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)

Opening Oral Statement of
the United States of America

January 24, 2017

TABLE OF ACRONYMS

Acronym	Full Name
AIDCP	Agreement on the International Dolphin Conservation Program
C.F.R.	Code of Federal Regulations
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
ETP	Eastern Tropical Pacific Ocean
Form 370	NOAA Fisheries Certificate of Origin
IATTC	Inter-American Tropical Tuna Commission
IOTC	Indian Ocean Tuna Commission
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
RFMO	Regional Fishery Management Organization
PBR	Potential Biological Removal
TBT Agreement	Agreement on Technical Barriers to Trade
WCPFC	Western and Central Pacific Fisheries Commission
WTO	World Trade Organization

1. Mr. Chairman, members of the Panels – on behalf of the United States, I want to thank you, and the Secretariat staff assisting you, for your ongoing work in these proceedings.

I. INTRODUCTION

2. The United States has provided in its written submissions a complete case as to why the this long-running dispute should come to an end by finding that the United States has come into compliance with the DSB recommendations and rulings.

3. In 1990, Mexico challenged U.S. dolphin safe labeling requirements under the *General Agreement on Tariffs and Trade* 1947. That panel found that the U.S. requirements did not discriminate against Mexican tuna product. Then, in 2008, Mexico challenged the U.S. dolphin safe labeling measure because it did not allow tuna product produced from Mexico's principal fishing method – the intentional chase and capture of dolphins – to be labeled dolphin safe in the U.S. market. In 2012, the Appellate Body found the measure WTO-inconsistent on a narrow ground affecting tuna product produced from fisheries other than the ETP large purse seine fishery.

4. Relying on the Appellate Body's analysis, the United States amended the measure in July 2013 to address that narrow ground. Because the regulatory change did not give Mexican tuna product access to the label, Mexico again challenged the measure. On appeal, the Appellate Body upheld the first compliance panel's finding that the measure was WTO-inconsistent but did so on, again, a very narrow ground.

5. The DSB adopted the reports in the first compliance proceeding. Relying on the DSB's findings, the United States again amended the measure in March 2016, including to directly address those findings. In particular, the United States changed the design of the determination

provisions, thus resolving the sole basis on which the measure was found to be inconsistent with the WTO Agreement.

6. Following from the findings adopted by the DSB and its recommendations, the central question for the Panels to resolve is whether the (second) measure taken to comply with the DSB's recommendations, specifically addressed to the DSB's findings, results in the measure being even-handed, and thus does not reflect arbitrary or unjustifiable discrimination, because it is calibrated to the differences in risk of overall harm to dolphins.[1] The Appellate Body has been clear that, for purposes of this dispute, this same analysis is determinative of the claims both under the TBT Agreement and the GATT 1994.[2]

7. The United States has provided the evidence and argumentation showing that the regulatory distinctions are, in fact, calibrated to the differences in risk of overall harm to dolphins. Mexico, however, has largely not engaged in that conversation.

8. As to the law, instead of accepting the clear guidance of the Appellate Body, Mexico has sought to undermine – and even eliminate – the question of calibration from the legal analyses of Article 2.1 of the TBT Agreement and Article XX of the GATT 1994. Rather, Mexico urges the Panels to find that the measure is inconsistent with the WTO Agreement on bases other than whether the measure is calibrated to the differences in risk of overall harm to dolphins. That is to say, Mexico urges the Panels to find the measure inconsistent with the WTO Agreement *even if it is calibrated* in the manner described by the Appellate Body. Mexico's approach is directly

[1] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.169, 7.359.

[2] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.169, 7.353.

contrary to the previous approach and findings adopted by the DSB in this dispute.

9. As to the facts, the evidence and the findings of the previous compliance panel establish that there is a clear difference in overall risk to dolphins between intentional sets on dolphins in the ETP and fishing methods that do not specifically target dolphins.[3] Mexico has not rebutted the U.S. showing that setting on dolphins, as practiced in the ETP, is a unique fishing method in that it interacts with dolphins in 100 percent of all sets, causes a unique category of unobservable harms due to those interactions, and causes a high level of observed mortalities, based on a fair, apples-to-apples comparison with other fisheries.[4] Instead, Mexico makes factual assertions that are not relevant to assessing the relative risk profiles of different fisheries and seeks to undermine the "special relevance" of the calibration analysis in this proceeding.[5]

II. THE AMENDED MEASURE IS CONSISTENT WITH ARTICLE 2.1 OF THE TBT AGREEMENT

A. The Legal Question Is Whether the Measure Is Calibrated to Differences in Risk to Overall Harm to Dolphins

10. The question of what legal analysis applies in these compliance proceedings *should be* straightforward. After all, the Appellate Body has issued *two separate, adopted reports* in this very dispute stating that whether the measure is consistent with Article 2.1 depends on whether it is calibrated to the differences in the risk of overall harm to dolphins posed by setting on dolphins in the ETP large purse seine fishery and other fishing methods used in other fisheries.[6]

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[3] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.240.

[4] *See* U.S. First Written Submission, sec. IV.

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

[6] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.169; *US – Tuna II (Mexico) (AB)*, para. 297.

11. To conduct such an analysis, the Appellate Body has stated that it is necessary to examine "the relative risks to dolphins from different fishing techniques in different areas of the oceans," and then determine whether the labeling conditions drawn "are explained" in the light of the differences in the relative risk profiles.[7] The United States studied the findings adopted by the DSB and amended the measure to ensure it would satisfy the Appellate Body's calibration analysis. In this proceeding, the United States has provided the facts necessary for the Panels to make the appropriate assessment of the differences in risk,[8] and has explained why the differences in labeling conditions are "commensurate" with those differences.[9] As such, the United States has established that it has brought the measure into compliance with Article 2.1.[10]

12. Mexico rejects this analysis, arguing that the Panels cannot find the U.S. measure to be consistent with Article 2.1 simply because it is calibrated to differences in risk of overall harm to dolphins of different fishing methods in different fisheries. Rather, Mexico insists that a collection of alternative analyses that do not depend on the Panels examining the relative differences in risk must drive the finding of whether the measure is consistent or inconsistent with Article 2.1. Mexico's various arguments appear to address both the labeling conditions overall and certain conditions specifically. All of Mexico's arguments are in error.

13. As to its overall arguments, Mexico claims that the Panels can find the regulatory distinctions inconsistent with Article 2.1 "on their face" on the grounds that differentiating

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

[8] *See* U.S. First Written Submission, sec. IV; *see also* U.S. Second Written Submission, sec. III.B; U.S. Third Written Submission, sec. II.B.

[9] *See* U.S. First Written Submission, sec. V.C.2; *see also* U.S. Second Written Submission, sec. III.B; U.S. Third Written Submission, sec. II.B.

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

between tuna product produced from the ETP large purse seine fishery and tuna product produced from other fisheries is inconsistent with either the objectives that the measure actually pursues or with the objective that the measure *should* pursue (*i.e.*, environmental "sustainability").[11] Neither analysis depends on the Panels examining the relative observed and unobserved harms to dolphins across fisheries. And both analyses encourage the Panels to find the measure inconsistent with Article 2.1, *even if the labeling conditions are calibrated* to the differences in risk of overall harm to dolphins.

14. Mexico also makes specific – and different – arguments with regard to the eligibility criteria, on the one hand, and the requirements regarding certification and tracking and verification, on the other. As a preliminary matter, Mexico errs in this regard – the Appellate Body has already made it clear that *the same legal analysis* is applicable to all three regulatory distinctions.[12] Further, each of Mexico's distinction-specific arguments is, in itself, in error.

15. For the eligibility criteria, Mexico argues that fishing methods should be unable to produce tuna product eligible for the label if they result in above *de minimis* "absolute levels of dolphin mortalities or serious injury" (without regard to unobserved harms),[13] or if they do not meet a fishery-by-fishery sustainability standard – namely, a potential biological removal (PBR) standard – that Mexico has conceded cannot be applied based upon the available information.[14] Again, neither approach accords with the Panels following the Appellate Body's guidance and examining the relative harms to dolphins – both observed and unobservable – across fisheries

[11] Mexico's First Written Submission, first para. 214; Mexico's Second Written Submission, para. 32.

[12] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.159, 7.166, 7.169.

[13] Mexico's First Written Submission, paras. 246-247; Mexico's Second Written Submission, paras. 63-65.

[14] *See* U.S. Second Written Submission, para. 120.

and determining whether the distinction drawn between setting on dolphins, on the one hand, and other fishing methods on the other, is calibrated. Therefore, both are in error.

16. To evaluate the certification and tracking and verification requirements, Mexico again claims that the Panels need not examine the relative risk profiles for dolphins of different fisheries. Rather, in Mexico's view, the Panels should examine either whether a fishery causes harm to dolphins above some undefined *de minimis* level (one that exceeds Mexico's proposed standard for the eligibility criteria), or whether the level of municipal regulations applicable in a particular fishery fall below some *de minimis* standard.[15] Mexico puts forward no reasonable explanation as to why the Panels should diverge so dramatically from the Appellate Body's analysis and ignore the relative risk profiles to dolphins in different fisheries, and there is none.

17. Overall, the central thrust of Mexico's arguments is that the Panels should disregard the prior findings adopted by the DSB that form the basis for these compliance proceedings. Under those findings that resulted in the DSB's recommendations, the key inquiry is an analysis of the relative risks of overall harm to dolphins due to different fishing methods in different fisheries and whether the differences in the measure's conditions are commensurate with those differences in risk. Instead, in Mexico's view, no difference in the labeling conditions could ever be consistent with Article 2.1. *That is why* Mexico insists that the Panels can find that the differences in labeling conditions provide less favorable treatment "*on their face*," without evidence as to relative risk.[16] Mexico is wrong to reject the central relevance of levels of risk to dolphins in this analysis. Mexico was wrong when it argued that before the first compliance

[15] *See, e.g.*, Mexico's Second Written Submission, paras. 92-93.

[16] Mexico's First Written Submission, first para. 214; *id.* n.280.

panel,[17] Mexico was wrong when it argued that before the Appellate Body,[18] and Mexico is wrong to argue it here.[19]

B. The Evidence Establishes That the Measure Is Calibrated to Differences in Risk of Overall Harm to Dolphins

18. The evidence establishes that the regulatory differences of the measure – on a distinction-by-distinction basis and overall – are calibrated to the risks to dolphins posed by different fishing methods in different ocean areas. Specifically, the United States has shown that setting on dolphins in the ETP large purse seine fishery has a far greater risk profile for dolphins than the fishing methods used in other fisheries that can produce tuna product eligible for the label, and that the regulatory requirements of the measure are commensurate with the difference in risk.

19. Mexico has not rebutted this showing. Mexico has altogether failed to respond to key RFMO-generated data, such as the exhibits summarized in Exhibit US-13; has advanced incorrect or irrelevant criticisms of other U.S. evidence; and has submitted exhibits that are not probative of the risk profile of different fishing methods or fisheries or relevant to the operation of the U.S. measure. Overall, Mexico has not shown that, as a general matter, any other fishing method causes an equivalent level of harm to dolphins to that consistently caused by dolphin sets, nor has Mexico shown that any fishery not already determined to have a "regular and significant" mortality or serious injury has a risk profile for dolphins equivalent to that of setting on dolphins in the ETP large purse seine fishery.

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[17] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.184.

[18] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.80.

[19] *See, e.g.*, Mexico's First Written Submission, first para. 214.

1. Setting on Dolphins Has a Higher Risk Profile for Dolphins than the Fishing Methods That Can Produce Dolphin Safe Tuna

20. The evidence establishes that setting on dolphins has a higher risk profile for dolphins than do fishing methods employed in other fisheries. This clear distinction in risk profiles is due to three factors: (1) setting on dolphins is the only method that intentionally targets and depends on dolphins in a way that puts them at risk; (2) setting on dolphins causes a unique category of unobservable harms; and (3) setting on dolphins causes a high level of direct dolphin mortalities compared to other fishing methods. The evidence on the record in this proceeding and many of the factual findings of the previous panels, affirmed by the Appellate Body, prove that this is the case, and Mexico has not shown otherwise.

21. First, the intentional targeting of dolphins is an essential element of setting on dolphins, in that *every* dolphin set ***necessarily*** involves an intensive, sustained interaction with dolphins.[20] Such interactions are intrinsically dangerous to dolphins and can result in death, injury, and other unobservable harms, such as cow-calf separation, a point that the previous panels and the Appellate Body have confirmed.[21] The risk that the chase and encirclement process poses to those hundreds of dolphins in 100 percent of dolphin sets is certainly relevant to the Panels' analysis of the relative risk profile of the fishing method.

22. In contrast, other fishing methods do not intentionally target dolphins and, therefore, do not necessarily involve *any* dolphin interactions in a given set or gear deployment, as the first

[20] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.239-240; U.S. Second Written Submission, paras. 55-56; U.S. First Written Submission, para. 55.

[21] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.248; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.244-145.

compliance panel recognized.[22] Because they do not depend on dolphin interactions, the fishing methods able to produce dolphin safe tuna product – including purse seine, longline, pole and line, gillnet, and handline fishing – can be employed in fisheries that pose no known, or only a remote, risk to any dolphin species.[23] And in many other such fisheries, well upwards of 90 percent of gear deployments occur without any dolphin interaction at all, putting no dolphins in danger.[24] The evidence therefore shows that these fishing methods – in contrast to dolphin sets – *can* be used in a dolphin safe manner. Mexico has not rebutted the U.S. evidence in this regard.

23. Second, the evidence – and the adopted findings of the DSB in the original and first compliance proceedings – confirm that setting on dolphins causes a unique category of unobservable harms to dolphins, even where *no dolphin was killed or seriously injured* by the fishing gear directly.[25] Indeed, this was *uncontested* in the original proceeding,[26] and the Appellate Body has confirmed the findings of *both* previous panels in this regard.[27]

24. In contrast, other fishing methods are not capable of causing the type of unobservable harms caused by setting on dolphins. The previous compliance panel explicitly found that this was the case, and the Appellate Body confirmed that finding in its rejection of one of Mexico's appeals under DSU Article 11.[28] Mexico's assertion that the United States must *presume* –

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[22] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.240; *see also id.* para. 7.278 (min. op.).

[23] *See* U.S. Third Written submission, para. 59; Second Written Submission, para. 57.

[24] *See* U.S. Second Written Submission, para. 57; U.S. First Written Submission, paras. 44-45, 55.

[25] *US – Tuna II (Panel)*, paras. 7.493-506; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.120-121.

[26] *US – Tuna II (AB)*, para. 330, n.663.

[27] *US – Tuna II (AB)*, para. 330, n.663; *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.200-202.

[28] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.134-135; *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.200-202.

without a basis in science – that other fishing methods cause the same unobservable harms as dolphin sets is simply wrong. Contrary to Mexico's claim, the fact that setting on dolphins results in categories of unobservable harms not caused by other fishing methods is a key factor in analyzing the relative risk profiles of the different fisheries. Mexico's attempt to misuse these compliance proceedings to "reverse" previous findings on this issue should be rejected.

25. Third, the level of direct dolphin mortalities caused by setting on dolphins is much greater than that generally caused by other fishing methods. The stakes are clearly high for this fishing method – it is undisputed that *millions* of dolphins were killed by ETP purse seine vessels from the 1950s through the 1980s.[29] And even when complying with the requirements of the AIDCP, a small number of vessels – only about 80 to 90 – have continued to cause at least hundreds, and sometimes thousands, of direct dolphin mortalities each year. Controlling for the level of effort, dolphin mortalities have ranged between 69 and 227 dolphins per 1,000 dolphin sets since the AIDCP came into effect.[30] This data is generated by the applicable RFMO, and is not contested by Mexico.

26. In contrast, the evidence proves that other fishing methods generally cause lower levels of direct dolphin mortalities than dolphin sets. In explaining this issue, the United States has focused on the primary fishing methods that produce for the global and U.S. tuna product

[29] *See* Gosliner 1999, at 124 (Exh. US-49); Gerrodette 2009, at 1192 (Exh. US-12).

[30] U.S. Third Written Submission, para. 69; *See* "Dolphin Mortalities Per Set Due to ETP Dolphin Sets and in Other Fisheries" (Exh. US-111).

markets – purse seine, longline, and pole-and-line fishing[31] – but has also addressed the other fishing methods that can be used to catch tuna but do not generally produce for these markets.

27. The use of these fishing methods varies widely throughout the world. As compared to the 80-90 vessels setting on dolphins in the ETP, there are thousands of purse seine, longline, and pole-and-line vessels operating in tuna fisheries throughout the world. Therefore, in order to analyze the relative harm caused by different fishing methods in different fisheries in terms of direct mortalities, the United States has used a metric of dolphin mortalities per set – that is, total observed dolphin mortalities divided by the total number of sets observed.[32] This metric, which is widely used by national regulators, RFMOs, and scientists, allows for a fair, apples-to-apples comparison of mortality across fisheries that are otherwise very different from one another in terms of gear type used, the number of vessels operating in the fishery, and the level of effort involved.[33] Further, a per set metric is *particularly* appropriate for determining whether the U.S. measure is calibrated to risk because the measure requires the certification of whether a dolphin has been killed or seriously injured *on a per set basis*.[34]

28. For other types of **purse seine** fishing (namely unassociated and floating object sets),

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[31] *See* U.S. Third Written Submission, para. 73, n.157; Gilman & Lundin 2009, at 2 (Exh. US-53); Joseph 2003, at 2 (Exh. US-148).

[32] *See, e.g.*, U.S. First Written Submission, paras. 42-44, 57-58.

[33] *See, e.g.*, IATTC, Tunas, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2015, at 121, 145 (2016) (Exh. MEX-6); IATTC, Doc MOP-28-05, Report on the International Dolphin Conservation Program, at 3, Table 3 (Oct. 18, 2013) (Exh. MEX-8); IATTC, Doc MOP-32-05, Report on the International Dolphin Conservation Program, at 3 (Oct. 20, 2015) (Exh. US-15); WCPFC, Cetacean Interactions Paper, at 5-6 (Exh. US-17); Al Kingston & Simon Northridge, "Extension Trial of an Acoustic Deterrent System to Minimise Dolphin and Porpoise Bycatch in Gill and Tangle Net Fisheries," at 8 (2011) (Exh. US-160); David Macias Lopez et al., "Marine Mammal Bycatch in Spanish Mediterranean Large Pelagic Longline Fisheries, with a Focus on Risso's Dolphin (*Grampus Griseus*)," 25 *Aquat. Living Resour.* 321, 326 (2012) (Exh. US-178).

[34] *See, e.g.*, U.S. Second Written Submission, paras. 162-163; *see also* NOAA, Form 370 (Exh. US-4).

data from the ETP large purse seine fishery offers a direct comparison with setting on dolphins by the same type of vessels in the same ocean area. The data show that, on a per set basis, dolphin sets cause about ***475 times*** as many direct dolphin mortalities as other types of purse seine sets.[35] The best available evidence from the Western Pacific, Atlantic, and Indian Ocean purse seine fisheries also shows low levels of dolphin mortality due to unassociated and floating object sets.[36] The most recent observer data from the WCPFC tropical purse seine fishery, for example, shows approximately 1.2 and 2.2 dolphin mortalities for every 1,000 sets undertaken in the fishery in 2014 and 2015, whereas the rate of observed mortalities due to ETP dolphin sets was over 70 and 30 times higher, respectively.[37]

29. For **longline** fishing, the best available evidence shows that it causes a far lower level of dolphin mortalities than setting on dolphins. Scientific studies, as well as national and RFMO reports, show that U.S. longline fisheries in the Pacific and Atlantic Oceans, as well as other western Pacific, Atlantic, and Indian Ocean longline fisheries, cause far lower levels of dolphin mortality on a per set basis than ETP dolphin sets.[38] As a scientific study of the EU longline fishery in the Mediterranean from 2000 to 2009 explained: "[L]ongline fisheries have been traditionally defined as having a low impact on marine mammals."[39] Indeed, Mexico has presented no evidence suggesting that there is any individual longline fishery where the rate of direct dolphin mortalities approaches that caused by dolphin sets in the ETP, let alone that this

[35] *See* U.S. First Written Submission, paras. 41-42.

[36] *See* U.S. Third Written Submission, paras. 75-80.

[37] *See* U.S. Third Written Submission, para. 78; "Dolphin Mortalities Per Set Due to ETP Dolphin Sets and in Other Fisheries" (Exh. US-111).

[38] *See* U.S. First Written Submission, para. 55; U.S. Second Written Submission, paras. 94-100; Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13).

[39] Lopez et al. 2012, at 321 (Exh. US-178); *see* Gilman & Lundin 2009, at 12 (Exh. US-53).

level of direct mortalities is a general feature of the fishing method.[40]

30. For **pole-and-line** fishing, it appears *uncontested* that this fishing method does not cause the same level of direct mortality as setting on dolphins in the ETP large purse seine fishery and, indeed, that it is not associated with any level of dolphin bycatch at all. Mexico explicitly conceded this in the first compliance proceeding[41] and has implicitly conceded it in this proceeding by simply ignoring the fishing method entirely, despite the fact that it is the third major method producing for the global and U.S. tuna product markets.

31. The other methods of fishing for tuna – **gillnet**, **trawl**, and **handline** fishing – also do not generally produce levels of direct dolphin mortalities comparable to setting on dolphins. Gillnet fishing in some fisheries causes no known risk to any marine mammal population or causes levels of dolphin mortality considerably below those caused by dolphin sets in the ETP, particularly when certain gear or fishing modifications are used.[42] Where gillnet fishing has resulted in an unusually high level of direct dolphin mortalities, that high mortality can be, and has been, addressed under the determination provisions of the U.S. measure.[43] Trawl fishing is not generally used to catch tuna, but where it is, it is generally associated with low levels of all marine mammal bycatch.[44] Mexico has identified no tuna trawl fishery where direct dolphin mortalities approach the level caused by dolphin sets in the ETP.[45] Handline fishing is a highly

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[40] *See* U.S. Third Written Submission, paras. 86-89.

[41] *See* Mexico's Opening Statement to the 1st 21.5 Panel, paras. 72, 86.

[42] *See* U.S. Third Written Submission, paras. 97-98; NMFS, *Proposed Rule: List of Fisheries for 2017*, 81 Fed. Reg. 54,019 (Exh. US-101); Kingston & Northridge 2011, at 8 (Exh. US-160).

[43] *See* U.S. Third Written Submission, paras. 95-99, 143.

[44] *See* U.S. Third Written Submission, para. 101.

[45] *See* U.S. Third Written Submission, para. 102; Mexico's Second Written Submission, para. 74.

selective fishing method, like pole-and-line fishing, and, as such, is not associated with dolphin bycatch.[46] Mexico has identified no handline fishery where dolphin bycatch has been identified as a problem or where any study has suggested that handline fishing causes harm to dolphins.[47]

32. The evidence thus firmly establishes that setting on dolphins in the ETP large purse seine fishery has a uniquely high risk profile for dolphins compared to the fishing methods that can produce tuna product allowed to be labeled as "dolphin safe."

2. The ETP Large Purse Seine Fishery Has a High Risk Profile for Dolphins Compared to Other Tuna Fisheries

33. Relatedly, the ETP large purse seine fishery has a relatively high risk profile for dolphins compared to other tuna fisheries in the world. The previous compliance panel specifically recognized the "special risk profile" of this fishery,[48] which is attributable to the fact that it is the only fishery in the world where widespread setting on dolphins occurs.[49] The evidence shows that two consequences flow from the systematic use of this high-risk fishing method: (1) harmful interactions between dolphins and fishing gear occur on a much greater scale; and (2) the rate of direct dolphin mortalities is much higher than in other fisheries. As a result, the ETP large purse seine fishery is, overall, relatively much more dangerous for dolphins than other fisheries, in general. Mexico has not rebutted the U.S. showing that this is the case.

34. First, the level of interaction with dolphins in the ETP large purse seine fishery is

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[46] U.S. Second Written Submission, n.292; FAO, "Tuna Handlining," at 3 (Exh. MEX-38) M. Shiham Adam et al., IOTC, *Review of Yellowfin Tuna Fisheries in the Maldives*, at 7 (Oct. 8, 2015) (Exh. MEX-40).

[47] *See* U.S. Third Written Submission, paras. 104-108; U.S. Second Written Submission, para. 110-114; Mexico's Second Written Submission, paras. 76-78; Mexico's First Written Submission, paras. 110-111.

[48] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.398; *see also id.* paras. 7.240-242, 7.244-245.

[49] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.241-242; *see* U.S. First Written Submission, paras. 48-52; U.S. Second Written Submission, paras. 143-144.

extremely high, due to the fact that nearly half of all sets are dolphin sets and so involve sustained, intense interactions with hundreds of dolphins.[50] In other tuna fisheries, by contrast, any dolphin interaction is rare, meaning that only a small percentage of sets puts any dolphins directly at risk.[51]

35. Second, the available evidence confirms that the ETP large purse seine fishery, even subject to the unique requirements imposed by the AIDCP, remains a highly dangerous fishery for dolphins in terms of direct dolphin mortalities. Over the past decade, large purse seine vessels in the ETP have caused, on average, about 1,000 observed dolphin mortalities each year, nearly all caused by dolphin sets, or about 95 dolphin mortalities per 1,000 dolphin sets.[52] For every other purse seine fishery and every longline fishery on the record – including WCPFC purse seine fisheries, the largest Atlantic and Indian Ocean purse seine fisheries, and major longline fisheries in the Pacific, Atlantic, and Indian Oceans – the best available evidence shows per set dolphin mortalities to be a small fraction of that level.[53]

36. None of Mexico's evidence suggests that this is not the case. The majority of the exhibits Mexico has submitted are not probative of the *level* of dolphin mortality in any particular tuna fishery and, therefore, do not support a direct comparison with the ETP large purse seine

[50] U.S. First Written Submission, para. 53.

[51] *See* U.S. First Written Submission, para. 55; Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 3 (Exh. US-13).

[52] *See* "Dolphin Mortalities Per Set Due to ETP Dolphin Sets and in Other Fisheries" (Exh. US-111).

[53] *See* "Dolphin Mortalities Per Set Due to ETP Dolphin Sets and in Other Fisheries" (Exh. US-111); "Dolphin Bycatch in the WCPFC Purse Seine Fishery from Annual Reports for 2015" (Exh. US-149); U.S. Third Written Submission, paras. 167-168.

fishery.[54] Where Mexico's evidence does relate to particular existing tuna fisheries, it generally shows a level of direct dolphin mortality *lower* than that caused by dolphin sets in the ETP.[55] For example, the 2014 annual report from the Papua New Guinea purse seine fishery, which showed a higher than usual level of mortality, still shows that direct dolphin mortalities in the fishery were, on an estimated per set basis, far below those caused by dolphin sets in the ETP.[56] Further, the annual report for 2015 showed that dolphin mortalities were, on an estimated per set basis, less than 15 percent of direct dolphin mortalities caused by dolphin sets in the ETP.[57] The only fisheries where direct dolphin mortalities seemed to equal or exceed those in the ETP large purse seine fishery have been designated under the determination provisions.[58]

37. Thus, the evidence establishes that dolphin sets in the ETP large purse seine fishery have a high risk profile for dolphins compared not only to the *major fishing methods and fisheries* producing for the global and U.S. tuna product markets, but also compared to those fishing methods that do not produce for those markets.

3. The Measure Is Commensurate with the Differences in Risk

38. As we have discussed, in prior reports in this very dispute, the Appellate Body has concluded that if the risks posed to dolphins by different fishing methods in different ocean areas are not the same, then it is necessary to consider whether "the regulatory distinctions drawn by

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[54] U.S. Second Written Submission, paras. 84-86, 95-100, 107, 109, 111-113, 147; U.S. Third Written Submission, paras. 89, 102, 106.

[55] *See* U.S. Second Written Submission, paras. 85-88, 97-99; U.S. Third Written Submission, paras. 81-82, 102.

[56] *See* U.S. Third Written Submission, para. 81; U.S. Second Written Submission, para. 85, n.195.

[57] *See* "Dolphin Mortalities Per Set Due to ETP Dolphin Sets and in Other Fisheries" (Exh. US-111); "Dolphin Bycatch in the WCPFC Purse Seine Fishery from Annual Reports for 2015" (Exh. US-149).

[58] *See* U.S. Second Written Submission, paras. 107, 169-174; U.S. Third Written Submission, para. 115.

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."[59] According to the Appellate Body, such an inquiry examines whether the different treatment "is explained by, and appropriately tailored to, the relevant risks."[60]

39. For this reason, the United States in its first written submission not only discussed the differences in risk, but also examined the differences in treatment provided by the eligibility criteria, certification requirements, and tracking and verification requirements, as evidenced in the measure itself, and, with regard to the tracking and verification requirements in particular, through a comparison with the requirements of the AIDCP.[61] The United States then discussed why these regulatory distinctions are "explained by, and appropriately tailored to, the relevant risks" in a distinction-by-distinction analysis.[62]

40. It is well established, however, that the Panels' ultimate finding as to whether the United States has brought its measure conformity with the TBT Agreement and GATT 1994 cannot rest on such a "segmented" distinction-by-distinction analysis but must be based on an assessment of the measure "as a whole," taking into account the highly interrelated nature of the individual regulatory distinctions.[63] And for this reason, the United States has also discussed in each of its

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[59] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.160.

[60] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.163; *see also id.* paras. 7.252, 7.353.

[61] *See* U.S. First Written Submission, paras. 20, 89 (eligibility), 120-121 (certification), and 146-168 (tracking and verification).

[62] *See* U.S. First Written Submission, paras. 104-110 (eligibility), 132-142 (certification), and 172-178 (tracking and verification).

[63] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.159, 7.166, 7.169.

three written submissions why all of the regulatory distinctions, when viewed as a whole, are, in fact, commensurate with, and thus calibrated to, the differences in risk.[64]

a. The Individual Regulatory Distinctions Are Commensurate with the Differences in Risk

41. First, the distinction drawn in the eligibility criteria between fishing methods is explained by, and tailored to, the difference in risk profile between setting on dolphins and other fishing methods. The criteria distinguish between tuna product produced by a fishing method that is intrinsically dangerous to dolphins, causes unique unobservable harms, and causes a high rate of direct dolphin mortalities, and tuna product produced from fishing methods that interact with dolphins only incidentally, do not cause such unobservable harms, and generally cause lower levels of direct dolphin mortalities. Tuna product produced by setting on dolphins is ineligible for the label, while tuna produced by other fishing methods is potentially eligible, provided no dolphin was killed or seriously injured in the particular set or gear deployment from which the tuna was produced.[65] Simply put, the regulatory distinction reflects the difference in overall risks presented between a fishing method that cannot be conducted in a manner that is dolphin safe in any fishery (or even in any set) and fishing methods that can be safe for dolphins, both on a fishery-wide and on a per set basis. Thus, the eligibility criteria are commensurate with the different risk profiles for dolphins of these fishing methods.

42. Second, the difference in certification requirements between tuna product produced from the ETP large purse seine fishery and tuna product produced from other fisheries is

[64] *See* U.S. First Written Submission, paras. 179-186; U.S. Second Written Submission, paras. 176-178; U.S. Third Written Submission, paras. 146-148.

[65] *See* U.S. First Written Submission, paras. 104-110.

commensurate with the risk profiles of those different fisheries.

43. Under the U.S. measure, in order to qualify for the label, tuna product must be accompanied by a certification that the eligibility criteria are met (*i.e.*, that no dolphin was killed or seriously injured in the gear deployment in which the tuna was caught and that the harvesting vessel did not intentionally set on dolphins).[66] For tuna caught in fisheries other than the ETP large purse seine fishery, the general rule is that the certification is provided by the captain of the harvesting vessel, who must have taken a training course specifically tailored to accurately making the dolphin safe certifications.[67] For tuna product produced from the ETP large purse seine fishery, the certification is made by the captain of the harvesting vessel *and* the observer who is required under the AIDCP to be on board the vessel during all fishing operations.[68]

44. This distinction between fisheries is explained by, and tailored to, the fundamental difference between the ETP large purse seine fishery and other fisheries. There are *millions* more dolphin interactions in the ETP large purse seine fishery than occur in other fisheries, controlling for fishery size because half of all sets are dolphin sets and thus involve sustained, intense interactions with hundreds of dolphins.[69] This makes the task of verifying that tuna meets the eligibility criteria potentially much more difficult, as it is much easier to miss dolphin mortalities in a particular set.[70] It also means that small inaccuracies, on a per interaction basis, translate into many more unnoticed dolphin mortalities. For example, if the ETP certifier fails to

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[66] *See* 50 C.F.R. § 216.91(a)(3)(iii) (Exh. US-2); NOAA, Form 370, 5.B.1-5 (Exh. US-4).

[67] 50 C.F.R. § 216.91(a)(3)(iii) (Exh. US-2); *see* U.S. First Written Submission, para. 121.

[68] *See* U.S. First Written Submission, para. 115; NOAA, Form 370, 5.B.1-5 (Exh. US-4).

[69] *See* U.S. First Written Submission, paras. 125-129.

[70] U.S. First Written Submission, paras. 133-138; U.S. Second Written Submission, para. 145; *see US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.239-245.

notice one dolphin mortality for every 100 dolphins captured in the purse seine net, this would translate to over 35,000 unobserved dolphin deaths per year.[71] In other fisheries, by contrast, the same rate of inaccuracy would translate to zero or only a few unobserved mortalities.[72]

45. There is no evidence on the record that, despite these potential differences in the certification conditions, dolphin safe certifications of tuna caught in the ETP large purse seine fishery are more accurate than certifications of tuna caught outside it. (Indeed, they may be less accurate, given the nature and scale of the dolphin interactions involved.) However, even if there is a difference in accuracy, the difference in the certification requirements is commensurate with the difference in risk because, given the greater risks in the ETP large purse seine fishery, it is reasonable to require a lower "margin of error" for tuna product produced in that fishery.[73] The distinction that the certification requirements draw between tuna product produced in different fisheries is thus calibrated to the general differences in risk.

46. Third, the difference in tracking and verification between the NOAA and AIDCP regimes is commensurate with the risk profiles of these different fisheries.

47. As the United States has discussed, the basic, universal requirement is that all dolphin safe tuna must be kept separate from any non-dolphin safe tuna caught during the same trip from catch through unloading and processing.[74] Under the general NOAA regime, producers of dolphin safe tuna product are subject to record-keeping requirements from the point of catch

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[71] *See* U.S. First Written Submission, paras. 125-127 (showing that there are generally over 10,000 dolphin sets per year and, on average, approximately 600 dolphins are chased and 350 are encircled in a net in each set).

[72] *See* U.S. First Written Submission, paras. 128-129.

[73] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.278 (min. op.).

[74] *See* U.S. First Written Submission, paras. 146, 150-154; 50 C.F.R. § 216.93(c)(1)-(3) (Exh. US-2).

through unloading and processing, to ensure that this requirement, as well as the requirement of associating the tuna and the relevant captain certification, is met.[75] For tuna caught in the ETP large purse seine fishery, dolphin safe tuna product must be accompanied by the relevant AIDCP tuna tracking form (TTF) number.[76] The AIDCP regime requires that this number accompany the tuna through unloading and processing and requires processors must maintain records sufficient for the tuna to be traced back to the corresponding TTF number.[77] Additionally, under the AIDCP system, 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."[78]

48. This difference between the two tracking and verification regimes can be explained by, and is tailored to, the high risk profile for dolphins of the ETP large purse seine fishery compared to other fisheries, in general. As with the certification requirements, there is no evidence on the record that the dolphin safe determinations of tuna product produced from the ETP large purse seine fishery under the AIDCP system are substantively more accurate than those of tuna product produced from other fisheries. Given the much greater frequency and scale of dolphin interactions and mortalities in the ETP large purse seine fishery, small inaccuracies, on a per set or per shipment basis, could translate to much greater proportions of tuna product being inaccurately designated as "dolphin safe." Moreover, any difference in accuracy that does exist is reasonable in light of the significant differences in the risk profile of the ETP large purse seine

[75] *See* 50 C.F.R. § 216.91(a)(5) (Exh. US-2).

[76] 50 C.F.R. §§ 216.92(b)(1), (b)(2)(i) (Exh. US-2); NOAA Form 370, para. 5B(5) (Exh. US-4).

[77] U.S. First Written Submission, paras. 153-157; AIDCP Tracking and Verification Resolution, sec. 6(b)-(c) (Exh. US-90).

[78] U.S. First Written Submission, para. 168; AIDCP Tracking and Verification Resolution, sec. 6(d) (Exh. US-90).

fishery and other tuna fisheries, in general. Differences between the two systems are small, particularly in light of the significant differences in risk profile,[79] and thus are, at a minimum, commensurate with those differences in risk."

49. Further, under the determination provisions, NOAA can require the tuna product produced from any fishery where the risk profile for dolphins is as high as it is in the ETP large purse seine fishery to be subject to enhanced certification and tracking and verification requirements comparable to those for tuna product produced from the ETP large purse seine fishery.[80] In other words, the measure is designed in such a manner that "enable[s] the United States to impose the same requirements in fisheries where the same degree of risk prevails."[81]

b. The Regulatory Distinctions, When Viewed as a Whole, Are Commensurate with the Differences in Risk

50. As noted earlier, although the United States considers it useful to discuss the issues on a distinction-by-distinction basis in order to provide a thorough explanation of how the calibration analysis applies in these proceedings, we recognize that such a "segmented" approach is not the analysis that the Appellate Body has explained is necessary.[82] Rather, the Appellate Body has stated consistency with the TBT Agreement and GATT 1994 must be determined based on a "comprehensive" analysis that takes into account the "cumulative and highly interrelated" nature of the different distinctions and "reconcil[es]" any different intermediate conclusions that may be drawn as to particular regulatory distinctions.[83] In particular, the Appellate Body has stated that

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[79] *See* U.S. First Written Submission, paras. 150-168, 175.

[80] U.S. First Written Submission, paras. 77-79, 85-87; 50 C.F.R. §§ 216.91(a)(3)(v), (a)(5)(ii) (Exh. US-2).

[81] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.280 (min. op.).

[82] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.159, 7.169, 7.305.

[83] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.166, 7.305.

the fact that one regulatory distinction may not be "balanced" in relation to the risk does not mean the measure as a whole should be found inconsistent – it is necessary to look at whether the measure "as a whole" is commensurate with the risk.[84]

51. This type of broad analysis makes sense. It is not the role of a WTO panel to step into the shoes of a regulator and find a measure inconsistent based on a hyper-technical investigation of whether the measure responds to every small detail of different circumstances around the world. The WTO Agreement has never been interpreted as requiring a measure to satisfy such a standard.[85] Rather, the Appellate Body has indicated that the analysis should be the same type of analysis as other past panels have done, namely whether the measure, as a whole, is justified in light of the evidence available. In this light, we do not read the Appellate Body's characterization of the calibration test – in particular, whether the regulatory distinctions are "commensurate" with the risk – to be materially different from how the previous proceeding's minority panelist understood it. The question is simply whether the regulatory distinctions drawn by the measure reflect a "fair response to the different risk profiles existing in different fisheries, as established by the evidence."[86]

52. The United States believes that, in fact, the measure – when viewed as a whole – reflects such a "fair response" to the evidence. In particular, the evidence establishes that the ETP large purse seine fishery has a higher risk profile than other fisheries because a uniquely dangerous fishing method is widely employed in that fishery that is not employed in other fisheries. The

[84] *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.335, 7.159.

[85] *See US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 149.

[86] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.282 (min. op.); *see also id.* para. 7.277.

measure recognizes the unique risk to dolphins that the intentional chase and capture of dolphins poses and draws distinctions between fishing methods and fisheries in light of that difference in risk. The difference in risk "explains" the distinctions contained in the measure, and the measure is, in turn, calibrated to the risk. Accordingly, the measure is consistent with Article 2.1.[87]

III. THE MEASURE IS CONSISTENT WITH ARTICLE XX OF THE GATT 1994

53. For purposes of this dispute, the Appellate Body has stated that the question to be answered to determine whether the measure reflects "arbitrary or unjustifiable discrimination," as understood in the chapeau of Article XX, *is the same* question that needs to be answered to determine whether the measure is even-handed under Article 2.1. Namely, is the measure calibrated to differences in risk of overall harm between setting on dolphins in the ETP large purse seine fishery and other fishing methods employed in other fisheries?[88] As discussed in both this oral statement and the U.S. written submissions, the measure is, in fact, so calibrated. As such, any inconsistency with GATT 1994 Articles I:1 and III:4 is justified under Article XX.

IV. CONCLUSION

54. This concludes our opening remarks. We are pleased to respond to the advance questions by the Panels and any additional questions the Panels may have.

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

[88] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.169, 7.353.