803] While the Appellate Body did not state that assessing the accuracy, depth, and government oversight required under the two tracking and verification regimes was incorrect, it was clear that any assessment of the regimes should be with reference to their ability to address the risks to dolphins caused by tuna fishing in different ocean areas and not to identify, for its own sake, differences in burden.[804] Thus, the first compliance panel's approach was certainly not the only correct approach to assessing the differences between the AIDCP and NOAA tracking and verification regimes.

310. Of course, once the Panels in these proceedings adopted the correct legal analysis the relevant factors for the analysis did change somewhat. The first compliance panel focused on factors that created a differential "burden" regardless of whether they contributed to differences in the regimes ability to track dolphin safe and non-dolphin safe tuna.[805] The Panels in these proceedings analyzed whether the tracking and verification requirements, both the AIDCP and NOAA regimes, "enforce the eligibility criteria with a view to achieving the objective of

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[800] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.382.

[801] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.358, 7.369-371.

[802] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.158.

[803] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.169.

[804] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.160 (explaining that the appropriate analysis is "whether the regulatory distinctions drawn by the amended tuna measure, and the resulting detrimental impact, could be explained as commensurate with the different risks associated with tuna fishing in different oceans and using different fishing methods").

[805] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.358, 7.369-371, 7.382.

protecting dolphins"[806] and do so in a manner that is "calibrated to the differences between the risk profiles" of the ETP large purse seine fishery and other fisheries.[807] The Panels did not err by assessing some factors differently given that they were doing so as part of different legal tests. Indeed, if the Panels had considered identical "factors" in the same manner as the first compliance panel, that would have suggested that the Panels, in fact, did not adopt the appropriate legal framework for this dispute consistent with the Appellate Body's guidance in the first proceeding.

311. Mexico suggests no other reason why the Panels' analysis would constitute legal error and, therefore, to the extent Mexico's claim is a legal appeal, it should be rejected.

iii. The Panels Appropriately Assessed the Facts on the Record Concerning the AIDCP and NOAA Regimes

312. Finally, regardless of how Mexico's claim was raised, none of Mexico's arguments concerning the Panels' appreciation of the facts and evidence on the record have merit. The Panels "addressed," explicitly or implicitly, in a reasonable and objective manner all of the factors Mexico claims the Panels ignored.

313. As to the depth of the AIDCP and NOAA regimes, Mexico claims that the Panels "did not comment" on the U.S. evidence concerning the "actual practice of processors," which included an exhibit that the first compliance panel "had found did *not* demonstrate that tuna could be traced to the well in which it was stored."[808] In fact, the Panels explicitly addressed the finding from the previous compliance proceeding concerning traceability to the well.

314. In response to "further explanations" by the United States, the Panels clarified the finding of the previous compliance panel regarding traceability to the well under the AIDCP regime. In fact, as the Panels found, under the AIDCP regime, while tuna can "*potentially*" be traced back to the well in which it was stored, the AIDCP requirement is that it be traced back to the group of dolphin-safe wells from that vessel trip (potentially constituting all of the wells on the vessel).[809] Under the NOAA regime, as amended by the 2016 IFR, the requirement is the same: dolphin-safe tuna must be traceable to the "harvesting vessel" and to the group of storage locations in which dolphin-safe tuna was stored (potentially the entire vessel, as under the AIDCP).[810] Thus, there was "no longer any meaningful difference" between the regimes in this regard.[811]

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[806] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.707.

[807] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.653.

[808] Mexico's Appellant Submission, para. 287 (emphasis original).

[809] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.654. Specifically, tuna could be traced to the well if there were a single dolphin-safe well on a harvesting vessel for the trip in which the tuna was caught.

[810] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.655. The NOAA regime refers to "storage wells or other storage locations" because, while purse seiners generally have more than one will, this is not the case for other types of vessels subject to the NOAA regime. *See* 50 C.F.R. § 216.91(a)(5) (Exh. US-2); 2016 IFR, at 15,447 (Exh. US-7).

[811] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.656.

315. As a consequence, it is appropriate that the Panels "did not comment" on whether the exhibits submitted by the United States (including Exhibit US-177, which was Exhibit US-192 in the first compliance proceeding) showed that U.S. processors necessarily track tuna to the well in which it was stored. Doing so is not required under either regime and is not relevant to segregating and tracking dolphin safe and non-dolphin safe tuna. Rather, what is relevant to assessing whether the tracking and verification requirements are calibrated to the risk to dolphins posed by tuna fishing is the Panels' finding that both the NOAA and AIDCP regimes require that any dolphin safe and non-dolphin safe tuna be traceable to the harvesting vessel and to the group of wells in which it was stored[812] and that this requirement is meaningful and enforceable as to both U.S. processors and importers.[813] On this basis, the Panels correctly found that there was no longer any difference between the depths to which the two regimes track.

316. As to the accuracy of the AIDCP and NOAA regimes, Mexico claims that the Panels "did not say anything" about the "lack of evidence that processors and importers could actually provide reliable tracking documentation" or about the "problem of multiple intermediaries" before tuna reaches the processor.[814] With regard to the first issue, Mexico cites the statement of the first compliance panel that "it [was] not clear . . . how particular certificates are kept with particular lots of tuna up until the tuna reaches the canning plant."[815] In fact, the Panels explicitly addressed both of these issues.

317. The first compliance panel's finding on the "lack of evidence" that processors kept adequate records referred to processors' practices "up until the tuna reaches the canning plant."[816] Similarly, with respect to "intermediaries," the first compliance panel referred to tuna passing through "a number of parties *before it reaches a US cannery*."[817] The Panels in this dispute noted that panel's findings[818] and explained that the 2016 IFR imposed a new requirement that all U.S. processors and importers "collect and retain . . . information on each point in the chain of custody" and that this information be "sufficient . . . to conduct a trace-back of any product marketed as dolphin safe to verify that the tuna product in fact meets the dolphin-safe labelling requirements."[819] The Panels had already noted that the requirement covers all intermediaries through which tuna may move before it reaches the cannery, including "information on all storage facilities, trans-shippers, processors, and wholesalers/distributors" that hold, carry, or process the tuna.[820] The Panels found that the requirement is enforceable

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[812] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.654-655.

[813] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.645, 7.675.

[814] *See* Mexico's Appellant Submission, paras. 288-289, 291.

[815] *See* Mexico's Appellant Submission, paras. 288, 291.

[816] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.361.

[817] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.362.

[818] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.67 (citing *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.361).

[819] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.657.

[820] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.643.

against both U.S. processors and U.S. importers (covering all tuna on the U.S. market).[821]

318. Thus, the Panels' finding on the additional legal requirement imposed by the 2016 IFR covers both the completeness of the chain of custody documentation and its substantive truth and covers all relevant intermediaries, both prior to the tuna reaching the cannery and afterwards.[822] Consequently, it covers all of the statements of the first compliance panel cited by Mexico.[823]

319. Mexico also references "lack of evidence" that "processors and importers could actually provide reliable tracking documentation." To the extent that Mexico is suggesting the Panels failed to address something broader than the findings of the first compliance panel, it is unclear to what Mexico is referring, and Mexico provides no additional citations.[824] We note, however, that the United States submitted substantial new evidence in these proceedings showing that tuna processors routinely trace tuna back to the harvesting vessel, including through all relevant intermediaries.[825] The Panels did not mention this evidence explicitly, but their findings on the content and enforceability of the chain of custody requirements fully address the critical issue, namely whether the tracking and verification requirements fulfill their role and thus contribute to addressing the risk to dolphins posed by tuna fishing in different fisheries.

320. Finally, as to government oversight, Mexico again alleges that the Panels "did not address the findings of the first compliance Panel regarding the lack of evidence that processors and importers could actually track tuna back to the well in which was stored, or ensure that certificates matched to specific lots of tuna."[826] This time, Mexico refers to the first compliance panel's statement that it had "seen no evidence suggesting that canneries and other importers" ensure that the requirements of the 2013 measure are "properly observed from the time of catch through delivery to the cannery" and that the measure did not legally require "canneries and other importers" to do so.[827] Mexico also recalled the first compliance panel's finding that transshipment "may increase the likelihood" that tuna caught outside the ETP "could be" incorrectly labelled.[828] Finally, Mexico states that the Panels found that various enforcement penalty statutes gave NOAA the "necessary tools" to enforce the measure, including with respect to imports, but stated that the first compliance panel "gave those laws no weight."[829]

321. All of Mexico's argument lacks merit.

322. The Panels explicitly addressed the first finding that Mexico raises. In the first

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[821] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.645, 7.675.

[822] In this regard, the Panels' finding also addresses the finding of the first compliance panel at paragraph 7.363, as Mexico seems to acknowledge. *See* Mexico's Appellant Submission, paras. 290-291.

[823] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.657.

[824] Mexico's Appellant Submission, para. 291.

[825] U.S. Third Written Submission, paras. 132-134; U.S. Response to Panels' Question 46, paras. 237-240.

[826] Mexico's Appellant Submission, para. 297.

[827] Mexico's Appellant Submission, para. 294.

[828] Mexico's Appellant Submission, para. 295.

[829] Mexico's Appellant Submission, para. 298.

compliance proceeding, the panel found that there was "no legal requirement" for canneries and importers to verify the correctness of the dolphin safe documentation prior to tuna's arrival at the cannery.[830] As a consequence, the panels inquired whether the United States had shown that, notwithstanding the absence of such a legal requirement, the canneries "in fact do this."[831] The Panels cited their previous finding (made in the context of assessing "accuracy") that the United States had not shown this was the case.[832] In these proceedings, the situation was different because, as the Panels found, there *is* now a legal requirement that canneries and importers "verify" the completeness and correctness of the chain of custody documentation and captain certification.[833] Consequently, there are no longer any "differences" between the AIDCP and NOAA regimes concerning the chain of custody documentation to which the AIDCP "national and regional authorities," on the one hand, and NOAA, on the other, must have access.[834]

323. Given the symmetry of the legal requirements and the Panels' finding that both are meaningful and enforceable,[835] there was no need for the Panels to compare the evidence concerning the implementation of the requirements, as the first compliance panel did after finding that the NOAA regime under the 2013 did not require complete, accurate chain of custody documentation. Had the Panels done so, we note that the evidence suggests that the implementation of the two regimes is substantially similar.[836] This is not surprising, as major U.S. processors use the same system to comply with both the AIDCP and NOAA regimes.[837] However, the Panels' finding that there was no meaningful difference between the regimes in terms of the ability of governments to "go behind the documents" is sufficient to fully resolve the issue of whether the regimes are complete and effective means of enforcing the eligibility criteria by ensuring the segregation and traceability of dolphin safe and non-dolphin safe tuna.

324. With respect to the second finding Mexico raises, on transshipment, the Panels' findings also address this issue. In the first compliance proceeding, the panel found that there was no legal requirement under the NOAA regime to collect and retain complete chain of custody

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[830] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.368.

[831] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.368.

[832] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.368. In this regard, we note that the first compliance panel's finding concerning differences in government oversight between the AIDCP and NOAA regimes was based in significant part on their previous finding concerning differences in the accuracy of the regimes. That is, the key difference was the absence of an explicit legal requirement for canneries and importers to check the documentation they receive. *See id.* (citing *id.* para. 7.363). Therefore, contrary to Mexico's suggestion, it is not surprising that the Panels found that the "same new aspect of the 2016 tuna measure" resolved both issues. *See* Mexico's Appellant Submission, para. 296.

[833] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.662.

[834] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.663.

[835] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.645.

[836] *See* U.S. Response to Panels' Question 29, paras. 151-152 (describing and comparing "Comparison of Track and Verification of 'Dolphin Safe' Tuna under the AIDCP and the Revised Measure," at 10 (Exh. MEX-93) *with* "Reference Reports for NMFS Periodic Audit," at 2-3 (2014) (BCI) (Exh. US-177)). Mexico did not comment on this point. *See* Mexico's comments on U.S. Response to Panels' Question 29, para. 63.

[837] *See* U.S. Response to Panels' Question 29, para. 152.

information.[838] The panel therefore considered whether existing instruments regulating trans-shipment filled this gap in the regime and found that they did not.[839] The panel then noted that trans-shipping may increase the likelihood that tuna caught outside the ETP large purse seine fishery (where there was no requirement to document trans-shipments of dolphin safe tuna).[840] The Panels in these proceedings, by contrast, found that both the AIDCP and NOAA regimes require all transfers of tuna, including the transferring and receiving vessels, to be documented and the record retained. Under the AIDCP regime, transfers must be documented on the TTF accompanying the tuna.[841] Under the NOAA regime, the U.S. processor or importer must collect documentation showing all entities holding, carrying, or processing the tuna, including any trans-shippers.[842] The Panels found both these requirements to be meaningful and enforceable.[843]

325. Thus, the Panels' finding that the 2016 IFR filled the gap identified by the previous compliance panel addresses that panel's finding concerning the potential effect of transshipment on label accuracy under the prior NOAA regime. Further, the Panels specifically noted Mexico's argument on this point.[844] The fact that the Panels did not agree with Mexico's argument and did not attribute to the first compliance panel's finding the same significance as Mexico does not suggest that the Panels' evaluation of the facts and evidence was incorrect.[845]

326. Finally, Mexico's argument on the Panels' evaluation of the "enforcement penalty statutes" also lacks merit. The only reason Mexico suggests as to why the Panels' evaluation of these statutes was improper seems to be that the panel in the previous compliance proceeding gave them "no weight."[846] It is correct that the first compliance panel did not mention the penalty statues in its assessment of the government oversight of the tracking and verification regimes. However, as mentioned several times, that panel had concluded that there was no relevant legal requirement to collect and verify chain of custody documentation.[847] In these proceedings, however, the Panels found that there was such a requirement.[848] Consequently, the existence of civil and criminal penalties for, *inter alia*, breaching the legal requirements of the dolphin safe labeling regulations or submitting false documents to the U.S. government have a completely different relevance in these proceedings.[849] Additionally, the first compliance panel

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[838] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.368.

[839] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.373-380.

[840] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.381.

[841] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.57.

[842] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.65.

[843] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.645.

[844] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.634.

[845] *See EC – Fasteners (China) (Article 21.5) (AB)*, para. 5.49; *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.201.

[846] Mexico's Appellant Submission, para. 298.

[847] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.368; *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.658.

[848] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.659-662.

[849] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.645.

was assessing the difference in burden between the two regimes, not their relative abilities to segregate and track dolphin safe tuna.[850] Therefore, once the Panels adopted the correct legal standard, it is not surprising that their evaluation of enforcement instruments would change.

327. Further, the Panels did address Mexico's argument that the penalties could not necessarily be enforced against all foreign processors.[851] As the Panels explained, the 2016 measure and the statutes that can be used to enforce it provide the U.S. government with the "necessary tools to induce compliance of US processors *and importers*."[852] Mexico has never argued, nor submitted any evidence suggesting, that any U.S. importers are not subject to U.S. jurisdiction. And, as the Panels found, the importers are legally responsible for the completeness and veracity of the chain of custody documentation.[853] Consequently, the Panels' findings correctly demonstrate that the tracking and verification requirements of the 2016 measure are enforceable with respect to both domestic and imported tuna products on the U.S. market.

328. For all these reasons, Mexico's arguments that the Panels failed to correctly analyze the facts and evidence on the record, including the findings of the first compliance panel and therefore wrongly concluded that "differences between the AIDCP and NOAA regimes 'have been considerably narrowed'" should be rejected.[854]

f. The Panels Did Not Act Inconsistently with Article 11 of the DSU in Their Treatment of Exhibit MEX-127

329. In section V.C.2.c(5) of its appellant submission, Mexico argues that the Panels acted inconsistently with Article 11 of the DSU by failing to cover Exhibit MEX-127 in their analysis

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[850] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.370; *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.158.

[851] *See* Mexico's Appellant Submission, para. 298; *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.633.

[852] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.675 (emphasis added).

[853] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.643 ("US processors *and importers* of tuna or tuna products from such 'other fisheries' are now required to collect and retain, for two years, information on each point in the chain of custody of the tuna or tuna product . . . . This information must be provided to the NMFS upon request and must be sufficient for the NMFS to conduct a trace-back of any product marketed as dolphin-safe *to verify* that the tuna product in fact meets the dolphin-safe labelling requirements. The information must also be sufficient for the NMFS to trace any non-dolphin-safe tuna loaded onto the harvesting vessel back to one or more storage wells or other storage locations for a particular fishing trip *to prove* that such non-dolphin-safe tuna was kept physically separate from dolphin-safe tuna through unloading.") (emphasis added); *see id.* para. 7.657; *id.* para. 7.662; 7.675 ("[As] we have explained above in the context of the certification requirements, the NOAA regime provides that breaches of the tracking and verification requirements may lead to the imposition of sanctions. In particular, sanctions for offering for sale or export tuna products falsely labelled dolphin-safe may be assessed against any producer, importer, exporter, distributor, or seller who is subject to the jurisdiction of the United States. Thus, even in the absence of jurisdiction by the US Department of Commerce to audit foreign fishing vessels, carrier vessels, and foreign processors or vulnerability to IUU fishing in some countries, the United States, through the 2016 Tuna Measure, has the necessary tools to induce compliance of US processors and importers.").

[854] As such, none of Mexico's arguments would establish a breach of DSU Article 11, even if Mexico had sought to make that particular claim.

of the tracking and verification requirements.[855] Mexico claims that this exhibit shows that "the tuna industry . . . is not currently able to provide verification of the catch to the individual vessel and throughout the supply chain."[856] Mexico argues that "if market participants sourcing tuna from the Western and Central Pacific and the Indian Ocean are unable to track tuna to the vessel from which it was caught" the differences between the NOAA and AIDCP regimes "cannot have been 'narrowed'" and the Panels' finding that this is the case is contradicted by the evidence.[857]

330. Mexico's argument fails to meet the standard of DSU Article 11 for three reasons. First, properly interpreted, Exhibit MEX-127 does not, in fact, undermine the findings of the Panels. Second, Mexico's argument is an inappropriate attempt to recast an argument that Mexico made before the Panels and that the Panels rejected as a DSU Article 11 claim. Third, even if Mexico's interpretation of Exhibit MEX-127 were correct, it would not undermine the Panels' finding that the differences between the regimes had been "narrowed."

i. The Standard of DSU Article 11

331. As mentioned above, Article 11 of the DSU provides that a panel must "make an objective assessment of the matter before it, including an objective assessment of the facts of the case." In examining a panel's obligation under Article 11, the Appellate Body has emphasized that the weighing of the evidence on the record is within the panel's discretion.[858] Thus, a panel "is not required to discuss, in its report, each and every piece of evidence,"[859] and "does not err simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it."[860] Therefore, as the Appellate Body has also explained, "a participant cannot simply recast factual arguments that it made before the panel in the guise of a claim under Article 11."[861] Rather, for an Article 11 claim to succeed, "the Appellate Body 'must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts.'"[862]

332. The Appellate Body has explained that "[a]n allegation that a panel has failed to conduct the 'objective assessment of the matter before it' required by Article 11 of the DSU is a very serious allegation" that "goes to the very core of the integrity of the WTO dispute settlement

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[855] Mexico's Appellant Submission, para. 305.

[856] Mexico's Appellant Submission, para. 305.

[857] Mexico's Appellant Submission, para. 305.

[858] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.191 (explaining that a panel must "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence" but that "[w]ithin these parameters, panels enjoy a margin of discretion in their assessment of the facts"); *Korea – Dairy (AB)*, para. 137.

[859] *Brazil – Retreaded Tyres (AB)*, para. 202.

[860] *See US – Tuna II (Mexico) (AB)*, para. 272; *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.191 (explaining that a panel's margin of discretion "includes the discretion to determine how much weight to attach to the various items of evidence placed before them by the parties").

[861] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.191; *EC – Fasteners (China) (AB)*, para. 442.

[862] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.191.

process."[863] Thus, "not every error allegedly committed by a panel amounts to a violation of Article 11," but only errors "that are so material that, taken together or singly, they undermine the objectivity of the panel's assessment of the matter before it."[864] Therefore, for an Article 11 claim to succeed, it must be shown that the panel committed "an egregious error that calls into question [its] good faith."[865]

333. For the reasons explained in the remainder of this section, Mexico's claim under DSU Article 11 fails to meet this standard.

ii. Properly Interpreted, Exhibit MEX-127 Does Not Undermine The Panels' Findings

334. Mexico's claim that the Panels' treatment of Exhibit MEX-127 amounted to a breach of Article 11 of the DSU should be rejected because, properly interpreted, the exhibit was not relevant to the Panels' assessment of the tracking and verification requirements and, for the same reasons, does not undermine the Panels' findings. Mexico assumes that Exhibit MEX-127's statement that "processor systems are not currently able to provide verification of the catch to the individual vessel and throughout the supply chain" refers to the "verification" required under the measure's tracking and verification requirements.[866] If the exhibit was referring to a different type of "verification" altogether, it is, as the Panels considered it, "not relevant" to their assessment of whether the tracking and verification requirements are even-handed.[867] And, in fact, the document is referring to an entirely different system from the tracking and verification required by the U.S. dolphin safe labeling measure.

335. Specifically, Exhibit MEX-127 concerns the potential for developing and implementing Catch Documentation Schemes (CDS) by the tuna RFMOs.[868] CDS are "global traceability systems that certify a unit of legal catch, providing a catch certificate to the legal owner of the fish (at the point of capture) and then trace the movement of this unit of catch from unloading through international trade . . . into the end market."[869] Thus, CDS schemes are distinguished by being based on a "unit of legal catch" – either individual fish or a quantity of fish, measured by weight[870] – and by the two documents the report sets out, a catch certificate and a trade certificate.[871] Central to CDS is the concept of "mass balancing," *i.e.*, weighing (or counting) the tuna during harvest and processing to enable the particular "catch" of tuna to be tracked and

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[863] *EC – Poultry (AB)*, para. 133.

[864] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.191; *see EC – Fasteners (China) (AB)*, paras. 442, 499; *China – Rare Earths (AB)*, para. 5.179.

[865] *EC – Hormones (AB)*, para. 133.

[866] *See* Mexico's Appellant Submission, paras. 300, 305.

[867] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 6.57.

[868] *See* ISSF, "RFMO Catch Documentation Schemes: a Summary," at 2 (Sept. 16, 2016) (Exh. MEX-127).

[869] ISSF, "RFMO Catch Documentation Schemes: a Summary," at 2 (Exh. MEX-127).

[870] ISSF, "RFMO Catch Documentation Schemes: a Summary," at 4 (Exh. MEX-127).

[871] ISSF, "RFMO Catch Documentation Schemes: a Summary," at 2-3 (Exh. MEX-127).

verified.[872] Another distinguishing feature of CDS is that they are "complete," meaning they track "all catches [within the system] into all market states."[873] Systems that track catch entering a single market are not examples of CDS.[874]

336. Having explained what CDS is, Exhibit MEX-127 summarizes the existing RFMO and other activities that are, or could form the basis of, CDS. With regard to processors' own systems, it explains that "[a]lthough there is no legislated system . . . , processors continue to undertake mass balance monitoring at the cannery to monitor production for economic reasons" and have also "increased their product traceability systems . . . , enabling consumers to track the product they are purchasing."[875] The report notes that "[t]he mass balance and product tracking systems . . . demonstrates the ability to implement a CDS scheme for bulk tuna products" but notes that "processor systems are not currently able to provide verification of the catch to the individual vessel and throughout the supply chain and so there is still a need to implement the CDS scheme."[876] Thus, the point of the report is that the current processor systems are not required to, and do not, provide "verification" (through the two documents that are integral to a CDS) of the "catch" (*i.e.*, individual fish or a known weight of fish) from harvest throughout processing. Further, they do not do so in a comprehensive manner for all the tuna they process.

337. However, this point is not relevant to the inquiry in these proceedings, which is whether the tracking and verification requirements address the risks of tuna fishing "commensurate[ly]" with the risk profile of different fisheries.[877] Neither the AIDCP nor the NOAA system require "verification" of "catch" in the sense of a comprehensive accounting of individual fish or a known weight of fish. Both simply require that the captain certification accompany lots of tuna from harvest through processing.[878] And neither is comprehensive, as both apply only to dolphin safe tuna, the former only applies to tuna caught by ETP large purse seine vessels, and the latter applies only to tuna destined to be sold on the U.S. market as dolphin safe tuna product. Finally, the NOAA system does not rely on a single "trade certificate" but requires the importer to collect chain of custody information, without specifying the form. Thus, whether processor systems are not able to provide "verification of the catch to the individual vessel and throughout the supply chain" in the sense covered by a CDS scheme is not suggestive of whether they meet the tracking and verification requirements of the measure.

338. This interpretation of the language Mexico relies on from Exhibit MEX-127 is confirmed by the fact that it is clear that, like the processor systems, the AIDCP also does not amount to a CDS. Contrary to Mexico's submission, the report's description of the inadequacy of processor systems, from the perspective of the catch verification required by a CDS, is not confined to

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[872] *See* ISSF, "RFMO Catch Documentation Schemes: a Summary," at 4, 5, 11, 13 (Exh. MEX-127).

[873] ISSF, "RFMO Catch Documentation Schemes: a Summary," at 3 (Exh. MEX-127).

[874] ISSF, "RFMO Catch Documentation Schemes: a Summary," at 3 (Exh. MEX-127).

[875] ISSF, "RFMO Catch Documentation Schemes: a Summary," at 4 (Exh. MEX-127).

[876] ISSF, "RFMO Catch Documentation Schemes: a Summary," at 4 (Exh. MEX-127).

[877] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.673.

[878] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.59, 7.63-66.

fisheries outside the ETP large purse seine fishery.[879] Indeed, the report states explicitly that the AIDCP, and the processor systems that implement it, are *not* a CDS.[880] However, it states that both the AIDCP and the current processor systems "demonstrate[] the ability" or the "potential" for implementing a "full" "CDS traceability program for bulk tuna products."[881] We note that the fact that the quote at paragraph 301 of Mexico's submission omits "however" from the description of the AIDCP and wrongly suggests that the report considered the AIDCP a CDS.[882]

339. Additionally, other evidence on the record confirms this interpretation of Exhibit MEX-127. In particular, several other ISSF reports establish that companies covering approximately 75 percent of the global canned tuna market, including the major suppliers to the U.S. market, yearly "demonstrate [the] ability to trace products from can code or sales invoice to vessel and trip" on which the tuna was caught."[883] Specifically, the ISSF requires participating companies to demonstrate compliance with this conservation measure each year through an audit by an independent scientific and technical consulting firm.[884] The ISSF audits published in 2016 found that 24 out of 25 participating companies had demonstrated compliance with the product traceability measure.[885] The key difference between these reports and Exhibit MEX-127 is that these reports cover tracking "products from can code or sales invoice to vessel and trip" rather than "verifying" all "catch[es]" of tuna, within the meaning of CDS. The former is what is required by tracking and verification requirements under both the AIDCP and NOAA regimes.[886]

340. Therefore, the statement in Exhibit MEX-127 that processor systems are not able to provide "verification of the catch to the individual vessel and throughout the supply chain" in the sense covered by a CDS scheme is not suggestive that processors do not meet the requirements

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[879] *See* ISSF, "RFMO Catch Documentation Schemes: a Summary," at 4 (Exh. MEX-127).

[880] *See* ISSF, "RFMO Catch Documentation Schemes: a Summary," at 4 (Exh. MEX-127) (stating that "there are only three RFMO CDS currently active: (1) CCAMLR for Patagonian toothfish . . . ; (2) CCSBT for Southern Bluefin tuna . . . ;and (3) ICCAT for Atlantic Bluefin tuna"); *id.* at 7-8.

[881] ISSF, "RFMO Catch Documentation Schemes: a Summary," at 4, 8 (Exh. MEX-127). We note that Mexico's appellant submission suggests that it quotes all of paragraph 9 of Exhibit MEX-127 beginning with "some" but omits this sentence without any indication of doing so. *See* Mexico's Appellant Submission, para. 300.

[882] *See* Mexico's Appellant Submission, para. 301.

[883] *See* U.S. Response to Panels' Question 46, para. 239.

[884] U.S. Response to Panels' Question 46, para. 239; "Lot Tracking Procedures," at 1 (BCI) (Exh. US-175).

[885] U.S. Response to Panels' Question 46, para. 239; ISSF, "Update to ISSF Conservation Measures & Commitments Compliance Report," at 5 (Nov. 2016) (Exh. US-215); *see* MRAG Americas, "Thai Union Manufacturing Co., Ltd. Final Compliance Report," at 7 (Apr. 26, 2016) (Exh. US-220); MRAG Americas, "Bumble Bee Seafoods Final Compliance Report," at 7 (Apr. 26, 2016) (Exh. US-219) ("The company has an excellent traceability system in place that allows the proper tracing of each batch of canned products back to the original vessels and fishing trips during which the product was caught"); MRAG Americas, "Starkist Co. Final Compliance Report," at 6-7 (Apr. 26, 2016) (Exh. US-221); MRAG Americas, "Tri Marine," at 7 (Apr. 26, 2016) (Exh. US-222) (confirming: "The company has a traceability system in place that allows product codes to be traced back to the vessel and vessel trip").

[886] We note that Mexico had the opportunity to respond to the argumentation and evidence the United States put forward concerning these ISSF reports but did not do so. *See* Mexico's comments on U.S. response to Panels' question 46, paras. 107-113. The United States, by contrast, had no opportunity to respond to Exhibit MEX-127, which was submitted for the first time in Mexico's final submission.

of the AIDCP or NOAA regimes. That is the basis on which Mexico suggested the exhibit was relevant to the Panels' consideration of the tracking and verification requirements. As that basis is incorrect, the Panels did not err in finding that the exhibit was not relevant to their inquiry. Further, for the same reasons, Exhibit MEX-127 in no way contradicts the finding of the Panels that the differences between the NOAA and AIDCP regimes were "narrowed" by the 2016 IFR.

iii. Mexico Is Simply Recasting Factual Assertions It Made Before the Panels

341. In this claim under DSU Article 11, Mexico is simply "recast[ing] . . . in the guise of a claim under Article 11," "factual arguments that it made before the panel."[887] Mexico has not put forward an argument that suggests that the Panels have, in fact, "exceeded the bounds of its discretion, as the trier of facts."[888] Consequently, Mexico's claim should be rejected, even aside from the substantive problems with Mexico's argument discussed above.

342. The arguments that Mexico puts forward in section V.C.2.c(5) of its appellant submission are identical to those it put forward before the Panels in its comments on the U.S. response to question 46.[889] Indeed, the quotes Mexico deploys (including selective omissions), and even the phrasing that Mexico uses to present its argument at paragraphs 300 to 302 of its appellant submission, are almost identical to those set out at paragraphs 109-112 of its comments on the U.S. response to the Panels' questions.[890] The Panels rejected Mexico's interpretation of Exhibit MEX-127 when they explained that it was "not directly relevant to [their] inquiry."[891] Mexico may disagree with this assessment but, in its appellant submission, it simply restates its own interpretation of the exhibit and puts forward no reason why the Panels' assessment of its argumentation and evidence amounted to an abuse of its discretion as a trier of fact.[892]

343. Thus, Mexico has simply recast as an Article 11 claim factual arguments made before and rejected by the Panels. On this basis alone, Mexico's claim should be rejected.

iv. Even Under Mexico's Interpretation of Exhibit MEX-127, Mexico's Argument Should Be Rejected

344. As discussed above, Mexico's interpretation of Exhibit MEX-127 as referring to the type of "verification" required by the 2016 measure is incorrect. Even if it were correct, however, Mexico's DSU Article 11 appeal should fail because Mexico has identified no errors that undermine the key findings that led the Panels to conclude that difference in the tracking and verification requirements of the 2016 measure have been narrowed, let alone that undermine the

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[887] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.191; *EC – Fasteners (China) (AB)*, para. 442.

[888] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.191.

[889] *See* Mexico's Appellant Submission, paras. 300-302; Mexico's Comments on U.S. Response to Panels' Question 46, paras. 109-112.

[890] *Compare* Mexico's Appellant Submission, paras. 300-302 *with* Mexico's Comments on U.S. Response to Panels' Question 46, paras. 109-112.

[891] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 6.57.

[892] Mexico's Appellant Submission, paras. 300-305.

objectivity of the Panels' assessment of the facts.

345. Mexico argues that, if its interpretation of Exhibit MEX-127 is accepted, the exhibit means that market participants producing tuna product harvested outside the ETP "are unable to track tuna to the vessel from which it was caught" and, therefore, the Panels' finding that the differences between the requirements of the NOAA and AIDCP regimes have been "narrowed" "lack a proper basis in the evidence on the record."[893] However, this argument mistakes the basis of the Panels' finding. In fact, Mexico's arguments about Exhibit MEX-127 suggest no error in the Panels' finding that the difference in the requirements has been "narrowed" because the current practice of tuna processors (inside or outside the ETP large purse seine fishery) was not the basis for that finding.

346. As explained in previous sections, the basis for the Panels' finding that the differences between the regimes have been "narrowed" was a detailed comparison of the legal requirements of the AIDCP and NOAA regimes, coupled with the finding that the requirements of both regimes are meaningful and enforceable.[894] Based on their review of the relevant legal instruments, as well as the mechanisms available for enforcement, the Panels found that the 2016 IFR substantially "narrowed" the gap between the legal requirements of the AIDCP and NOAA tracking and verification regimes as regards the depth, accuracy, and government oversight of the regimes and that, under the 2016 measure, the United States "has the necessary tools to induce compliance of US processors and importers."[895] The Panels' finding that the differences between the regimes had been "narrowed" was not based on a finding that all tuna companies producing for the U.S. tuna product market currently comply with the additional requirements of the 2016 measure concerning complete chain of custody documentation.[896]

347. Therefore, Mexico's arguments concerning Exhibit MEX-127 suggest no error in the Panels' analysis of the legal requirements of the two regimes or of the enforceability of the two regimes. They concern an argument Mexico made that the Panels did not accept or use as a basis for their analysis.[897] They do not detract from the factual bases of the Panels' finding in the evidence on the record or introduce new evidence that "contradict[s]" those factual bases.[898] Consequently Mexico's arguments concerning Exhibit MEX-127, even if they reflected the correct interpretation of that exhibit, do not undermine the accuracy – let alone the objectivity – of the Panels' assessment that the differences in the tracking and verification requirements for tuna caught outside and inside the ETP large purse seine fishery have been narrowed.

348. For the reasons stated above, Mexico's DSU Article 11 appeal should be rejected.

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[893] Mexico's Appellant Submission, para. 305.

[894] *See supra* sec. III.B.4.a.

[895] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.675-676; *see also id.* paras. 7.649-674 (reviewing the evidence on the record on these issues).

[896] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.649-676.

[897] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.675.

[898] *See* Mexico's Appellant Submission, para. 305.

5. The Panels Correctly Found that the Measure Is Calibrated

349. In Section 7.8.6 of the Reports, the Panels analyzed whether the 2016 measure, as a whole, was "calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean" and concluded that it was.[899]

350. The Panels explained that the measure, as a whole, is calibrated because it disqualifies from access to the label fishing methods "that are particularly harmful to dolphins" (setting on dolphins and high-seas large-scale driftnet fishing) while "conditionally qualifying other methods" (if there was "no dolphin was killed or seriously injured in the set or gear deployment during which the tuna was caught") and establishing mechanisms to ensure that the eligibility distinctions are "respected and properly enforced."[900] These mechanisms – the certification and tracking and verification requirements, including the determination provisions – "enforce the eligibility criteria" by providing different certs of requirements "that properly take account of the differences in the levels of harms caused to dolphins by different fishing methods in different areas of the ocean."[901] Specifically, they impose somewhat "more sensitive detection mechanis[m]" on fisheries with a "relatively high risk profile" (namely the ETP large purse seine fishery and fisheries designated under the determination provisions) and somewhat "less sensitive mechanism[s]" in fisheries "where the risks to dolphins are relatively lower."[902]

351. Thus, the measure "ensures that similar situations are treated similarly" and, overall, "establishes a regime that is calibrated to, tailored to, and commensurate with the risks to dolphins arising from the use of different fishing methods in different areas of the ocean."[903] On this basis, the Panels concluded that the measure "accords to Mexican tuna products treatment no less favourable than that accorded to like products from the United States and other countries, and therefore is consistent with Article 2.1 of the TBT Agreement."[904]

352. Mexico argues that the Panels erred in so finding because their intermediate findings concerning the eligibility criteria, certification requirements, and tracking and verification requirements" "were the exclusive basis for this assessment" and, accordingly, the alleged errors that Mexico identified in those assessments "flowed through" the Panels' assessment of the measure as a whole.[905]

353. As shown in the preceding sections, the Panels' intermediate conclusions concerning the eligibility criteria, certification requirements, and tracking and verification requirements were correct and not in error. In addition, they were not the "exclusive basis" for the Panels' assessment. Contrary to Mexico's suggestion, the Panels did not simply refer to their previous

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[899] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras.

[900] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.706-708.

[901] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.710, 7.712.

[902] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.710, 7.712.

[903] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.715.

[904] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.717.

[905] *See* Mexico's Appellant Submission, para. 307.

intermediate conclusions. Rather, the Panels explained how the components of the measure "work together" to "achieve the objectives of the 2016 Tuna Measure."[906] In particular, the Panels found that certification requirements (including the determination provisions) effectively "work together with and reinforce the eligibility criteria" and thus enable U.S. consumers "know whether tuna used in producing tuna products was obtained by fishing methods that harmed dolphins."[907] Similarly, the tracking and verification requirements "reinforce" the eligibility criteria and certification requirements and "work together" with them by controlling "how the tuna caught by different fishing methods is stored on board the fishing vessels, unloaded and handed over to the canneries."[908] Finally, the determinations provide the "necessary flexibility" that allows the measure to ensure that the same requirements are imposed on situations that are "similar," with respect to the risk to dolphins.[909]

354. Thus, Mexico's argument should be rejected for the reasons set out in the previous sections. Additionally, it is not the case that the Panels' analysis of the measure as a whole was entirely derivative of their analysis of the measure's components. It was certainly based on those analyses but also considered how the different parts of the measure interact to address the risk to dolphins arising from different fishing methods in different ocean areas.

IV. MEXICO'S APPEAL REGARDING ARTICLE XX OF THE GATT 1994 SHOULD BE REJECTED

355. In section VI of its appellant submission, Mexico appeals the Panels' finding that the 2016 measure "is not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination, and is therefore justified under Article XX of the GATT 1994."[910]

356. Mexico makes two arguments in this section. First, Mexico argues that the Panels erred in relying on their findings under Article 2.1 of the TBT Agreement to conclude that the 2016 measure is applied consistently with the chapeau of Article XX.[911] Second, Mexico argues, citing the Appellate Body report in *US – Shrimp*, that the measure *per se* "results in 'unjustifiable discrimination'" under Article XX "because the United States did not seek a multilateral solution before imposing a unilateral measure."[912]

357. This section shows that both of Mexico's arguments should be rejected. After summarizing the relevant findings of the Panels in subsection A, the United States addresses Mexico's arguments in subsections B and C, and show that both of Mexico's arguments lack

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[906] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.709, 7.711-713.

[907] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.711.

[908] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.712-713.

[909] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.715.

[910] Mexico's Appellant Submission, para. 335. Mexico does not list specific paragraphs it is appealing but seems to be quoting and describing paragraphs 7.739-740 of the Panel Reports. *See id*.; *see also* Mexico's Notice of Appeal, paras. 7.739-740.

[911] Mexico's Appellant Submission, sec. VI.B.

[912] Mexico's Appellant Submission, sec. VI.C.

merit. In fact, the Panels' analysis and conclusions under Article XX reflected the correct legal standard and the correct application of that standard

A. The Panels' Analysis

358. The Panels began their analysis under Article XX of the GATT 1994 by recalling the elements of the provision that were not at issue between the parties. The parties agree "that the Measure is provisionally justified under subparagraph (g) of Article XX."[913] Further, the findings of the Appellate Body in the first compliance proceeding addressed two of the relevant analytical elements of the chapeau – that the application of the measure results in discrimination and that the discrimination occurs between countries where the same conditions prevail.[914] Thus, the only element of Article XX in dispute between the parties is whether the "discrimination" caused by the measure is "arbitrary or unjustifiable" under the chapeau.[915]

359. The Panels then summarized the relevant analysis and findings from the first compliance proceeding. They recalled that the Appellate Body in that proceeding found that, in assessing "arbitrary and unjustifiable discrimination" under the chapeau, "so long as the similarities and differences between Article 2.1 of the TBT Agreement and Article XX of the GATT 1994 are taken into account, it may be permissible to rely on reasoning developed in the context of one agreement for purposes of conducting an analysis under the other."[916] The Panels also recalled that the Appellate Body had faulted the first compliance panel's analysis under the Article XX chapeau on the grounds that it had conducted a "segmented analysis" that "also led to legal error" in assessment.[917] Specifically, the panel's analysis had not "encompassed consideration of the relative risks of harm to dolphins from different fishing techniques in different areas of the oceans, or of whether the distinctions that the amended tuna measures draws in terms of the different conditions of access to the dolphin-safe label are explained in the light of the relative risk profiles."[918] Due to this omission, the Appellate Body was unable to complete the analysis of most of the measure as it could not "assess fully whether all of the regulatory distinctions" of the 2013 measure "can be explained and justified in the light of differences in the relative risks associated with different methods of fishing for tuna in different areas of the oceans."[919]

360. The Panels then began their analysis of whether the 2016 measure "is applied in a manner that constitutes a means of 'arbitrary or unjustifiable discrimination' within the meaning of the

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[913] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.730.

[914] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.731-733.

[915] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.734.

[916] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.734 (quoting *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.346-7.347).

[917] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.726, 7.736 (citing *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.332).

[918] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.332.

[919] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.727 (citing *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.359).

chapeau of Article XX."[920] They noted that the legal standards of Article 2.1 and Article XX of the GATT 1994 are not identical.[921] However, the Panels explained that, "given our finding that the 2016 Measure is calibrated to the levels of risks posed by different fishing methods in different parts of the ocean," there was no basis to find that the measure "is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination."[922] The Panels explained that they did not "consider that the Measure, which is tailored to and commensurate with the relevant risks, can be said to be applied in a manner that constitutes a means of 'arbitrary or unjustifiable discrimination'" under the chapeau of Article XX.[923] Further, neither of the parties had advanced a reason that the measure was inconsistent (or consistent) with the Article XX chapeau additional to those they alleged in the context of Article 2.1.[924]

361. On this basis, the Panels found that the 2016 measure, as a whole and in its components "do not constitute a means of arbitrary or unjustifiable discrimination."[925] As such, the Panels found that the measure is justified under Article XX of the GATT 1994.[926]

B. The Panels Did Not Err in Relying on Their Findings Under Article 2.1

362. Mexico claims in section IV.B that the Panels erred in their analysis under the Article XX chapeau because, by relying on their analysis under Article 2.1, they failed to assess whether "the detrimental impact caused by the tuna measure's regulatory distinctions can be reconciled with, or rationally connected to, the measure's objectives."[927] Mexico brought an analogous claim against the Panels' Article 2.1 analysis[928] but argues that past reports are particularly clear that the assessment of whether "the detrimental impact caused by the tuna measure's regulatory distinctions can be reconciled with, or rationally connected to, the objectives pursued by the measure" is "necessary" to an assessment of arbitrary and unjustifiable discrimination under the chapeau.[929] Mexico also argues that the Panels misinterpreted the Appellate Body's guidance on the "rational connection" factor and that this contributed to their erroneous approach.[930] Finally, Mexico argues that the Panels' approach under Article 2.1 – "declining to consider the 'rational connection' factor" or make findings "with respect to arbitrary or unjustifiable discrimination" – meant that they are in a different situation from the first compliance panel, which focused in its Article 2.1 analysis "on the existence of arbitrary or unjustifiable discrimination" and then relied

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[920] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.734.

[921] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.739.

[922] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.739.

[923] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.739.

[924] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.739.

[925] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.739.

[926] *US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.740.

[927] Mexico's Appellant Submission, para. 319.

[928] *See supra* section [x], Mexico's Appellant Submission, paras. 315, 319.

[929] Mexico's Appellant Submission, paras. 320-324.

[930] Mexico's Appellant Submission, para. 325.

on that analysis under Article XX.[931] Mexico also disputes the Panels' finding that the parties' arguments under Article XX depended on their arguments under Article 2.1.[932]

363. Mexico's claim should be rejected. The Panels did not err in relying on their findings under Article 2.1 in their analysis under the chapeau. Specifically, the Panels' analysis is consistent with the Appellate Body's guidance on the appropriate Article XX analysis for this dispute in the first compliance proceeding, and, moreover, their Article 2.1 analysis does, in fact, include an assessment of the relationship between the distinctions of the measure and the measure's objective. Additionally, Mexico is wrong that the Panels' characterization of the parties' arguments is in error.

364. First, the Panels' Article XX analysis is consistent with the Appellate Body's analysis of Article XX in the first compliance proceeding.

365. In that proceeding, the Appellate Body confirmed that the analysis of whether the dolphin safe labeling measure is calibrated to the risks to dolphins posed by tuna fishing is as important to the analysis of "arbitrary or unjustifiable discrimination" under the chapeau of Article XX as it is to the assessment of even-handedness under Article 2.1. The Appellate Body explained that, "[i]n the circumstances of this dispute," "an assessment of whether the requirements of the amended tuna measure are calibrated to the likelihood that dolphins would be adversely affected in the course of tuna fishing operations in the respective conditions" is "relevant for an analysis of arbitrary or unjustifiable discrimination under the chapeau of Article XX."[933] The Appellate Body explained that this test is appropriate in light of the claim that the measure's requirements "are justified by reference to the objective of dolphin protection because [they] reflect the differences in risks arising in different fisheries."[934]

366. Further, as in the context of Article 2.1, the Appellate Body reversed the first compliance panel's analysis under the chapeau of Article XX because it had not "encompassed consideration of the relative risks of harm to dolphins from different fishing techniques in different areas of the oceans" and whether the distinctions of the 2013 measure were "explained in the light of the relative risk profiles."[935] Later, the Appellate Body found that, as under Article 2.1, the panel's failure to analyze the "relative risk profiles" of different fishing methods used in different ocean areas meant that it was unable to complete the legal analysis of the 2013 measure, as a whole, under the Article XX chapeau.[936] Again, as in the context of Article 2.1, the Appellate Body did not suggest that the panel's failure to analyze any of the other factors Mexico argues the Panels should have considered with respect to the "rational connection" test constrained its ability to

[931] Mexico's Appellant Submission, para. 328.

[932] Mexico's Appellant Submission, para. 329.

[933] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.330.

[934] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.330; *see id.* paras. 7.344, 7.347.

[935] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.332.

[936] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.348, 7.350-351, 7.353, 7.359.

complete the analysis under the Article XX chapeau.[937]

367. In this regard, Mexico's argument that the situation in these proceedings is different from the previous compliance proceeding in a way that now renders it inappropriate to the Panels to have relied on their Article 2.1 analysis and conclusions in the context of Article XX is wrong.[938] In making this argument, Mexico ignores the fact that the panel in the first compliance proceeding purported to apply, under Article 2.1 and Article XX, a "rational connection test" similar to the one Mexico advocates in this proceeding and that the Appellate Body *reversed* both analyses for identical reasons, namely that the panel had failed to assess whether the measure, as a whole, was calibrated to the risk to dolphins posed by different fishing methods in different ocean areas.[939] Thus, contrary to Mexico's argument, the differences between the Panels' assessment and the first compliance panel's assessment only further confirm that the Panels did not err in relying on their analysis and conclusions under Article 2.1.

368. Second, and contrary to Mexico's arguments, the Panels' Article 2.1 analysis encompassed an assessment of whether the regulatory distinctions of the 2016 measure are rationally related to the objectives of the measure. This is because, as discussed above, the relevant nexus between the measure's distinctions and its objectives is inherent in the assessment of whether the measure is calibrated to the risks to dolphins posed by different tuna fishing methods in different ocean areas.[940] As the Panels explained, the objectives of the measure inform both "the form and content of the calibration test" and its application.[941] Thus, the "rational connection test" does not exist as a separate legal step or as a "constraint" on the calibration analysis but, rather, is assessed through the calibration analysis itself.[942]

369. The Panels' analysis is supported by the Appellate Body reports in the two previous proceedings. The Appellate Body in the first compliance proceeding, explaining the standard of Article 2.1, explained that the "same considerations" that are relevant to an assessment of "whether discrimination is arbitrary or unjustifiable" under the Article XX chapeau – particularly the relationship between the "discrimination" and the legitimate objective of the measure – are relevant to the second step of Article 2.1.[943] It recalled that the U.S. argument had been (and remains) that the dolphin safe labeling measure is not discriminatory because "the distinctions that it [draws] . . . [can] be explained or justified by differences in the risks associated with [different] fishing methods and areas of the oceans."[944] Consequently, the Appellate Body in the original proceedings had assessed whether the United States had proven that the distinctions of

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[937] *See supra* sections III.C.1.a, III.C.1.c; *see US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.348, 7.350-351, 7.353, 7.359.

[938] *See* Mexico's Appellant Submission, para. 328.

[939] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.229, 7.334-335.

[940] *See supra* sec. III.A.2.c, III.B.2.a-b.

[941] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.116-127.

[942] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, paras. 7.115-116.

[943] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.92.

[944] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.98.

the measure are "calibrated" to these different risks to dolphins.[945] The Appellate Body in the first compliance proceeding confirmed that this was the correct analysis and that the U.S. measure will not breach Article 2.1 if it is so calibrated.[946]

370. Thus, the Appellate Body's analysis in the two previous proceedings confirms that the "calibration" assessment, done correctly, is the appropriate test for the second step of Article 2.1 because it reflects the relationship between the distinctions of the measure and the measure's objective that renders the measure not discriminatory. As explained above, the Panels appropriately applied the calibration test set out by the Appellate Body in the previous proceedings and found that the 2016 measure is not discriminatory.[947] Therefore, the Panels' assessment under Article 2.1 reflects the appropriate analysis of whether "the detrimental impact caused by the tuna measure's regulatory distinctions can be reconciled with, or rationally connected to, the objectives pursued by the measure"[948] and their finding that this is the case. Consequently, Mexico's main argument that the Panels erred by relying, in their analysis of the Article XX chapeau, on their Article 2.1 analysis and conclusions is in error.[949]

371. Relatedly, Mexico's argument that the Panels were led into error by a mistaken interpretation of the Appellate Body's guidance in the previous proceeding is incorrect.[950] Indeed, the quote Mexico raises comes from the Panels' discussion of Article 2.1, not Article XX at all.[951] Moreover, the thrust of Mexico's argument is that the Panels misinterpreted the Appellate Body report and, on this basis, considered that assessing the relationship between the distinctions of the 2016 measure and its objective was not necessary.[952] However, as discussed in the preceding paragraphs, the Panels actually considered correctly that the calibration analysis, which they applied, reflected exactly that assessment. Therefore, Mexico's argument on this point doubly lacks merit.

372. Finally, Mexico is wrong that the Panels mischaracterized its argument concerning Article 2.1 of the TBT Agreement and Article XX of the GATT 1994. Mexico asserts that the Panels suggested that the parties agreed that "a finding of consistency with Article 2.1 of the TBT Agreement automatically resolves the question of arbitrary and unjustifiable discrimination for the purposes of the chapeau of Article XX."[953] In fact, it is clear from the passages of the parties' submission quoted in footnote 1247 that the Panels were merely noting that the parties advanced identical arguments under Article 2.1 and Article XX and that, therefore, the Panels' disposition of those arguments under Article 2.1 would dispose of all the parties' arguments

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[945] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.98.

[946] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.101, 7.155.

[947] *See supra* sec. III.

[948] *See* Mexico's Appellant Submission, paras. 320-323.

[949] *See* Mexico's Appellant Submission, paras. 318-32, 327.

[950] Mexico's Appellant Submission, paras. 324-325.

[951] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.83.

[952] Mexico's Appellant Submission, paras. 324-325.

[953] *See* Mexico's Appellant Submission, para. 329.

under Article XX.[954] This was accurate at the time, as neither Party argued that the legal standards of Article 2.1 and the Article XX chapeau are substantively different in this dispute. Indeed, Mexico put forward no arguments under Article XX, including on the Article XX legal standard, beyond those it put forward under Article 2.1, which it cross-referenced.[955]

373. For these reasons, Mexico's argument that the Panels erred in relying on their findings under Article 2.1 to find that the 2016 measure is applied consistently with the chapeau of Article XX should be rejected.

C. The Report in *US – Shrimp* Does Not Suggest the 2016 Measure Constitutes Unjustifiable Discrimination

374. In VI.C of its appellant submission, Mexico asserts that the 2016 measure results in "unjustifiable discrimination" under the Article XX chapeau "because the United States did not seek a multilateral solution before imposing a unilateral measure."[956] Mexico argues that the Appellate Body in *US – Shrimp* found that the U.S. failure to engage other Members "in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members" rendered the measure WTO-inconsistent.[957] And Mexico argues that the "facts are even worse" in this dispute because the United States "has never raised its concerns about dolphin stress and other unobservable harms from tuna fishing by setting on dolphins in the IATTC" but "chose to ignore and to thereby circumvent this already existing multilateral process."[958] Mexico's argument lacks merit and should be rejected.

375. First, the facts and conclusions of *US – Shrimp* are not applicable to this dispute.

376. *US – Shrimp* concerned a measure that imposed an import ban on shrimp harvested in a manner that may "adversely affect sea turtles" with an exception for shrimp from nations certified as having a regulatory program governing the incidental take of sea turtles.[959] The Appellate Body found that multiple aspects of the measure showed "unjustifiable discrimination"

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[954] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, n.1247.

[955] *See* Mexico's First Written Submission, para. 337 ("[G]iven that Mexico's arguments under both Article 2.1 and the chapeau are grounded in arbitrary and unjustifiable discrimination, it is appropriate for Mexico to rely upon its submissions regarding the lack of calibration in Section IV.C.2. to establish that the 2016 tuna measure is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, and, therefore, the requirements of the chapeau are not met."); Mexico's Second Submission, para. 114 (As explained in Mexico's first written submission, its arguments under both Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994 are grounded in arbitrary and unjustifiable discrimination and it is appropriate to rely on Mexico's submissions under Article 2.1, as supplemented by this submission, to establish that the 2016 tuna measure is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.")

[956] Mexico's Appellant Submission, para. 333.

[957] Mexico's Appellant Submission, para. 333.

[958] Mexico's Appellant Submission, para. 334.

[959] *US – Shrimp (AB)*, paras. 3-4.

one of which was the fact that the United States failed to engage appellees and other Members in "negotiations, with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles" before enforcing the import prohibition.[960] In making this finding, the Appellate Body emphasized: (1) the measure directed the government to enter into international agreements "for the protection and conservation of . . . sea turtles" and to "initiate negotiations as soon as possible with all [relevant] foreign government;"[961] and (2) the United States initiated such negotiations and concluded agreements with *some* harvesting nations, to which the ban largely did not apply, but not with the appellees or with all Members equally.[962] The Appellate Body explained: "Clearly, the United States negotiated seriously with some, but not with other Members (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable."[963]

377. The situation in this dispute is not analogous. The 2016 measure does not direct NOAA to engage in negotiations to try to achieve the objectives of the measure by international agreement. Moreover, the United States did not engage in negotiations – and thereby mitigate the trade-restrictive effect of the measure – with some Members but not others. Moreover, the reason driving the differences between the measures in this dispute and in *US – Shrimp* is the different objectives of the two measures. The objective of the measure in *US – Shrimp* was the global "protection and conservation" of sea turtle populations, which, by nature, cannot be achieved by unilateral action.[964] In this dispute, by contrast, the objective of the measure is the protection of dolphins by informing consumers about whether the tuna product they purchase was produced by harming dolphins and thereby discouraging fishing methods that harm dolphins.[965] This objective does not, by nature, depend on international cooperation.

378. Thus, the Appellate Body's statements concerning the measure in *US – Shrimp* are not applicable in the context of this dispute.

379. Second, Mexico is wrong that the United States has "never raised its concerns" concerning the unobservable harms caused by setting on dolphins in the IATTC fora.[966] This is a novel and entirely unsupported factual allegation that has no support in the evidence on the record or factual findings of the Panels. In fact, the United States has made the unobservable harms caused by dolphin sets a central theme of its engagement in the AIDCP from the

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[960] *US – Shrimp (AB)*, paras. 163-166. The first aspect of the measure the Appellate Body noted is that the application of the import ban depended only to the regulatory program of the harvesting Member, such that individual vessels could use the exact technology required by the United States and yet be ineligible to sell tuna into the United States based on the regulatory program of their flag state. *See id.* paras. 164-165. The Appellate Body found that this rigid application "is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles." *Id.* para. 165.

[961] *US – Shrimp (AB)*, para. 167.

[962] *US – Shrimp (AB)*, paras. 169-176.

[963] *US – Shrimp (AB)*, para. 172.

[964] *US – Shrimp (AB)*, para. 168.

[965] *See US – Tuna II (Article 21.5 – US/Mexico) (Panels)*, para. 7.125; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.134; *US – Tuna II (Mexico)*, para. 7.550.

[966] Mexico's Appellant Submission, para. 334.

beginning through the present day. Indeed, there is an IATTC/AIDCP Scientific Advisory Board that studies and considers the unobservable harms caused by dolphin sets. The United States is instrumental in the group's operations and NMFS studies provide much of the research that the group considers.

380. For these reasons, Mexico's legal argument and factual assertions should be rejected.

V. PARTIALLY OPEN HEARINGS

381. Mexico's notice of appeal states that Mexico "seeks review by the Appellate Body of, and requests the Appellate Body to reverse, the findings and conclusion of the Panels that they had the authority to conduct a partially open meeting of the parties without the consent of both Parties." However, the appeal based on this one-sentence statement fails for a number of reasons.

382. First, the notice of appeal fails to satisfy the requirements of Rule 20(2)(d) of the *Working Procedures for Appellate Review*.[967]

383. Rule 20(2)(d) requires that a notice of appeal "shall include" the following information:

> a brief statement of the nature of the appeal, including:
>
> (i) identification of the alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel;
>
> (ii) a list of the legal provision(s) of the covered agreements that the panel is alleged to have erred in interpreting or applying; and
>
> (iii) without prejudice to the ability of the appellant to refer to other paragraphs of the panel report in the context of its appeal, an indicative list of the paragraphs of the panel report containing the alleged errors.

384. Mexico's notice of appeal fails to satisfy these requirements.

385. At a minimum, the notice of appeal fails to reference any covered agreement that the Panels are alleged to have erred in interpreting or applying, let alone any legal provision of any covered agreement. Furthermore, the notice of appeal fails to indicate any paragraph of the Panel Reports containing the alleged errors.

386. This element of Mexico's appeal can, and should, be dismissed on the basis of these failures to comply with the Appellate Body's Working Procedures requirements alone.

387. More fundamentally, Mexico's notice of appeal fails to identify an alleged error in the issues of law covered in the Panel Reports or legal interpretation developed by the Panels. Article 7 of the DSU makes clear that the "matter" referred to the DSB involves the "relevant provisions in" any of the covered agreements "cited by the parties to the dispute." A panel is

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[967] WT/AB/WP/6.

then to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."[968]

388. And Article 17.6 of the DSU in turn provides that "appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." The Appellate Body is not called upon to review issues of law or legal interpretations outside of the matter referred to a panel in the panel's terms of reference.

389. This element of Mexico's notice of appeal relates not to any of the "relevant provisions in" any of the covered agreements "cited by the parties to the dispute" as part of the "matter referred to the DSB."[969] Consequently, Mexico has failed to justify its appeal as being within the scope of Article 17.6 of the DSU. Rather than relating to the matter referred to the Panels by the DSB, Mexico's appeal relates to the procedures adopted by the Panels to conduct their proceedings.

390. Furthermore, even aside from the other flaws in Mexico's appeal, it would be appropriate for the Appellate Body to exercise judicial economy since nothing in the Panels' decision on partially open hearings affected the "issues of law covered in the panel report" or the "legal interpretations developed by the panel."[970] Mexico cannot, and has not, alleged otherwise.

391. Even aside from the fact that this element of Mexico's appeal is not properly before the Appellate Body, Mexico's appeal fails. Mexico, in its appellant submission, fails to identify a single provision of a covered agreement that the Panels erred in interpreting or applying in the context of this dispute.

392. Rather than cite to any provision of the DSU, Mexico simply cites to the "burden" on the disputing parties,[971] Mexico's view on the "relationship between disputing parties and the adjudicator,"[972] the Appellate Body's decision on its own procedures under a different provision of the DSU (not applicable to panel proceedings) in *US – Continued Suspension* and *EU – Biodiesel*,[973] the fact that the question of whether to mandate that all panel meetings be open to the public is an issue Members are considering in the DSU review process,[974] and Mexico's assertion that there is a "general rule" at the WTO that meetings are closed, without ever citing to any text of a covered agreement reflecting this "general rule."[975] Mexico sums these up as what

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[968] DSU, Article 11; *see also* DSU, Article 7.1

[969] DSU, Articles 7.1 and 7.2.

[970] Article 17.6 of the DSU.

[971] Mexico's Appellant Submission, para. 345.

[972] Mexico's Appellant Submission, para. 348.

[973] Mexico's Appellant Submission, paras. 343, 348.

[974] Mexico's Appellant Submission, para. 346.

[975] Mexico's Appellant Submission, para. 348.

it characterizes as "the basic requirements of fairness, due process, and integrity,"[976] without reference to any provision of a covered agreement and without any attempt to substantiate this erroneous characterization.

393. On its face, then, Mexico's appeal does not relate to any error of law or legal interpretation by the Panels of a covered agreement. On this basis alone, then, this element of Mexico's appeal fails.

394. Furthermore, Mexico's arguments are in error. None of the bases on which Mexico relies supports Mexico's arguments.

395. Fundamentally, the DSU is explicit that panels are afforded the discretion to develop their own working procedures, including whether to close hearings to the public or to open hearings to the public.[977] Mexico itself concedes that open hearings are permitted under the DSU.[978]

396. Mexico's appeal concerns not whether a panel may open its hearings to the public (or conversely whether a panel is authorized to close its hearings to the public), but rather the conditions under which a panel may do so. But the DSU does not impose any conditions on either opening the hearing or closing the hearing to the public.

397. Mexico argues that a panel cannot open its hearings to the public unless all the disputing parties agree. Significantly, Mexico does not cite to any text of a covered agreement. To the contrary, Mexico concedes that: "The circumstances in which WTO dispute settlement hearings may be opened to the public are not explicitly regulated in the [DSU]."[979] Perhaps it is for this reason that Mexico also does not cite to any provision of the DSU that the Panels contravened in adopting their working procedures.

398. In fact, Article 12.1 of the DSU provides for a panel to "consult" the parties to the dispute in determining its working procedures, but does not require "agreement" of the parties. The Panels in their working procedures had the discretion to, and did in fact, provide for a number of procedures not included in, or that departed from, Appendix 3 of the DSU after consulting the parties but without necessarily obtaining the agreement of the parties. The procedures on partially open hearings were similarly adopted by the Panels, under the discretion afforded them by the DSU, after consulting the parties.

399. Mexico's reliance on the Appellate Body reports in *US – Continued Suspension* and *EU – Biodiesel* is misplaced. As an initial matter, nowhere in those reports did the Appellate Body

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[976] Mexico's Appellant Submission, para. 351

[977] *See* DSU, Article 12.1 ("Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute.").

[978] Mexico's Appellant Submission, para. 351 ("Mexico wishes to make clear that it does not object *per se* to the permissibility of open hearings when the parties agree on that . . . .)"

[979] Mexico's Appellant Submission, para. 340. Oddly, Mexico goes on to say that the circumstances under which WTO dispute settlement hearings may be opened to the public are also not explicitly regulated by "the *Working Procedures for Appellate Review*." As the Panels' proceedings were not Appellate Body proceedings, the Working Procedures for Appellate Review do not apply and so are irrelevant.

find that it lacked the authority to open its hearings, or that its discretion to open its hearings was dependent on the agreement of all the parties to the dispute. Instead, the Appellate Body was exercising that very discretion in deciding on a case-by-case basis whether to open the hearing in a particular appeal and under what conditions. But even more fundamentally, the Appellate Body in those reports was interpreting Article 17.10 of the DSU, a provision that does not apply to panels and that differs in substance from the DSU provision applicable to panels.[980]

400. Article 17.10 of the DSU provides: "The proceedings of the Appellate Body shall be confidential." It is significant that this requirement does not prevent the Appellate Body from opening its hearings to the public, including on a selective basis. And the Appellate Body has done so, including where some third participants make their statements and responses to questions in public session and some may choose to make their statements or responses to questions in closed session.

401. And there is no equivalent requirement for panels. The only relevant provision is paragraph 2 of Appendix 3 to the DSU: "The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it." However, as noted above, Article 12.1 permits a panel to depart from Appendix 3 after consulting with the parties to the dispute, and the Panels here did so.

402. One additional aspect of Mexico's appeal is worth noting. At the end of the section of Mexico's appellant submission concerning partially open hearings, Mexico "requests that the Appellate Body clarify that, in the future, panels should not open a hearing even partially without the agreement of all disputing parties." Mexico is thus seeking a declaratory statement by the Appellate Body rather than asking the Appellate Body to "uphold, modify or reverse the legal findings and conclusions of the panel" in keeping with the role of the Appellate Body under the DSU. To the contrary, Mexico is clearly asking the Appellate Body to depart from the role provided under the DSU. Nowhere does the DSU provide for the Appellate Body to make statements about what all panels are required to do or refrain from doing in the future.

403. Accordingly, this element of Mexico's appeal is not properly before the Appellate Body, and even aside from this, Mexico's arguments are in error and its appeal should fail.

VI. CONCLUSION

404. For the above reasons, the United States respectfully requests the Panels to find that the United States has brought itself into compliance with the DSB recommendations and rulings and the U.S. dolphin safe labeling measure is now consistent with the TBT Agreement and the GATT 1994.

[980] Mexico therefore errs in asserting that, "Rather, the authorization of public hearings has derived from the interpretation of articles 17.10 and 18.2 of the DSU under WTO case law." Mexico's Appellant Submission, para. 340.