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# *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*
## *Recourse to Article 21.5 of the DSU by Mexico*

## (DS381)

Third Written Submission of
the United States of America

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## TABLE OF CONTENTS

## 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 |
| FAD | Fish Aggregating Device |
| FAO | United Nations Food and Agriculture Organization |
| FCO or Form 370 | NOAA Fisheries Certificate of Origin |
| IATTC | Inter-American Tropical Tuna Commission |
| ICCAT | International Commission for the Conservation of Atlantic Tunas |
| IOTC | Indian Ocean Tuna Commission |
| ISSF | International Seafood Sustainability Foundation |
| NMFS | National Marine Fisheries Service |

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| NOAA | National Oceanic and Atmospheric Administration |
| RFMO | Regional Fishery Management Organization |
| TBT Agreement | Agreement on Technical Barriers to Trade |
| TTVP | Tuna Tracking and Verification Program |
| U.S.C. | United States Code |
| WCPFC | Western and Central Pacific Fisheries Commission |
| WCPO | Western and Central Pacific Ocean |
| WIO | Western Indian Ocean |
| WTO | World Trade Organization |
| WWF | World Wildlife Foundation |

## TABLE OF REPORTS

| Short title | Full Citation |
|---|---|
| *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 |
| *Chile – Price Band System (Article 21.5 – Argentina) (Panel)* | Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/RW and Corr.1, adopted 22 May 2007, upheld by Appellate Body Report WT/DS207/AB/RW |
| *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 – 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 (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 |

## TABLE OF EXHIBITS

| | |
|---|---|
| 156 | Chinese Taipei, Annual Report to the Commission, (Aug. 2016) |
| 157 | United States, Annual Report to the Commission, WCPFC-SC12-AR/CMM-27 (Aug. 2016) |
| 158 | "Dolphin Bycatch in the WCPFC Longline Fishery from Annual Reports" (data drawn from WCPFC annual reports) |
| 159 | Australia, Annual Report to the Commission, WCPFC-SC12-AR/CMM-01 (Aug. 2016) |
| 160 | Al Kingston & Simon Northridge, "Extension Trial of an Acoustic Deterrent System to Minimise Dolphin and Porpoise Bycatch in Gill and Tangle Net Fisheries" (2011) |
| 161 | NMFS, "California Set Gillnet Observer Program Observed Catch" (2011) |
| 162 | FAO, "Tuna Midwater Pair Trawling," http://www.fao.org/fishery/fishtech/1013/en |
| 163 | Alison McCarthy et al., "Pilot Observer Programme in Irish Pelagic Trawl and Gillnet Fisheries: Implementing Council Regulation (EC) No 812/2004 (2011) |
| 164 | John Boyd et al., "Report on the Pilot Observer Programme in Irish Pelagic Trawl Fisheries: Implementing Council Regulation (EC) No 812/2004" (2012) |
| 165 | IATTC, Resolution C-13-04 on the Collection and Analysis of Data on Fish-Aggregating Devices" (June 2013) |
| 166 | 18 U.S.C. § 545 |
| 167 | 18 U.S.C. § 3571 |
| 168 | 18 U.S.C. § 3559 |
| 169 | 16 U.S.C. § 3372 |
| 170 | U.S. Dep't of Commerce, "Civil Monetary Penalty Adjustments for Inflation," 81 Fed. Reb. 36454 (June 7, 2016) |
| 171 | 16 U.S.C. § 3373 |
| 172 | 16 U.S.C. § 3374 |
| 173 | 18 U.S.C. § 1001 |
| 174 | 16 U.S.C. § 1375 |
| 175 | "Lot Tracking Procedures" (2016) (BCI) |
| 176 | "Tracking System Overview" (2014) (BCI) |
| 177 | "Reference Reports for NMFS Periodic Audit" (2014) (BCI) |

# I. INTRODUCTION

1. In its previous two submissions, the United States explained that the U.S. dolphin safe labeling measure is consistent with Article 2.1 of the *Agreement on Technical Barriers to Trade* (TBT Agreement) and meets the standard of Article XX of the *General Agreement on Tariffs and Trade 1994* (GATT 1994). In particular, the United States explained that the measure, as amended by the National Oceanic and Atmospheric Administration's (NOAA) March 22, 2016 interim final rule (2016 IFR), is even-handed in that the labeling conditions are "calibrated" to the differences in risk between setting on dolphins in the eastern tropical Pacific Ocean (ETP) and other fishing methods practiced in other parts of the world. In light of this, and because the so-called determination provisions are also even-handed, any detrimental impact resulting from the measure stems exclusively from legitimate regulatory distinctions. The conclusion that the measure has been brought into compliance flows from the Dispute Settlement Body (DSB) recommendations and rulings in previous proceedings in this dispute.

2. In its second written submission, Mexico continues to urge the Panels to apply a legal approach that differs from the one endorsed by the Appellate Body for purposes of this dispute. Specifically, Mexico urges the Panels to conduct different legal tests for different regulatory distinctions with the goal of minimizing – or eliminating completely – the relevance of whether the measure is calibrated to the risk to dolphins. Certainly one of the most extreme examples of this is where Mexico urges the Panels to find the measure inconsistent with Article 2.1 not based on whether the distinctions consider the risk to dolphins, and not even based on the measure's own objectives, but instead based on whether the distinctions promote the objective of environmental sustainability.[1] Mexico urges this despite the fact that these are compliance proceedings and so the DSB recommendations and rulings form the basis for these proceedings.

3. To accept Mexico's approach would not only discard the DSB recommendations and rulings, but disregard the measure itself, which is about dolphin protection and consumer information, not sustainable fishing practices. However, even where Mexico purports to apply the calibration test that was endorsed by the Appellate Body for purposes of this dispute, Mexico does so in a manner that differs significantly from that test.[2]

4. The United States would further observe that Mexico's approach also undermines the appropriate role of these Panels in another way. That role is not, as Mexico would appear to believe, to step into the shoes of the regulator and determine at what level to achieve a particular legitimate objective or precisely how a Member's measure needs to be revised to be consistent with that Member's WTO obligations.[3] Nor is a panel's role to determine whether a measure breaches a WTO obligation based on a view that an individual part of the measure is imperfect in some way. Rather, the role of a panel and the Appellate Body is to determine if a measure is inconsistent with a particular WTO obligation. Furthermore, the Appellate Body has stated the role of panels is to determine whether the measure, as a whole, meets the standards of Article 2.1 and Article XX, and has indicated that panels should not base an ultimate conclusion on an intermediate finding with regard to one part of a measure, but on an assessment of the measure

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[1] Mexico's Second Written Submission, para. 32 ("But if the means they use to achieve those ends are inconsistent with the objectives of sustainable development, then they are likewise inconsistent with their WTO obligations.").

[2] *See infra*, sec. II.B.1 (discussing that Mexico's test for assessing the even-handedness of the eligibility criteria does not appear to take account of either unobservable harms or the relative risks to dolphins).

[3] *See, e.g.*, Mexico's Second Written Submission, para. 51.

overall.[4] Mexico's shifting legal tests, which do not rely on an assessment of the relative risks to dolphins from different fishing methods in different oceans, prevents the Panels from fulfilling their responsibility, and raises grave concerns about the proper distinction between the WTO Agreement and Members' own ability to regulate.

5. Finally, the United States would recall that the burden of proof for these proceedings has not changed. The United States continues to carry the burden of proof with respect to the matter brought by the United States, and Mexico continues to carry the burden of proof with respect to the matter brought by Mexico,[5] notwithstanding certain stray comments from Mexico on this subject.[6] It is, of course, well established that, regardless of which party has the burden of proof, "the party that asserts a fact is responsible for providing proof thereof."[7]

6. The United States has explained in previous submissions why the measure is WTO-consistent and has fully responded to the arguments Mexico made in its first written submission. As such, the United States devotes this submission to responding to the arguments Mexico makes in its second written submission. In section II, the United States explains why Mexico has failed to establish that the U.S. measure is inconsistent with Article 2.1 of the TBT Agreement. In section III, the United States addresses Mexico's argument under the GATT 1994.

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

7. As discussed in the first two U.S. submissions and below, the U.S. measure, as amended by the 2016 IFR, does not accord less favorable treatment to Mexican tuna product because any detrimental impact it causes stems exclusively from legitimate regulatory distinctions. In section II.A below, the United States again explains the obligations under Article 2.1 and addresses Mexico's most recent arguments regarding the appropriate legal standard. Section II.B responds to Mexico's specific arguments regarding eligibility criteria, certification requirements, tracking and verification requirements, and determination provisions as well as demonstrates again that the U.S. measure, as a whole, is even-handed and consistent with Article 2.1.

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[4] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.335 ("Indeed, a conclusion that a particular element of the amended tuna measure results in arbitrary or unjustifiable discrimination because it is not balanced in relation to particular risk profiles in different fisheries *may not be sustainable* if other integral elements of the measure are also examined. This, in our view, underscores the importance of making an assessment of arbitrary or unjustifiable discrimination in respect of relevant elements of the measure, taking into account relevant interlinkages.") (emphasis added); *see also id.* para. 7.159.

[5] *See* U.S. Second Written Submission, para. 11. In this regard, references by the United States to the "Panels" in this submission are intended to be read bearing in mind the different burdens of proof.

[6] *See* Mexico's Second Written Submission, paras. 33, 65.

[7] *US – Tuna II (Mexico) (AB)*, para. 283 ("As an initial matter, we note that, in *Japan – Apples*, the Appellate Body pointed out that '[i]t is important to distinguish, on the one hand, the principle that the complainant must establish a *prima facie* case of inconsistency with a provision of a covered agreement from, on the other hand, the principle that the party that asserts a fact is responsible for providing proof thereof.'") (quoting *Japan – Apples (AB)*, para. 157, and citing *US – Wool Shirts and Blouses (AB)*, p.14, *EC – Hormones (AB)*, para. 98).

## A. What Article 2.1 Requires

### 1. The Appropriate Legal Test for Even-Handedness in This Dispute

8. In its first two written submissions, the United States discussed the legal test for whether the measure is even-handed.[8] In particular, the United States explained that, for purposes of this dispute, the test for even-handedness is whether the particular labeling conditions of the U.S. dolphin safe measure are "calibrated" to the differences in risks to dolphins. In such an analysis, the Appellate Body has stated that a panel must assess:

> [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.[9]

9. Pursuant to this framework, the United States has explained that there is a difference in risk to dolphins between setting on dolphins in the ETP large purse seine fishery and other fishing methods in other oceans,[10] and that the regulatory distinctions regarding the eligibility criteria, certification requirements, and tracking and verification requirements are commensurate with these differences in risk.[11] The United States has further explained why the measure as a whole, including the design and application of the determination provisions, is even-handed.[12]

10. The United States will address below each of the specific arguments Mexico makes in its second written submission. Prior to doing so, however, the United States observes that the overall thrust of Mexico's two submissions is, in essence, that the Panels should reject this analysis of the Appellate Body. In particular, Mexico argues for approaches that directly conflict with two central, highly related points of the Appellate Body's analysis, namely, that:

- "[T]here is *a special relevance* in these Article 21.5 proceedings in conducting an assessment" of whether the differences in labelling conditions are calibrated to the risks

[8] U.S. First Written Submission, paras. 64-67; U.S. Second Written Submission, paras. 14-20.

[9] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.101; *see also* U.S. First Written Submission, para. 67.

[10] *See* U.S. First Written Submission, paras. 96-103, 124-131, 171; U.S. Second Written Submission, paras. 52-114, 142-144, 149.

[11] *See* U.S. First Written Submission, paras. 104-110, 132-142, 172-178; U.S. Second Written Submission, paras. 115-138, 145-146, 149-153; *see also US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.160 ("[Where] the risk profiles are different, then further inquiry would have been needed into 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.").

[12] *See* U.S. First Written Submission, paras. 179-186; U.S. Second Written Submission, paras. 176-178.

to dolphins.[13]

- "[T]he Appellate Body accepted the premise that such regime *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."[14]

11. First, Mexico's approach gives no "special relevance" to the Appellate Body's calibration test. Rather, in Mexico's view, whether the differences in labeling conditions are calibrated to differences in overall harm to dolphins is merely "one element" of the legal test for even-handedness that the Panels should apply.[15] Indeed, whether the measure is calibrated to the overall harm is not even the most important test under Mexico's approach, as Mexico suggests that the key inquiry is whether differences in labeling conditions can be reconciled with the objectives of the measure (irrespective of the risk).[16] Moreover, Mexico appears to reject the application of the Appellate Body's calibration test for purposes of examining the certification requirements and tracking and verification requirements.[17]

12. Second, Mexico implicitly – but repeatedly – alleges that the measure *will* violate Article 2.1 *even if* it is calibrated by contending that the measure is inconsistent with Article 2.1 for reasons unrelated to whether it is calibrated to harm to dolphins. Thus, in its first written submission, Mexico argues that all three regulatory distinctions are inconsistent with Article 2.1 because they are "at odds with the objectives and the design, architecture and revealing structure

[13] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.101 ("*[T]here is a special relevance* in these Article 21.5 proceedings in conducting an assessment of whether, under the amended tuna measure, 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.") (emphasis added).

[14] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.155 ("By engaging with the United States' arguments as it did, *the Appellate Body accepted the premise that such regime 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*. This, in turn, indicates that, in the context of the original proceedings, the Appellate Body considered appropriate an analysis involving: first, an identification of whether different tuna fishing methods in different areas of the oceans pose different risks to dolphins; and, second, examination of whether, in the light of these risks, the different treatment created by the relevant regulatory distinction shows that, as between different groups, the treatment accorded to each group is commensurate with the relevant risks, taking account of the objectives of the measure. This assessment was conducted in order to determine whether or not the original US dolphin-safe labelling regime was even-handed.") (emphasis added).

[15] Mexico's Second Written Submission, para. 15 ("[C]alibration is not a synonym for even-handedness, but rather only one element of the legal test for even-handedness."); *see also id.* para. 29 ("The legal test for 'even-handedness' is a multi-factor test.").

[16] *See, e.g.*, Mexico's First Written Submission, para. 214; Mexico's Second Written Submission, para. 26.

[17] *See* Mexico's First Written Submission, paras. 283, 299; Mexico's Second Written Submission, paras. 51, 92-93, 102.

of the tuna measure."[18] While in its second submission, Mexico claims that the measure is inconsistent with Article 2.1 because it is "inconsistent with the objectives of sustainable development,"[19] as well as the fact that the measure does not apply "strict" certification and tracking and verification requirements to tuna product produced from fishing methods that result in above *de minimis* harms to dolphins or in fisheries subject to (allegedly) substandard municipal regulations.[20]

13. These arguments are consistent with Mexico's positions in previous submissions. Mexico has never accepted that a measure that results in a detrimental impact is not inconsistent with the WTO Agreement if it is tailored to differences in risk.[21] It is thus not surprising that Mexico has rejected the minority panelist's incorporation of the concept of accuracy into the calibration analysis.[22] Indeed, an analysis where differences in the regulatory requirements that may affect the "accuracy" of the label can be WTO-consistent if those differences are tailored to risk to dolphins in different fisheries is antithetical to Mexico's approach.[23]

14. Mexico's arguments directly conflict with the Appellate Body's analysis and are in error in these compliance proceedings. Compliance proceedings do not begin from a "fresh start" that would allow such a deviation from the Appellate Body's analysis.[24] Rather, compliance

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[18] Mexico's First Written Submission, first para. 214 ("Such regulatory differences are completely at odds with the objectives and the design, architecture and revealing structure of the tuna measure. *On their face, they constitute arbitrary and unjustifiable discrimination*.") (emphasis added); *see also id.* n.280.

[19] Mexico's Second Written Submission, para. 32 ("But if the means they use to achieve those ends are inconsistent with the objectives of sustainable development, then they are likewise inconsistent with their WTO obligations.").

[20] Mexico's Second Written Submission, paras. 51, 92-93, 102.

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

[22] Mexico's First Written Submission, para. 280 ("Nonetheless, the United States argues that a higher "margin of error" is acceptable in fisheries where only captain self-certifications are required, relying upon the reasoning of the minority panelist in the first compliance proceeding. This is *not a reasonable approach* where the very objective of the measure is to provide accurate information to consumers regarding the dolphin-safe status of the tuna in the products that they choose to purchase.") (emphasis added).

[23] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 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. . . . For Mexico, '[t]una is either dolphin safe or it is not – *eligibility for the dolphin safe label cannot be viewed as a relative assessment*.'") (quoting Mexico's Second Written Submission to 1st 21.5 Panel, para. 173) (emphasis added); *id.* para. 7.149 ("Mexico argues that it cannot be even handed for the amended tuna measure to permit a higher proportion of incorrect dolphin-safe information with respect to tuna caught in allegedly low-risk fisheries outside the ETP than for tuna caught in the allegedly high-risk ETP large purse seine fishery. Thus, 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.").

[24] *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

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.[25] Mexico has been afforded the opportunity to argue what the legal standard should be,[26] but the Appellate Body rejected Mexico's approach, and there the matter should end. The United States relied on the Appellate Body's calibration analysis in designing the 2016 IFR to amend the measure to come into compliance with the U.S. WTO obligations. In this regard, the issues *should* have narrowed dramatically from the previous proceeding. The fact that this has not occurred is due to Mexico's rejection of the DSB recommendations and rulings.[27]

### 2. Mexico's Proposed Legal Tests for Even-Handedness Are Incorrect

15. Mexico uses its most recent submission to disagree once again with the Appellate Body's test for whether the measure is even-handed. In section III of its second written submission, Mexico makes a number of overlapping arguments to support its main claim that the Panels cannot find the U.S. measure to be even-handed simply because it is calibrated to differences in risk to dolphins. Mexico argues, instead, that the Panels must apply different tests (use different "factors," in Mexico's terminology[28]) to determine the even-handedness of the relevant regulatory distinctions, including examining whether differences in the distinctions can be reconciled with the objectives of the measure and the WTO Agreement (irrespective of the risk) and whether the regulatory distinctions reflect differences in municipal fishery regulations among the Membership. Ultimately, Mexico cannot conform its approach with that of the Appellate Body that a measure tailored to the risks to dolphins will not be inconsistent with the WTO Agreement even if it results in a detrimental impact on Mexican tuna product.

16. In subsection (a), the United States explains why Mexico's legal test for whether the U.S. measure reflects discrimination is incorrect. In subsection (b), the United States explains why Mexico's alternative legal tests for the even-handedness of the certification and tracking 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.").

[25] *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…").

[26] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.80, 7.149, n.492.

[27] Indeed, Mexico goes as far to argue that these proceedings represent the "first time" that the calibration need be applied. Mexico's First Written Submission, paras. 224, 17; Mexico's Second Written Submission, para. 15. Such an argument reflects a fundamental misunderstanding of *both* Appellate Body reports.

[28] *See, e.g.*, Mexico's Second Written Submission, para. 48 ("Contrary to the arguments of the United States, Mexico is not proposing separate calibration tests but, rather, a single multi-factor calibration test that takes into account the different relevant factors depending on the circumstances.").

verification requirements are likewise incorrect. Finally, in subsection (c), the United States explains why Mexico's argument that the U.S. measure is not even-handed because it does not pursue the objective of "environmental sustainability" is incorrect.

### a. Mexico's Legal Test for Whether the Measure Reflects Discrimination Is Incorrect

17. Mexico argues in sections III.A and III.B of its second written submission that the United States misunderstands its argument and that Mexico does not consider its test for discrimination to be independent from the calibration test. Rather, Mexico conceives of the even-handedness test as a multi-factor analysis where "one of the[] questions" is whether the measure is calibrated, and "[a]nother question is whether the regulatory distinctions are reconciled with the objectives of the measure."[29] In Mexico's view, these two questions "do not create independent or discrete legal tests," but rather are different elements that are weighed and balanced against one another to determine whether the measure is even-handed.[30]

18. Mexico suggests that its creation of this multi-factor balancing test is required by the Appellate Body's analysis because the Appellate Body has stated, in articulating the standard for even-handedness generally, that "one of the ways to determine whether the detrimental impact caused by a technical regulation is even-handed and therefore stems exclusively from a legitimate regulatory distinction is by examining whether the regulatory distinction is designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination,"[31] while also emphasizing the importance of the calibration analysis in this particular dispute.[32] Mexico misunderstands the Appellate Body's even-handed analysis as it applies in this dispute.

19. While the Appellate Body has recognized that there may be different approaches a panel could employ to test whether the challenged measure is even-handed, the facts and circumstances of a particular dispute will dictate the approach that is needed. *In this dispute*, the Appellate Body "considered appropriate an analysis" of whether the measure "is properly 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the oceans."[33] It

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[29] Mexico's Second Written Submission, para. 22 ("The Panels must take into account *a number* of factors or questions in conducting and resolving the legal test for 'even-handedness.' … *One of these questions* is whether or not the discriminatory effects of the tuna measure's regulatory distinctions can be justified on the basis that they are "calibrated" … *Another question* is whether or not the discriminatory effects constitute arbitrary or unjustifiable discrimination on the basis that the regulatory distinctions cannot be reconciled with, or rationally connected to, the legitimate policy objectives of the measure.") (emphasis added).

[30] *See* Mexico's Second Written Submission, para. 23 ("These questions do not create independent or discrete legal tests; rather, they are elements within the overall analysis of whether or not the tuna measure is "even-handed", and they are assessed cumulatively, in relation to one another, on a common record of facts and circumstances.").

[31] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.94.

[32] *See* Mexico's Second Written Submission, paras. 23, 26.

[33] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.155 ("By engaging with the United States' arguments as it did, the Appellate Body accepted the premise that such regime 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. This, in turn, indicates that, in the context of the original proceedings, *the Appellate Body considered appropriate an*

is this analysis that, *in this dispute*, must be "conducted in order to determine whether or not the … US dolphin-safe labelling regime [is] even-handed."[34] In other words, the fact that, in theory, there are different ways to test for even-handedness does not mean, as Mexico suggests, that these Panels must explore all these options in this dispute or that doing so would be appropriate.

20. Indeed, what Mexico seems to be arguing is that the Appellate Body has required the Panels to face the same situation that the first compliance panel did with regard to the certification requirements. There, the first compliance panel attempted to balance the two analyses presented here, *i.e.*, whether the differing certification requirements were calibrated to differences in risk and whether they were reconcilable with the objectives of the measure. The majority ultimately concluded that while the evidence regarding the differences in risks to dolphins set out a *prima facie* case that the certification requirements did not support a finding of inconsistency with Article 2.1,[35] the different certification requirements supported a finding of inconsistency because they were not reconcilable with the objectives of the measure.[36]

21. The Appellate Body, however, *reversed* this analysis, finding that the majority did not conduct the appropriate analysis to determine the even-handedness of the certification requirements. In particular, the Appellate Body found:

> [W]hile the concept of different risks to dolphins in the relevant fisheries seems to have played some part in its analysis, we do not see that such analysis encompassed a clear identification of the respective risks or an assessment of

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*analysis* involving: first, an identification of whether different tuna fishing methods in different areas of the oceans pose different risks to dolphins; and, second, examination of whether, in the light of these risks, the different treatment created by the relevant regulatory distinction shows that, as between different groups, the treatment accorded to each group is commensurate with the relevant risks, taking account of the objectives of the measure.") (emphasis added).

[34] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.155 ("This assessment was conducted in order to determine whether or not the original US dolphin-safe labelling regime was even-handed.").

[35] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.238-245; *see also US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.165 ("It appears to us that certain aspects of this part of the Panel's analysis suggest that the Panel gave some consideration to the respective risk profiles associated with different fishing methods in different areas of the oceans. Thus, for example, the Panel explained that the distinction between different fishing methods is especially important given that setting on is inherently dangerous to dolphins, even where no dolphin is seen to be killed or seriously injured, because it has unobservable deleterious effects on dolphins' physical and emotional well being.") (internal quotes omitted).

[36] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.233 ("In the Panel's view, the United States has not rebutted Mexico's showing that captains may not necessarily and always have the technical skills required to certify that no dolphins were killed or seriously injured in a set or other gear deployment, and this may result in inaccurate information being passed to consumers, in contradiction with the objectives of the amended tuna measure. The Panel therefore finds that the different certification requirements are not even-handed, and so cannot be said to stem exclusively from a legitimate regulatory distinction."); *see also US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.164 (observing, in particular, that while "part of the Panel's reasoning appears to have employed a concept that looks like calibration," the first compliance panel ultimately "concluded that the different certification requirements are not even handed" based on the first compliance panel's concern regarding the technical skill of the captains).

> whether such risks were addressed in an even handed manner by the different certification requirements.[37]

As such, the first compliance panel had failed to conduct the required analysis.[38] The Appellate Body then found that it could not complete the analysis because the first compliance panel had not made sufficient findings for the Appellate Body to assess whether the measure was calibrated. Specifically, the first compliance panel had not conducted "a proper assessment … of the respective risks posed to dolphins inside and outside the ETP large purse-seine fishery."[39]

22. The United States would further observe that, if Mexico were correct that the Appellate Body has *required* these Panels to engage in this multifactor balancing test, the Appellate Body's analysis of the *eligibility criteria* would also have been fundamentally different. The Appellate Body found that, by focusing only on the unobserved harms, the first compliance panel did not address "the questions of the overall levels of risk in the different fisheries and how they compare to each other."[40] Notably, the Appellate Body *did not* reverse (or even criticize) the first compliance panel's analysis on the ground that the panel had failed to examine whether the

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[37] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.165.

[38] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.169 ("In sum, in the light of the circumstances of this dispute and the nature of the distinctions drawn under the amended tuna measure, we are of the view that, in applying the second step of the 'treatment no less favourable' requirement under Article 2.1 of the TBT Agreement, 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. We therefore consider that the Panel failed to take full account of 'the particular circumstances' of this case, including 'the design, architecture, revealing structure, operation, and application' of the amended tuna measure, as well as of the manner in which similar circumstances pertaining to the original tuna measure had been assessed in the original proceedings.").

[39] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.266 ("[I]n the absence of a proper assessment by the Panel of the respective risks posed to dolphins inside and outside the ETP large purse-seine fishery, we are unable to complete the legal analysis and assess fully whether all of the regulatory distinctions drawn under the amended tuna 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.").

[40] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.161 ("By focusing solely on its understanding that the unobserved harms differed between setting on dolphins and other fishing methods, the Panel did not consider 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 they compare to each other. However, it was precisely this kind of examination that was the focus of the Appellate Body's analysis in the original proceedings, which revolved around an assessment of the US dolphin-safe labelling provisions in the light of the overall levels of risk in the relevant fisheries, including risks of both observed and unobserved harms. Indeed, we recall that, in its conclusion, the Appellate Body emphasized that 'the US measure fully addresse[d] the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it d[id] not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP.' Therefore, we 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.") (emphasis added).

eligibility criteria can be reconciled with the objectives of the measure. Nor did the Appellate Body find that the panel's failure to make a finding in this regard affected its ability to complete the analysis. Rather, the Appellate Body concluded that it could not complete the analysis of the eligibility criteria for the same reason that it could not complete the analysis for *any* of the regulatory distinctions, namely that "a proper assessment … of the respective risks posed to dolphins inside and outside the ETP large purse-seine fishery" had not been conducted.[41]

23. In this dispute, the question of whether the detrimental impact stems exclusively from legitimate regulatory distinctions is not answered by conducting an assessment that does not take into account differences in risks to dolphins. Rather, the question of even-handedness is answered by determining whether those differences in the regulatory distinctions, including any differences in accuracy in that may result, "*can be explained* as being properly tailored to, or commensurate with, the differences in such risks in the light of the objective of protecting dolphins from adverse effects arising in different fisheries."[42]

24. In this regard, it is clear that the calibration analysis, as set out by the Appellate Body, *already* takes into account the dual objectives of the measure.[43] Specifically, the Appellate Body's test examines whether the measure is calibrated to the risk of harm to dolphins as a way of explaining the differences in regulatory distinctions.[44] Dolphin protection, including assuring consumers of dolphin protection, is the main substantive objective of the measure, and label accuracy is a means of ensuring that end.[45] Consequently, if the measure is appropriately calibrated to the risks to dolphin in different ocean areas, then the regulatory distinctions of the measure, including any (alleged) differences in accuracy, are consistent with the measure's

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[41] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.266.

[42] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.253 ("For instance, we note the Panel's finding that captains, in comparison to observers, do not necessarily and always have the technical skills required to certify that no dolphins were killed or seriously injured. As the Panel found, this difference, as between captains and independent observers, in the respective training and technical skills required to certify the dolphin-safe status of tuna *may result in inaccurate information* being passed to consumers, in contradiction with the objectives of the amended tuna measure. We also note the Panel's conclusions that the tracking and verification requirements that apply outside the ETP large purse-seine fishery are less burdensome than those that apply inside that fishery in terms of their depth, accuracy, and degree of government oversight and that this *may contribute to inaccurate labelling* of tuna caught outside the ETP large purse seine fishery. In the absence of a proper assessment by the Panel of the relative risks existing inside and outside the ETP large purse-seine fishery, the Panel limited its ability to determine whether the discriminatory aspects of the amended tuna measure can be explained as being properly tailored to, or commensurate with, the differences in such risks in the light of the objective of protecting dolphins from adverse effects arising in different fisheries. 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.") (emphasis added).

[43] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.16 ("We observe, for instance, that the original panel and the Appellate Body found that the objectives of the US dolphin-safe labelling regime are, first, 'ensuring 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, 'contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins.'") (citing *US – Tuna II (Mexico) (AB)*, para. 325 (quoting *US – Tuna II (Mexico) (AB)*, paras. 7.401, 7.413, and 7.425)); *see also US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.523.

[44] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.253.

[45] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.16.

objectives.[46] Additionally, the fact that the Appellate Body analysis requires the *same* calibration test to determine whether the measure reflects arbitrary or unjustifiable discrimination for purposes of the chapeau of Article XX further confirms that, for purposes *of this dispute*, the analysis is not what Mexico claims it is.[47]

25. Thus, Mexico's proposed test for arbitrary or unjustifiable discrimination, and its insistence that the even-handed analysis is a multifactor test, is incompatible with the Appellate Body's analysis. Such an argument seeks to divert the Panels from conducting the required risk-based analysis and considering other factors – not relied on by the Appellate Body *in two consecutive reports* – that will minimize the importance, or eliminate entirely the relevance, of the relative overall risks to dolphins resulting from different fishing methods in different fisheries. Further, as discussed in section II.B.1.a, where Mexico does purport to apply the calibration analysis, namely in the context of the eligibility criteria, Mexico applies it incorrectly by not assessing the "overall" or "relative" harms of setting on dolphins, compared to other fishing methods.[48]

### b. Mexico's Alternative Legal Tests for the Even-Handedness of the Certification and Tracking and Verification Requirements Are Incorrect

26. Closely connected to Mexico's theory regarding arbitrary and unjustifiable discrimination is Mexico's reliance on the relevance of "accuracy" to the legal test for even-handedness, which Mexico discusses in subsections III.D and III.E of its second written submission. Mexico argues that both of the objectives of the measure are important to the proper functioning of the U.S. dolphin safe labeling regime, and, as such, that the objectives need to be taken into account in the calibration analysis.[49] On this basis, Mexico argues that the Panels should adopt different tests (or "factors") to determine the even-handedness of the certification requirements and tracking and verification requirements than it should apply for the eligibility criteria.[50] In particular, Mexico argues that, in analyzing the former two regulatory distinctions, the Panels must rely on

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[46] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.253.

[47] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.347-348; *see also id.* at 7.359 ("[I]n the absence of a proper assessment by the Panel of the respective risks posed to dolphins inside and outside the ETP large purse-seine fishery, we are unable to complete the legal analysis and assess fully whether all of the regulatory distinctions drawn under the amended tuna 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").

[48] *See infra*, sec. II.B.1.a.

[49] *See* Mexico's Second Written Submission, paras. 34-35, 42-44.

[50] *See, e.g.*, Mexico's Second Written Submission, para. 48 ("The relevant factors that must be considered in assessing whether the differences in the labelling conditions are designed and applied in an even-handed manner will vary depending upon the particular circumstances of a regulatory distinction."); *id.* para. 92 ("In assessing the purported calibration [of the certification requirements], a different measure may be applied than with respect to the fishing method eligibility criterion."); *see also* Mexico's First Written Submission, para. 219 (arguing for a different legal test to be applied to the certification and tracking and verification requirements than to the eligibility criteria).

"factors" other than the risk of harm to dolphins, namely, "the risks of inaccurate information being provided."[51] Mexico's arguments lack merit for several reasons.

27. First, as explained above, the Appellate Body's calibration analysis *already* takes into account the objectives of the measure. The Appellate Body has explained that the question of even-handedness is answered by determining whether the measure is calibrated to differences in risks to dolphins. In other words, the test for even-handedness is whether differences in the regulatory distinctions of the measure, including ones which may result in a difference in accuracy, "can be explained as being properly tailored to, or commensurate with, the differences in such risks in the light of the objective of protecting dolphins from adverse effects arising in different fisheries."[52] Thus, if the differences are "commensurate with" the different risks to dolphins in different fisheries (*i.e.*, if the measure is calibrated), then the differences "can be explained . . . in light of the objective of protecting dolphins." Therefore, the Appellate Body's calibration analysis already incorporates the objectives of the measure, there is no basis for adding an additional test not reflected in the DSB recommendations and rulings.

28. Second, Mexico is simply wrong to argue that different tests (or "factors") apply to different regulatory distinctions. As noted previously, the Appellate Body has already directly addressed this issue.[53] In the first compliance proceeding, the Appellate Body faulted that panel for applying a modified calibration test to the eligibility criteria and a different test to the certification requirements and tracking and verification requirements, emphasizing that *the same test* must be applied to each of these "cumulative and highly interrelated" regulatory distinctions.[54] Thus, in analyzing the tracking and verification requirements, the Appellate Body disagreed with the first compliance panel's notion that relative risks to dolphins are irrelevant to whether the tracking and verification requirements are even-handed because such requirements apply after the time of the catch,[55] and found that the same test applies. Indeed, the Appellate

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[51] *See, e.g.*, Mexico's Second Written Submission, para. 50 ("Thus, although differences in the eligibility criteria will be assessed primarily in reference to the dolphin mortalities and serious injury caused by a particular fishing method, differences in the certification and tracking and verification criteria must take into account the risks of inaccurate information being provided."). As discussed below in section II.B.1, Mexico's application of the calibration test to the eligibility criteria is incorrect. In particular, Mexico's test does not appear to take account of either unobservable harms or the relative risks to dolphins. *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.249 (stating that what was required of the first compliance to come to "a conclusion in respect of the *relative risks* attributable to different fisheries, including in respect of both observed *and* unobserved harms").

[52] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.253.

[53] *See* U.S. Second Written Submission, para. 42.

[54] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.166.

[55] *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

Body was so clear on this point that it is surprising that Mexico seeks to characterize it as being in debate. According to the Appellate Body, 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 methods in different areas of the oceans."[56] Mexico's suggestion that other tests apply to these two regulatory distinctions is wrong and reflects a rejection of the DSB recommendations and rulings in this dispute.[57]

29. Further, the United States would observe that, by claiming that these Panels must apply different tests (or "factors") to two of the three interrelated regulatory distinctions, Mexico appears to argue that these Panels must conduct the same "segmented analysis" that the Appellate Body disagreed with so strongly in the previous proceeding.[58] In contrast, the Appellate Body's approach of applying the same test to each of the three regulatory distinctions allows these Panels to make an assessment of the measure as a whole.[59] Such analysis is presented in sections V.C.3 and III.B.5 of the first two U.S. written submissions, respectively, and in section II.B.5 below.

30. Third, the tests that Mexico claims must be used to determine whether the certification requirements and tracking and verification requirements are even-handed are incorrect.[60]

31. Mexico's first test – which Mexico raises for the first time in its second written submission – is tied to whether a fishing method causes above *de minimis* harm to dolphins.

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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.").

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

[57] *See also US – Tuna II (Article 21.5 – Mexico) (AB)*, 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").

[58] *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.").

[59] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.305 (noting in the context of the Article XX chapeau that the Appellate Body had expressed concern "that the Panel's segmented analysis of the measure led it to isolate its consideration of different elements of the measure without examining the manner in which those elements are interrelated, and without reconciling the different conclusions it drew in respect of these elements. In particular, we do 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."); *see also id.* para. 7.159 ("[T]he Panel's segmented analysis of the amended tuna measure also appears to have led the Panel to overlook that, at least when compared to the original tuna measure, the amended tuna measure as a whole furthers the objectives of providing information to consumers and protecting dolphins from harms arising from tuna fishing.").

[60] *See* Mexico's Second Written Submission, para. 51; *see also id.* paras. 92-93, 102.

Under Mexico's proposed test, the Panels would simply evaluate whether the mortality and serious injury caused by a fishing method rises above some undefined minimum threshold and, if so, find that not imposing the same "strict" certification and tracking and verification requirements on tuna product produced using that method lacks even-handedness.[61] In other words, the Panels would not conduct the examination that the Appellate Body faulted the first compliance panel not conducting, namely an examination 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."[62] Simply examining whether the fishing method results in an above *de minimis* harm to dolphins appears to be nothing more than another attempt by Mexico to re-use its previously discarded "zero tolerance" argument.[63]

32. Moreover, the United States would observe that by setting the threshold for imposing "strict" certification and tracking and verification requirements at *de minimis* harm, Mexico's argument conflicts with the DSB recommendations and rulings regarding the determination provisions. As these Panels will recall, the first compliance panel determined that the determination provisions supported a finding of inconsistency with Article 2.1 because the standard of "regular and significant" association or mortality/serious injury did not cover enough scenarios, not because the standard itself ("regular and significant" mortality/serious injury) or the way that standard is assessed (on fishery-by-fishery basis) was wrong.[64] Thus, to accept Mexico's theory would be to render that panel's findings, the Appellate Body's affirmation of those findings,[65] and the determination provisions themselves meaningless.

33. Mexico's second test, which did appear in its first written submission, is not tied to harm

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[61] *See* Mexico's Second Written Submission, para. 51 ("[T]he Panel potentially could decide that the risks to dolphins from a particular fishing method are not so high as to warrant complete disqualification from eligibility, but are sufficiently high (i.e., greater than *de minimis*) to require strict certification and tracking and verification requirements to ensure that individual sets and gear deployments have not resulted in dolphin mortalities or serious injuries."); *see also id.* para. 92 ("In Mexico's view, the use of any fishing method that poses more than a *de minimis* risk to dolphins requires reliable certifications. Otherwise, the entire purpose of the tuna measure would be undermined.").

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

[63] As the United States observed with regard to Mexico's potential biologic removal (PBR) argument presented in Mexico's first written submission, Mexico had argued in the first compliance proceeding that the United States could only draw distinctions between eligible and non-eligible fishing methods based on whether the fishing method causes *any* adverse effects. *Compare* Mexico's Second Written Submission, para. 92 ("In Mexico's view, the use of any fishing method that poses more than a *de minimis* risk to dolphins requires reliable certifications. Otherwise, the entire purpose of the tuna measure would be undermined."), *with* Mexico's Response to 1st 21.5 Panel's Question 11, para. 59 (claiming that, in the context of its "zero tolerance" argument, that "the magnitude of the adverse effects is not relevant. What is relevant is the mere fact that such adverse effects exist.").

[64] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.260-263, and 7.283 (min. op.); *see also id.* para. 7.280 (min. op.) (observing that the determination provisions provide the measure "sufficient flexibility to enable the United States to impose the same requirements in fisheries where the same degree of risk prevails. In my view, this flexibility is further evidence of the even-handedness of the different certification requirements as designed in the amended tuna measure.").

[65] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.265-266.

to dolphins at all, but rather posits that "strict" certification and tracking and verification requirements need to be applied to tuna caught in all fisheries where the level of applicable municipal fishery regulations falls below some (unspecified) minimum standard.[66] As Mexico has conceded, this is not the test applied by the Appellate Body.[67] Indeed, under such a test, the risks to dolphins are *irrelevant*; the focus is on the domestic requirements of other nations. As such, like Mexico's other proposed alternative test, Mexico urges the Panels *not* to undertake the examination that the Appellate Body faulted the first compliance panel for failing to conduct in its evaluation of the certification requirements and tracking and verification requirements, *i.e.*, the examination of the relative risks to dolphins from different fishing techniques in different areas of the oceans.[68] For this reason alone, Mexico's test is wrong.

34. Moreover, it is unclear how Mexico's test makes logical sense. 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 marketed in the United States as dolphin safe. Further, Mexico has not shown that any connection exists between the "level" of a municipal fishery regulation and the "level" of compliance with the U.S. measure from that fishery.

35. In sum, none of Mexico's alternative tests for even-handedness are correct. The Appellate Body has clearly stated the applicable test in two consecutive reports, and that test should apply in this compliance proceeding. As discussed elsewhere, the United States has relied on the calibration analysis in amending its measure. As discussed below, the facts establish that each of the three regulatory distinctions are, in fact, appropriately calibrated to the risks to dolphins and the measure as a whole is even-handed and consistent with Article 2.1.

### c. Mexico's Argument that the Measure Is Not Even-Handed Because It Does Not Pursue the Objective of "Environmental Sustainability" Is Incorrect

36. Finally, the United State observes that in section III.C of its second written submission Mexico appears to make an argument unrelated to any calibration test or even to the objectives of the measure. Mexico argues that the Panels should find the measure inconsistent with Article 2.1 because, in Mexico's view, the measure discriminates between purse seine sets on dolphins – which Mexico claims (without proof) are "environmentally sustainable" – and purse seine sets

[66] *See* Mexico's Second Written Submission, para. 93 (arguing that "it is pertinent and appropriate for the Panels to evaluate the application of the regulatory distinctions not just on the basis of the fishing methods, but also on where they are being used. The reliability (or unreliability) of a fishing fleet or the regulatory authorities that oversee the fleet are relevant factors in the analysis."); *id.* paras. 51, 102; *see also* Mexico's First Written Submission, para. 219.

[67] *See* Mexico's First Written Submission, para. 218; *see also* U.S. Second Written Submission, paras. 39-41 (addressing Mexico's argument in this regard).

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

on FADs – which Mexico claims (again without proof) are *not* "environmentally sustainable."[69] Mexico characterizes its argument in the following internally inconsistent way:

> Members are of course free to choose their own objectives. But if the means they use to achieve those ends are inconsistent with the objectives of sustainable development, *then they are likewise inconsistent with their WTO obligations*.[70]

37. Mexico argues, in other words, that while, in principle, Members may pursue the environmental objectives of their own choosing, they must also pursue the objective of "environmental sustainability" or their measure will be inconsistent with the TBT Agreement. In this regard, Mexico appears to be making the same argument it did in its first written submission where Mexico argued that "[t]he Panels must interpret and apply Article 2.1 of the TBT Agreement in a manner that furthers environmental sustainability."[71]

38. The United States already has explained why this is not the test for whether the measure is even-handed.[72] It is well established that the U.S. dolphin safe label does not address the sustainability of tuna stocks, but rather sets minimum conditions for informing U.S. consumers as to whether the tuna in a particular can or other container was produced in a manner that was harmful to dolphins. The objectives of the measure have already been upheld as legitimate for purposes of Article 2.2 of the TBT Agreement and as meeting the standard of Article XX(g) of the GATT 1994. The fact that Mexico wishes that the measure pursued different objectives than it does is irrelevant to the Panels' legal analysis. Mexico can cite 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.[73] Again, it is clear that it is not the role of the WTO to decide for its Members which legitimate objectives they should pursue with a particular measure.[74]

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[69] Mexico's Second Written Submission, para. 30 ("In this case, the labelling conditions discriminate against an environmentally sustainable fishing method (AIDCP-compliant dolphin encirclement) in favour of an environmentally unsustainable fishing practice (FAD fishing).").

[70] Mexico's Second Written Submission, para. 32 (emphasis added).

[71] *See* Mexico's First Written Submission, paras. 232, 235 (emphasis added). Mexico does not even attempt to explain how its proposed approach would be limited to certain measures. For example, Mexico does not explain whether its proposed approach would mean that a measure dealing with human health would also be required to pursue sustainability, and if not, why not.

[72] *See* U.S. Second Written Submission, paras. 36-38.

[73] Indeed, Mexico's argument seems to run contrary *to its own argument* that the test of even-handedness is focused on the objectives *of the measure*. *See, e.g.*, Mexico's Second Written Submission, para. 22; Mexico's First Written Submission, para. 217.

[74] Mexico's alternative argument, that in light of the overriding importance of environmental sustainability, that instead of finding the measure *per se* inconsistent with the TBT Agreement, the Panel should find the measure inconsistent with the TBT Agreement by applying "the highest possible level of objective scrutiny" and "rigorously apply[ing] the burden of proof," among other points, is equally unsupportable. Mexico's Second Written Submission, para. 33. Mexico cannot cite to *any* legal obligation or *any* part of the DSB recommendations and rulings applicable to this dispute, and Mexico's alternative argument, like its primary argument that the measure is *per se* inconsistent, is simply wrong.

39. Overall, there is no clearer example than this argument that Mexico seeks to have the Panel reject the DSB recommendations and rulings and apply a legal test that was not contemplated by the Appellate Body in *either* of its two reports in this dispute. But these compliance proceedings "form part of a continuum, such that due cognizance must be accorded to the [previous] recommendations and rulings made by the DSB,"[75] and those recommendations and rulings require analysis of whether the differences in labeling conditions are calibrated to differences in overall harms to dolphins occurring from different fishing methods in different fisheries. Mexico's focus on the alleged "sustainability" of fishing for tuna by intentionally chasing and capturing *millions* of dolphins is not part of that legal framework and, indeed, is an attempt to reject it. As the United States has shown, sets on FADs are significantly less dangerous to dolphins than dolphin sets, and that is the relevant difference for purposes of the U.S. measure.[76]

#### d. Conclusion

40. In sum, the Appellate Body has been clear as to the applicable analysis in this dispute. In particular, the calibration analysis has "a special relevance" in this dispute and the U.S. measure must be found to be consistent with Article 2.1 if it is appropriately calibrated to the risks of dolphins.[77] Yet the entirety of section III of Mexico's second written submission aims to dissuade the Panels from following such an approach. Mexico is wrong to urge the Panels to adopt an approach so inconsistent with the Appellate Body's analysis in this dispute, and the United States respectfully requests the Panels to reject Mexico's arguments in this regard.

### B. The Detrimental Impact Stems Exclusively from Legitimate Regulatory Distinctions

41. As discussed in the U.S. first and second submissions, the detrimental impact caused by the U.S. measure stems exclusively from legitimate regulatory distinctions. Specifically, the United States has established that the differences in the eligibility criteria, certification requirements, and tracking and verification requirements are calibrated to the differences in risks to dolphins posed by different fishing methods in different ocean areas. In addition, the United States has established that, in design and application, the determination provisions are even-handed as well. For these same reasons, the United States has ultimately established that the measure as a whole is even-handed and is consistent with Article 2.1.

42. In sections II.B.1-3, the United States addresses Mexico's specific arguments regarding the eligibility criteria, the certification requirements, and tracking and verifications, explaining

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

[76] For example, IATTC data establishes that 99.8% of dolphin mortality in the ETP large purse seine fishery occurs during dolphin sets while the remaining 0.2% occurs during all other purse seine sets, including FAD sets. *See* U.S. First Written Submission, paras. 41-42 (citing Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13); IATTC, EPO Dataset 2009-2013 (Exh. US-16); IATTC, *Annual Report of the Inter-American Tropical Tuna Commission – 2008* (2010) (Exh. US-51) (1st 21.5 Exh. US-43)); *see also* U.S. First Written Submission, para. 83 (quoting same statistic). Mexico has failed to respond to this evidence.

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

again why these regulatory distinctions are calibrated to the differences in risks to dolphins. In section II.B.4, the United States addresses Mexico's arguments regarding the determination provisions. Finally, in section II.B.5 the United States again establishes that the measure as a whole is even-handed.

### 1. The Eligibility Criteria Are Calibrated to the Risk to Dolphins Posed by Different Fishing Methods

43. The United States has established that the eligibility criteria are even-handed because the differences in them are "*commensurate* with the different risks associated with tuna fishing . . . using different fishing methods."[78] Specifically, the eligibility criteria distinguish between a fishing method that (1) depends on the intentional targeting of dolphins each time it is used; (2) causes a unique category of unobservable harms; and, (3) causes a high level of direct mortalities even under the AIDCP, and fishing methods that do not fit this description. Tuna produced using the former method, setting on dolphins, is ineligible for the label, while tuna produced using the others are potentially eligible, subject to the requirement that no dolphin was killed or seriously injured in a particular set or gear deployment.

44. As discussed in this section. Mexico has not rebutted this showing. Subsection (a) describes the appropriate legal inquiry, based on the Appellate Body's findings in the two previous proceedings in this dispute, and explains why Mexico's proposed analysis is incorrect. Subsections (b) and (c) explain why Mexico's factual assertions concerning setting on dolphins, on the one hand, and other fishing methods, on the other, are incorrect. Finally, subsection (d) explains that, under the appropriate legal analysis, the eligibility criteria are even-handed.

#### a. The Appropriate Framework for Assessing Whether the Eligibility Criteria Are Calibrated

45. As discussed above, the Appellate Body has been clear that the inquiry as to whether the eligibility criteria are calibrated and, thus, even-handed, must be based on an assessment of "the relative risks associated with different fishing practices in different areas of the oceans."[79] In such a comparative analysis,[80] the Panels must assess "the *relative* harms in respect of *observed* mortality or serious injury" as well as a "comparative assessment of *unobserved harms*."[81] In short, the Appellate Body has called upon these Panels to analyze "the relative risks existing inside and outside the ETP large purse seine fishery" and determine whether the differences in

[78] *See* U.S. First Written Submission, paras. 94 *et seq.* (citing *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.160); U.S. Second Written Submission, paras. 115-135.

[79] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.243.

[80] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.248 (concluding that the first compliance panel "never resolved the question of the overall levels of risk in the different fisheries, and how they compared to each other").

[81] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.249.

the amended tuna measure, and specifically the eligibility criteria, "can be explained as being properly tailored to, or commensurate with, the differences in such risks."[82]

46. In its previous submissions, the United States set out a framework, grounded in the DSB recommendations and rulings, for conducting such an analysis. Specifically, the United States has analyzed the "overall levels of risk" of different fishing methods by looking at three aspects of different fishing methods: (1) whether fishing methods are intrinsically dangerous to dolphins or can be conducted without endangering dolphin lives; (2) the nature and possible extent of any unobservable harms caused by different fishing methods; and, (3) the frequency and magnitude of the direct dolphin mortalities caused by different fishing methods.[83]

47. Such an approach includes all the factors that previous panels and the Appellate Body have considered relevant to the different risk profiles of different fishing methods, as used in different fisheries. Specifically, it addresses both the observed and unobservable harms caused by different fishing methods,[84] as well as the risk posed by the intentional nature of dolphin interactions in dolphin sets, compared to the accidental nature in other fishing methods.[85] In this regard, the United States has sought to present the factual basis on which the Panels can conduct the sort of comprehensive relative analysis of the risks to dolphins of different fishing methods that the Appellate Body in the previous proceeding made clear is required in this dispute.

48. Mexico has not introduced any additional factors relevant to the risk profile of different fishing methods but instead criticizes the United States for outlining a holistic approach and urges the Panels to ignore certain factors in the U.S. framework. First, Mexico criticizes the United States for not putting forth a single "metric" by which to assess dolphin harm.[86] Second, Mexico argues that the Panels cannot consider the intentional nature of dolphin interactions in dolphin sets as relevant to the risk profile of the fishing method.[87] Third, Mexico argues that the Panels cannot consider the unique category of unobservable harms caused by setting on dolphins without assuming that all other fishing methods also cause similar harms.[88] Mexico claims that the Panels instead should analyze only the direct mortalities caused by different fishing methods,

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[82] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.253; *see also id.* para. 7.249 (concluding that the first compliance panel had not conducted "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").

[83] *See* U.S. First Written Submission, paras. 104-109; U.S. Second Written Submission, paras. 48, 132-135.

[84] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.249 (stating that what was required of the first compliance to come to "a conclusion in respect of the *relative risks* attributable to different fisheries, including in respect of both observed *and* unobserved harms") (emphasis in original).

[85] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.240-241 (agreeing with the U.S. explanation that, as between setting on dolphins and other fishing methods, "the nature and degree of the interaction is different in quantitative and qualitative terms (since dolphins are not set on intentionally, and interaction is only accidental)," and finding that "the evidence submitted by Mexico is not sufficient to rebut the United States' argumentation on this point").

[86] *See* Mexico's Second Written Submission, para. 63.

[87] *See* Mexico's Second Written Submission, para. 60.

[88] *See* Mexico's Second Written Submission, paras. 6-8, 65.

either based on a fishery-specific potential biologic removal (PBR) metric or based on "worldwide mortality levels of different fishing methods."[89] Mexico's arguments all lack merit.

49. First, Mexico is mistaken in its assertion that the United States puts forward various standards by which to assess risk profiles.[90] In fact, the Appellate Body was clear that a comprehensive approach is required, and the United States therefore outlines and describes the factors that previous panels and the Appellate Body have found are relevant to the analysis of the overall risk profile of different fishing methods. Thus, the fact that setting on dolphins is based on the "harassment" of dolphins is relevant because, as the previous compliance panel explained, it "goes to the difference between fishing methods that cause harm to dolphins only incidentally and those, like setting on, that interact with dolphins in 100 per cent of dolphin sets."[91] Similarly, the Appellate Body was explicit that the "*relative* risks . . . in respect of both observed *and* unobserved harms" are essential components of the correct analysis.[92]

50. Second, Mexico is also wrong to claim that the Panels are precluded from considering the intentional nature of dolphin interactions in dolphin sets. Mexico asserts that the activities of fishing methods "will inherently be different for each fishing method," and, as such, should not "divert[]" the Panels' attention from the "risk profiles" of fishing methods.[93] In making this argument, Mexico ignores the fact that, for dolphin sets, the intentional nature of the dolphin interactions involved *is* relevant to the "risk profile" of the fishing method because, as the first compliance panel noted and as the evidence establishes, "the particular nature of the interaction is itself 'inherently dangerous' to dolphins."[94] Thus, the intentional nature of the interaction is not a subjective or moralistic point but, rather, addresses the difference between a fishing method that "interact[s] with dolphins in 100 per cent of dolphin sets" and those that do not.[95]

51. Third, Mexico's attempt to have the Panels ignore the unobservable harms caused by setting on dolphins should also be rejected. As discussed previously and summarized below, Mexico's attempt to "appeal" the findings contained in the reports of the previous panels and Appellate Body as to the unique category of unobservable harms caused by setting on dolphins is wrong as to the purpose of a compliance proceeding[96] and wrong on the facts.[97] As the

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[89] *See* Mexico's Second Written Submission, para. 64.

[90] *See* Mexico's Second Written Submission, para. 63 (claiming that the United States "variably cites to a standard based on 'harassment' – under which the number of mortalities caused by the method apparently is irrelevant – and a metric based on mortalities per set").

[91] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.244 (internal quotation omitted).

[92] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.249.

[93] Mexico's Second Written Submission, para. 65.

[94] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.244 (quoting U.S. Second Written Submission to 1st 21.5 Panel, para. 23).

[95] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.244 (internal quotation omitted).

[96] *See* U.S. Second Written Submission, paras. 65-66.

[97] *See* U.S. Second Written Submission, paras. 67-72; *infra*, sec. II.B.1.b.ii.

Appellate Body made clear, the unobservable harms caused by setting on dolphins, as well as other fishing methods, are an essential part of the correct analysis under Article 2.1.[98]

52. Finally, as the United States has already explained fully, neither of Mexico's proposed metrics is consistent with the Appellate Body's guidance in the previous compliance proceeding. The PBR metric Mexico has proposed is inconsistent with the fishing method approach of the eligibility criteria, cannot be applied based on available information, has no basis in the previous reports in this dispute, and is not consistent with the purpose of the label being to protect dolphins not dolphin populations.[99] Mexico's proposed "overall absolute effects" metric is inconsistent with the Appellate Body's guidance because it includes *only* direct mortalities and serious injuries, does not address the "relative" harms to dolphins of different fishing methods, and wrongly seeks to take advantage of the fact that setting on dolphins is widely condemned and only "systematically" used in one fishery to portray it as a less dangerous fishing method.[100]

53. Mexico's arguments are thus incorrect. The appropriate analysis is a holistic one based on the overall relative harms caused by dolphin sets and the fishing methods that produce tuna potentially eligible for the label. The United States has proposed a reasonable framework for this analysis and, as discussed below, has shown that, on a holistic basis, setting on dolphins is inherently dangerous for dolphins – in terms of both unobservable and observable dolphin harms – and thus presents a risk that is high relative to other fishing methods.

### b. Setting on Dolphins Is a Unique Fishing Method that Is Inherently Unsafe for Dolphins

54. The United States has shown that setting on dolphins is a fishing method that is particularly harmful to dolphins for three reasons: (1) it intentionally targets dolphins, such that dolphins *must* be put at risk of direct and indirect harm in every dolphin set; (2) it causes a unique category of unobservable harms that may occur in every dolphin set, regardless of whether a dolphin is directly killed or injured; and, (3) it continues to cause a high level of direct dolphin mortalities. As discussed in this section, Mexico has not rebutted any of these showings.

#### i. Setting on Dolphins Is the Only Fishing Method that Intentionally Targets Dolphins to Catch Tuna

55. It is well-established that setting on dolphins is the *only* fishing method that intentionally targets dolphins to catch fish. Thus, *every* dolphin set involves a sustained interaction between a

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[98] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.249 ("[A]rriving at a conclusion in respect of the relative risks attributable to different fisheries, including in respect of both observed *and* unobserved harms, was, in our view, particularly important given that the very issue the Panel was seeking to address was whether the new requirements of the amended tuna measure, which apply exclusively to fisheries other than the ETP large purse-seine fishery, adequately address the risks of harm to dolphins arising in such fisheries.") (emphasis in original). In this regard, the Appellate Body report's focus on the overall relative risks of different fishing methods refutes Mexico's claim in paragraph 58 of its second written submission that factors in the Article 2.1 assessment must be "quantified." *See* Mexico's Second Written Submission, para. 58.

[99] *See* U.S. Second Written Submission, paras. 119-123.

[100] *See* U.S. Second Written Submission, paras. 127-130.

large purse seine vessel (and its speedboats and often helicopters) and a herd of dolphins whereby the vessel chases about 600 dolphins for up to 2 hours, ultimately capturing about 300-400 of them.[101] Other fishing methods, by contrast, can be used with no effect on dolphins at all. Furthermore, vessels may interact with a small number of dolphins only incidentally and those other fishing methods can be conducted without putting any dolphin directly in danger.[102] Mexico argues that the United States has used overly "colourful, exaggerated, and inaccurate language" in describing dolphin sets,[103] and that the "activities" comprising dolphin sets are either not relevant to or not "determinative of" the Panels' analysis of the fishing method's risk profile for dolphins.[104] As discussed below, however, the U.S. description of setting on dolphins is accurate and the intentional nature of the fishing method is relevant to the risk profile for dolphins of this fishing method as practiced in the ETP large purse seine fishery.

56. With respect to Mexico's first claim, the U.S. descriptions of dolphin sets are based on descriptions by scientists and NGOs. As is clear from the citations in previous U.S. submissions, the description of dolphin sets provided in the U.S. submissions are well grounded in evidence already on the record.[105] In addition, other sources confirm that the U.S. description is correct, and is not overly "colourful, exaggerated, and inaccurate." For example, one article, published in a peer-reviewed journal in 2007, described the fishing method as follows[106]:

> The set procedure involves using helicopters to search for the disturbances caused by tuna schools feeding in association with dolphins and seabirds or for bird flocks over the horizon. Once an associated tuna school has been located and determined large enough to invest the time and effort in capture, the seiner begins to set the net while 4-5 speedboats with large outboard engines are dropped off the back of the vessel to separate dolphins associated with tuna and chase them into the closing purse-seine. . . .

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[101] *See* U.S. Second Written Submission, paras. 55-56 (providing extensive citation).

[102] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.278 (min. op.); *see id.* para. 7.240 (stating that, compared to setting on dolphins, with other fishing methods, "the nature and degree of the interaction [between fishing vessels and dolphins] is different in quantitative and qualitative terms (since dolphins are not set on intentionally, and interaction is only accidental)").

[103] *See* Mexico's First Written Submission, paras. 4-5, 60.

[104] *See* Mexico's First Written Submission, paras. 60-61.

[105] *See* U.S. Second Written Submission, para. 55 (citing Barbara E. Curry, *Stress in Mammals: The Potential Influence of Fishery-Induced Stress on Dolphins in the Eastern Tropical Pacific Ocean*, NOAA NMFS Technical Memorandum, at 6 (1999) (Exh. US-42) (for the duration of the chase and encirclement process); Tim Gerrodette, "The Tuna-Dolphin Issue," in Perrin, Wursig & Thewissen (eds.) *Encyclopedia of Marine Mammals* (2d ed. 2009), at 1192 (Exh. US-12) (stating that "Speedboats are used to chase down the dolphins and herd them into a tight group"); Humane Soc'y Int'l, "The Dolphin Safe Label" (Apr. 16, 2013) (Exh. US-99) (referring to dolphins as "exhausted"); "Tables Summarizing Fishery-by-Fishery Evidence on the Record," tables 1-2 (Exh. US-13) (showing that between 2009 and 2013, a total of 18.6 million dolphins were encircled in a total of 52,115 dolphin sets, for an average of 356.5 dolphins encircled per dolphin set).

[106] Elizabeth Edwards, "Fishery Effects on Dolphins Targeted by Tuna Purse-Seiners in the Eastern Tropical Pacific Ocean," 20 *Int'l J. Comp. Psychology* 217, 217-218 (2007) (Exh. US-140).

> ETP dolphins respond to an impending set by beginning to flee as soon as the tuna seiner, the helicopter, or the speedboats are perceived. Because the initial response tends to occur several kilometers from the vessel, initial perception appears to be acoustic rather than visual. The dolphins respond by moving closer together and increasing their swim speed from about 1-2 m/sec to 2-3 m/sec; *i.e.*, doubling to tripling their previous swim speed and thereby increasing their swimming power requirement by a factor of 8 to 27 times the power required for non-chase swim speeds.
>
> The chase portion of the set typically lasts 30-40 minutes (with a small percentage of chases lasting up to about 80 minutes), encirclement lasts 30-60 minutes (with a very small percentage of encirclements lasting up to about 75 minutes), and length of confinement lasts another 40-60 minutes (with a small percentage lasting up to about 90 minutes), so that time from initiation of chase to release typically ranges between about 1.5 and 2.5 hours (with a potential maximum in a few sets of about 4 hours). Once the dolphins perceive that the backdown channel is ready, they swim out quickly and continue their escape by swimming at even higher speeds (3-4 m/sec) for about 90 minutes before reverting to pre-chase behaviors. Thus, each purse seine set experience may disrupt normal ETP dolphin behavior for at least 30-40 minutes, if the dolphin manages to escape prior to capture, and for 3-4 hours (occasionally up to 5.5 hours) if the dolphin is captured in the seine and then released.

57. Further, Mexico's statement that the chase occurs at a leisurely pace "slower than dolphins' normal swimming speed" is contradicted not only by the study quoted above but also by the study underlying the exhibit on which Mexico relies.[107] The study in question, a 2002 peer reviewed study,[108] found that "[o]nce the helicopter was overhead the dolphins could be seen to start moving rapidly; and their speed increased as the purse seiner closed to within 2 miles."[109] For the dolphins being studied, the average daytime velocities were 3.01 and 3.58 knots (kn), respectively,[110] and both the "chase and post-release speeds exceeded the speeds of normal travel or feeding," with estimated chase speeds being "3.4 kn and 5.7 kn," respectively, and estimated post-release speeds being "5.2 kn and 6.2 kn."[111] The dolphins maintained "their post-release speeds for 106 and 90 minutes, respectively."[112]

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[107] *See* Mexico's Second Written Submission, para. 4 (citing International Dolphin Conservation Program, Document IRP-32-12 (2003), p. 3 (Exh. MEX-63), which, in turn, cites Susan J. Chivers & Michael E. Scott, "Tagging and Tracking of Stenella SPP. During the 2001 Chase Encirclement Stress Studies Cruise," at 2 (June 2002) (Exh. US-141)).

[108] Chivers & Scott 2002, at 2 (Exh. US-141).

[109] Chivers & Scott 2002, at 5 (Exh. US-141).

[110] Chivers & Scott 2002, at 14 (Exh. US-141).

[111] Chivers & Scott 2002, at 7, 14 (Exh. US-141).

[112] Chivers & Scott 2002, at 7, 14 (Exh. US-141).

58. With respect to Mexico's second point, Mexico is also wrong to argue that the intentional nature of dolphin interactions is not relevant to the risk profile of setting on dolphins. Previous Appellate Body reports confirm that the Panels' analysis must be based on an assessment of the "overall levels of risk" caused by different fishing methods in different fisheries.[113] The first compliance panel confirmed the relevance of the intentional nature of the dolphin interactions in dolphin sets, explaining that every set must involve a sustained interaction with hundreds of dolphins for up to several hours[114] and that these interactions are inherently dangerous, as they can cause significant unobservable harms, as well as direct mortalities and serious injuries.[115] There is, thus, no basis for excluding this feature of setting on dolphins from the analysis of the fishing method's risk profile. Mexico's claim that the intentional nature of dolphin interactions is not "determinative" is beside the point,[116] as the United States has consistently explained that a holistic assessment of the risks of different fishing methods is needed.

59. By contrast, as the first compliance panel recognized, other fishing methods in other fisheries do not intentionally target dolphins.[117] In particular, as the United States has explained, other fishing methods can be used without harm to dolphins. Indeed, some fisheries – including certain handline, gillnet, longline, pole and line, and purse seine fisheries – pose no known, or only a remote, risk to any dolphins, due to the distribution of dolphins and the area where the fishery operates.[118] In many other tuna fisheries, including in particular purse seine and longline fisheries, there is some known risk, but the vast majority of all sets occur without any dolphin interaction and, therefore, without putting any dolphin in danger.[119] Thus, the vast majority of fishing activities in these fisheries involve no dolphins at all and, therefore, pose little or no

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[113] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.248.

[114] *See* U.S. Second Written Submission, para. 55 (showing that, in an average dolphin set in the ETP, about 600 dolphins are chased in a dolphin set and about 300-400 are encircled in the purse seine net).

[115] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.197 ("[I]n our view, the Panel reiterated the substance of the Appellate Body's findings when it indicated that 'the Appellate Body clearly found that setting on dolphins causes observed and unobserved harm to dolphins'"); *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.122 ("As the Panel reads it, then, the Appellate Body clearly found that setting on dolphins causes observed and unobserved harm to dolphins. However, as we understand it, what makes setting on dolphins particularly harmful is the fact that it causes certain unobserved effects *beyond* mortality and injury 'as a result of the chase itself.'").

[116] *See* Mexico's First Written Submission, paras. 60-61.

[117] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.240 (stating that, compared to setting on dolphins, with other fishing methods, "the nature and degree of the interaction [between fishing vessels and dolphins] is different in quantitative and qualitative terms (since dolphins are not set on intentionally, and interaction is only accidental)"); *see also id.* para. 7.278 (min. op.) ("As the Panel explained in its discussion of the eligibility criteria, both the panel and the Appellate Body in the original proceedings found that setting on dolphins is 'particularly harmful' to dolphins. *Setting on dolphins is the only tuna fishing method that deliberately targets dolphins, and so interacts with dolphins in a way that is uniquely intense*, both in terms of the number of dolphins affected and the frequency of interaction. In my view, the United States has put forward evidence sufficient to show that the risks in fisheries other than the ETP large purse seine fishery are, as a general matter, significantly less serious than those posed in the ETP large purse seine fishery.") (emphasis added).

[118] *See* U.S. Second Written Submission, para. 57; NMFS, *Proposed Rule: List of Fisheries for 2017*, 81 Fed. Reg. 54,019 (Aug. 15, 2016) (Exh. US-101) (showing there are fisheries of each of these types in which there is considered only "a remote likelihood of or no known incidental mortality and serious injury of marine mammals").

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

direct risk of direct or indirect dolphin harms. This further confirms that the intentional nature of the dolphin interactions in dolphin sets is relevant to the risk profile of that fishing method and distinguishes it from the risk profile of the potentially eligible fishing methods.

60. The fact that dolphin sets intentionally target dolphins, while other tuna fishing methods do not, therefore, has a bearing on the risk profile of the fishing method for dolphins and so is relevant to the Panels' analysis of whether the eligibility criteria are even-handed.

### ii. Setting on Dolphins Causes a Unique Category of Unobservable Harms

61. As the United States has explained, the evidence on the record establishes, and the findings of previous panels and the Appellate Body in this dispute confirm, that setting on dolphins causes a unique category of indirect, unobservable harms due to the chase and encirclement process.[120] In its second written submission, Mexico again, without introducing new evidence, asks the Panels to reverse these previous panel and Appellate Body findings. Mexico argues that such effects are "speculative and unproven" and claims that, to the extent conclusions are drawn concerning indirect effects caused by dolphin sets, the same conclusions "must be presumed in relation to other fisheries and fishing methods."[121] Further, Mexico claims that the actions that cause the unique unobservable effects of dolphin sets are actually positive because they make the method sustainable.[122] None of Mexico's arguments have merit, and Mexico is wrong to try to "appeal" the DSB recommendations and rulings in these proceedings.

62. With regard to Mexico's first claim, the International Seafood Sustainability Foundation (ISSF) report Mexico cites for the proposition that unobservable effects are "speculative and unproven" does not support Mexico's assertion. The report states that "most participants agreed that adverse impacts by the mechanisms identified were plausible, especially at the individual level," but that the "overall impacts" had not "been quantified in a population context."[123] Thus, it was population-level effects, not individual-level effects, that were deemed "speculative," in the sense of being unquantified. The report thus does not undermine the finding of the first compliance panel, confirmed by the Appellate Body, that "various adverse impacts can arise from setting on dolphins, beyond observed mortalities"[124] and that these harms occur "as a result of the chase itself" and thus "continue to exist 'even if measures are taken in order to avoid the taking and killing of dolphins in the nets.'"[125] Further, there is no reason to think Exhibit MEX-

[120] *See* U.S. Second Written Submission, paras. 61-72.

[121] *See* Mexico's Second Written Submission, para. 8.

[122] *See* Mexico's Second Written Submission, para. 9.

[123] *See* Victor Restrepo, Chair's Report of the ISSF Tuna-Dolphin Workshop, at 3 (2012) (Exh. MEX-67).

[124] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.120 (citing *US – Tuna II (AB)*, para. 289); *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.198-208.

[125] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.121.

63 would undermine these findings, since it was on the record in the previous compliance proceeding and so formed part of that panel's assessment.[126]

63. Mexico is also incorrect that if setting on dolphins is found to cause unobservable effects, then there must be a presumption that other fishing methods cause the same effects.[127] As the United States has explained, a significant body of peer-reviewed scientific literature concludes that setting on dolphins causes indirect, unobservable harms to dolphin due to the chase and encirclement process.[128] Such harms include reproductive effects,[129] calf-cow separation,[130] and physical harms induced by stress.[131]

64. A 2007 article on the subject explained that a review of the existing literature showed, *inter alia*, that: (1) dolphin sets "entail well-recognized stressors in other mammals, especially wild animals," and that typical responses "to such disturbances include changes in metabolism, growth, reproduction, and immune status, any of which, alone or in combination, could significantly affect survival and reproduction"; (2) samples from dolphins caught in dolphin sets "showed cell damage similar to that in heart muscle, indicative of a degree of capture myopathy that could lead to unobserved mortality in some cases"; and, (3) "developmental issues indicate that smaller calves (less than 1 year postpartum) may have more difficulty remaining associated with the mother during fishery activities."[132] A 2010 study explained that there is evidence that the ETP large purse seine fishery "has been a significant factor in the lives of dolphins since its inception" and, in particular, "is influencing reproduction in dolphin populations."[133]

65. There are no such studies indicating similar indirect, unobservable mortalities caused by any other fishing method in any other fishery, and Mexico presents none. Thus, Mexico is wrong to claim that any conclusions about the harms of dolphin sets, made on the basis of peer-reviewed scientific studies, must result in presumptions to be applied to other fishing methods.

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[126] Specifically, this report was Exhibit MEX-82 in the previous compliance proceeding. *See* Mexico's First Written Submission to 1st 21.5 Panel, para. 192.

[127] *See* Mexico's Second Written Submission, para. 8.

[128] *See* U.S. Second Written Submission, paras. 70-71.

[129] *See* Katie L. Cramer, Wayne L. Perryman & Tim Gerrodette, "Declines in Reproductive Output in Two Dolphin Populations Depleted by the Yellowfin Tuna Purse Seine Fishery," 369 *Marine Ecology Progress Series* 273-282 (2008) (Exh. US-45).

[130] *See* Noren & Edwards, at 16-24 (Exh. US-43); Frederick Archer et al., "Annual Estimates of Unobserved Incidental Kill of Pantropical Spotted Dolphin (Stenella Attenuata Attenuata) Calves in the Tuna Purse-Seine Fishery of the Eastern Tropical Pacific," 102 *Fishery Bulletin* 233, 236-244 (2004) (Exh. US-44).

[131] *See* Albert C. Myrick & Peter C. Perkins, "Adrenocortical Color Darkness and Correlates as Indicators of Continuous Acute Premortem Stress in Chase and Purse-Seine Captured Male Dolphins," 2 *Pathophysiology* 191 (1995) (Exh. US-46); Stephen B. Reilly et al., NOAA, *Report of the Scientific Research Program Under the International Dolphin Conservation Program Act*, at 14-26 (2005) (Exh. US-47); Paul R. Wade et al., "Depletion of Spotted and Spinner Dolphins in the Eastern Tropical Pacific: Modeling Hypothesis for Their Lack of Recovery," 343 *Marine Ecology Progress Series* 1, at 11 (2007) (Exh. US-48); St. Aubin et al. 2013, at 16, 32 (Exh. MEX-13).

[132] *See* Edwards 2007, at 220-224 (Exh. US-140).

[133] Frederick I. Archer et al., "Estimation of Relative Exposure of Dolphins to Fishery Activity," 410 *Marine Ecology Progress Series* 245, 252-253 (2010).

No such studies exist for other fishing methods, nor are such methods characterized by the prolonged chase and encirclement process that causes such effects during dolphin sets.

66. Finally, Mexico's claim that the aspects of dolphin sets that cause the unobservable harms are positive attributes because they make dolphin sets "environmentally-sustainable" is not germane. The DSB recommendations and rulings in previous proceedings establish that the U.S. measure concerns the protection of "individual dolphins" not "dolphin population[s]," and certainly not the sustainability of tuna stocks or other populations potentially affected by tuna fishing.[134] The DSB recommendations and rulings also establish that the objective of protecting dolphins is legitimate for purposes of Article 2.1 of the TBT Agreement and Article XX of the GATT 1994.[135] It is not debatable, therefore, that the U.S. measure is not a sustainability label and does not *have* to become one to be consistent with U.S. WTO obligations. Thus, even if it were true that setting on dolphins is a "sustainable" fishing method for tuna or other species, that does not mean that it does not cause such unobservable harms to dolphins.[136]

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[134] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.527 (finding that the measure was "concerned with the effects of tuna fishing on the well-being of individual dolphins rather than on the state of a particular dolphin population, considered globally or statistically"); *see US – Tuna II (Mexico) (Panel)*, para. 7.550; *see id.* para. 7.735 ("[W]e are not persuaded that the objective of protecting dolphins through the US dolphin-safe provisions is to be understood exclusively, or even primarily, in terms of dolphin population recovery. Rather, . . . the US objective of seeking to minimize observed and unobserved mortality and injury to dolphins is not conditioned upon or dependent on dolphin populations being depleted.").

[135] *US – Tuna II (Mexico) (AB)*, paras. 303, 330-331 (finding that the objectives of the U.S. measure were "legitimate" under Article 2.2 of the TBT Agreement); *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.527; *id.* ("[T]he preservation of individual dolphin lives is just as much an act of conservation as is a program to encourage recovery of a particular population.").

[136] Mexico's claim that setting on dolphins is "environmentally-sustainable" and internationally approved is also misleading. *See* Mexico's First Written Submission, paras. 9-11. The FAO statement Mexico quotes refers to the "objective" of "ensur[ing] the sustainability of tuna stocks and associated species"; it does not declare that the method is sustainable. The letter from Vice President Gore compares AIDCP dolphin sets and unregulated dolphin sets but does not declare either to be dolphin safe. *See* Letter from Vice President Al Gore to Representative Gilchrest (June 3, 1996) (Exh. MEX-61). The amicus brief also does not certify dolphin sets as sustainable or dolphin safe. *See* Memorandum of Amicus Curiae, *Defenders of Wildlife v. Dalton*, at 3-4 (Apr. 27, 2001) (Exh. MEX-68). The MSC certification is not final and is conditioned on the outcome of scientific studies concerning ETP dolphin populations. Further, several NGOs, including World Wildlife Foundation (WWF), which was on the amicus brief submitted as Exhibit MEX-68, wrote to oppose the MSC certification on the grounds that dolphin sets are not safe for the ETP dolphin populations. *See, e.g.*, Letter from Annika Machensen, WWF, to Dr. Sian Morgan on "WWF input: Northeastern Tropical Purse Seine YFT and SKJ Fishery" at 5-6 (Jan. 16, 2015) (Exh. US-142) (stating that the "sources of unobserved mortality were never quantified in the past, but expert opinion from scientists and veterinarians who study and work with dolphins has been that these mechanisms are more detrimental than even an observed mortality of 15,000 dolphins per year" and that the "number of sets that produce these effects has increased since the years of the U.S. fishery"); Letter from Kitty Block, Humane Soc'y Int'l, to Dr. Sian Morgan, at 1 (May 8, 2015) (Exh. US-143) (stating that there has been no "systematic evaluation" of ETP dolphin populations and that "there is indirect evidence from observations of the proportion of females with calves that calf production for both eastern spinner and northeastern spotted dolphins has declined over time"). Indeed, WWF filed a notice of objection to the MSC certification of the ETP large purse seine fishery, which MSC accepted and which is currently considering, based on concerns about the fishery's effect on dolphins in the ETP. *See* Letter from Daniel Suddaby, WWF, to the Independent Adjudicator on "Notice of Objection for the Northeastern Tropical Pacific Purse Seine Yellowfin and Skipjack Tuna Fishery," at 8-19 (Oct. 24, 2016) (Exh. US-144).

67. Overall, Mexico tries to portray setting on dolphins, as regulated under the AIDCP, as a superior fishing method to other fishing methods. In making this claim, Mexico seems to forget that the continuation of dolphin sets under the AIDCP was supposed to be a temporary situation while less exploitative fishing techniques were explored. The AIDCP pledged the parties to "the goals of eliminating dolphin mortality in the purse-seine tuna fishery . . . and of seeking ecologically sound means of capturing large yellowfin tunas *not in association with dolphins*."[137] Many other RFMOs and countries have banned all intentional fishing operations in association with cetaceans.[138] The fact of the matter is that setting on dolphins is an inherently dangerous fishing method for dolphins – its allowance in the ETP large purse seine fishery is an exception to the international trend to ban all intentional sets on cetaceans.[139]

68. Thus, Mexico has presented no evidence undermining previous findings that setting on dolphins causes a unique category of unobservable harms due to the chase itself that are not caused by other fishing methods. As a consequence, it is simply not possible for dolphin sets to be certified "dolphin safe" in the sense of having caused no harm to dolphins, since unobservable harms may occur in each set, even without any direct dolphin mortality, but cannot be seen by a captain or observer.[140] Mexico's attempts to portray dolphin sets as a sustainable, positively regarded fishing method are misleading and not relevant to whether the method is dolphin safe.

### iii. Setting on Dolphins Remains a Uniquely Dangerous Fishing Method in Terms of Direct Dolphin Mortalities

69. The direct dolphin mortalities caused by dolphin sets in the ETP do not appear to be in dispute.[141] Over the past decade, dolphin sets by ETP large purse seine vessels have caused several hundreds, and sometimes thousands, of direct dolphin mortalities per year.[142] Between 2006 and 2015, mortalities due to dolphin sets have ranged between 765 and 1,237 dolphins

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[137] *See* Agreement on the International Dolphin Conservation Program (AIDCP), at 1 (2009) (Exh. US-5).

[138] *See* WCPFC, Conservation and Management Measure 2011-03 (Mar. 2013) (Exh. US-54) ("CMMs shall prohibit their flagged vessels from setting a purse seine net on a school of tuna associated with a cetacean in the high seas and exclusive economic zones of the Convention Area, if the animal is cited prior to commencement of the set."); IOTC, Resolution 13/04 on the Conservation of Cetaceans (2013) (Exh. US-55) ("Contracting Parties and Cooperating Non-Contracting Parties (collectively CPCs) shall prohibit their flagged vessels from intentionally setting a purse seine net around a cetacean in the IOTC area of competence, if the animal is sighted prior to the commencement of the set."); ICCAT, Draft Recommendation on Monitoring and Avoiding Cetacean Interactions in ICCAT Fisheries (2014) (Exh. US-56); 16 U.S.C. § 1372 (Exh. US-57) and 16 U.S.C. § 1362(13) (Exh. US-58); Australia, Annual Report to the Commission, at 12-13 (July 2014) (Exh. US-33) (explaining that "the intentional setting of purse-seine gear on cetaceans" has been "prohibited in Australian purse-seine fisheries since the introduction of the *Environmental Protection and Biodiversity Act of 1999*").

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

[140] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.132.

[141] *See* Mexico's Second Written Submission, paras. 4-14.

[142] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13); IATTC, Annual Report of the Inter-American Tropical Tuna Commission – 2008, at 50 (Exh. US-51); IATTC, Tunas, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2015, at 127 (Exh. MEX-6).

annually, even with strict AIDCP-imposed requirements in place.[143] Controlling for the level of effort, in order to facilitate comparison across fisheries, these figures translate to between 69.4 and 126.3 dolphin mortalities per 1,000 dolphin sets.[144] As the United States has already explained, this level of dolphin mortalities, being caused by 80-90 vessels in approximately 10,000 sets per year, is generally unparalleled in other tuna fisheries.[145]

### c. Fishing Methods that Can Produce Tuna Product Eligible for the U.S. Dolphin Safe Label Do Not Pose Equivalent Risk to Dolphins

70. In its first and second written submissions, the United States established that fishing methods that produce tuna product potentially eligible for the dolphin safe label generally pose a lower level of risk to dolphins than setting on dolphins in the ETP because: (1) they are not intrinsically harmful to dolphins and can be carried out without involving any dolphins;[146] (2) they do not cause the types of unobservable harms caused by the chase and encirclement process regardless of whether dolphins are directly killed;[147] and, (3) the levels of any direct dolphin mortality they may cause are generally lower, on a per set basis, than those caused by dolphins sets under the AIDCP and certainly are not high enough to counterbalance the unique risks posed by dolphin sets and thus equalize the risk profiles of dolphin sets and other fishing methods.[148]

71. Mexico, over the course of this dispute, has argued, variously, that other fishing methods have "adverse effects on dolphins that are equal to or greater" than those caused by dolphin sets under the AIDCP[149] and that *all* fishing methods capable of causing *any* dolphin harm must be ineligible if setting on dolphins is.[150] Mexico's first written submission espoused the former position, arguing that the eligibility criteria are not calibrated to the risk to dolphins vis-à-vis other types of purse seine sets, longlining, and gillnetting because ETP dolphin sets have "a

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[143] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13); IATTC, Annual Report of the Inter-American Tropical Tuna Commission – 2008, at 50 (Exh. US-51); IATTC, Tunas, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2015, at 127 (Exh. MEX-6).

[144] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13); IATTC, Tunas, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2015, at 46 (Exh. MEX-6).

[145] *See* U.S. Second Written Submission, paras. 73-76.

[146] *See* U.S. First Written Submission, paras. 97-99; U.S. Second Written Submission, paras. 81, 94, 103, 105, 109-110.

[147] *See* U.S. First Written Submission, paras. 100-101; U.S. Second Written Submission, paras. 82, 94, 103, 106, 109, 111-113.

[148] *See* U.S. First Written Submission, paras. 102-103; U.S. Second Written Submission, paras. 83-91, 95-100, 103, 107-110.

[149] *See, e.g., 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. 7.111-7.112 (referring to Mexico's Second Written Submission to the 1st 21.5 Panel, paras. 248 and 263)).

[150] *See* Mexico's Response to 1st 21.5 Panel Question 11, paras. 58-61, 62-66.

lower risk profile" than these fishing methods.[151] The United States fully responded to Mexico's argument in its second written submission.[152] In its most recent submission, Mexico appears to revert to the latter position, arguing that "where there is credible evidence that dolphins have been harmed by a fishing method, it must be assumed that there are widespread direct and indirect harms *unless proven otherwise with absolute certainty*."[153] Mexico's rationale is that the United States relies on "precautionary presumptions and speculation" with respect to setting on dolphins and that the same presumptions must be applied to other fishing methods.[154]

72. Mexico's argument should be rejected for legal and factual reasons. First, as discussed previously, the Appellate Body found that calibration, not Mexico's "zero tolerance" benchmark, is the applicable test for whether the U.S. measure, including the eligibility criteria, is even-handed.[155] Second, as shown in the preceding section, the United States did not rely on "presumptions and speculation" concerning dolphin sets but on scientific studies, confirmed by DSB recommendations and rulings, showing their dangerous nature and the unique unobservable harms caused by chase and encirclement.[156] Mexico has put forward no evidence suggesting any other fishing methods are intrinsically dangerous to dolphins or cause such unobservable harms. Further, Mexico's evidence does not show that, as a general matter, other fishing methods cause the level of direct dolphin mortalities caused by dolphin sets under the AIDCP.

73. The following sections show that the evidence on the record demonstrates that none of the potentially eligible fishing methods is as harmful to dolphins as dolphin sets, including under the AIDCP. Further, Mexico has not put forward any evidence suggesting that a presumption of "widespread direct and indirect harms" should be applied to any such fishing method. The United States begins with a discussion of the three main fishing methods that actually produce tuna for the global (and U.S.) canned tuna markets and then discusses those that do not.[157]

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[151] Mexico's First Written Submission, para. 256. Mexico did not claim that pole and line, handline, or trawl fishing posed as great a risk to dolphins as dolphin sets. *See id.* at paras. 106-108, 256 (not claiming that trawl fishing causes levels of observable dolphin mortalities comparable to those caused by dolphin sets in the ETP); *id.* at 110-111, 256 (same for handling fishing); *id.* at 256 (not mentioning pole and line fishing).

[152] *See* U.S. Second Written Submission, paras. 77-114.

[153] *See* Mexico's Second Written Submission, para. 65.

[154] Mexico's Second Written Submission, para. 65.

[155] *Compare* Mexico's Response to 1st 21.5 Panel's Question 11, para. 59 (claiming, in the context of its "zero tolerance" argument, that "the magnitude of the adverse effects is not relevant. What is relevant is the mere fact that such adverse effects exist.") *and US – Tuna II (Article 21.5 – Mexico) (AB)*, n.492 ("Mexico disputed the relevance of the concept of 'calibration' to the analysis of the even handedness of the amended tuna measure. . . . For Mexico, '[t]una is either dolphin safe or it is not – eligibility for the dolphin safe label *cannot be viewed as a relative assessment*'") *with, e.g., id.* at 7.169 (stating that the proper analysis must include whether the measure is "calibrated to the risks to dolphins arising from different fishing methods in different areas of the oceans").

[156] *See supra*, sec. II.B.1.b.

[157] *See* U.S. First Written Submission to the 1st 21.5 Panel, paras. 123-128 (explaining that over 99% of U.S.-produced and imported tuna product is produced from purse seine, longline, and pole and line vessels); *see also* U.S. Second Written Submission, n. 176, 233, 263, 269, 285, 289 (showing that purse seine-caught tuna accounts for approximately 90.7 percent of U.S.-caught and processed tuna products in the U.S. market and for 44.6 percent of vessel records associated with imported tuna and tuna products; longline-caught tuna accounts for approximately 7.8

### i. Purse Seine Fishing Other Than Dolphin Sets

74. In its second written submission, Mexico makes the incorrect claim that it has "already rebutted all of the United States' evidence."[158] Mexico then mentions two criticisms of the U.S. evidence: (1) the studies are not all based on 100 percent coverage of the fishery in question;[159] and, (2) none of the WCPFC reports except the 2014 report by Papua New Guinea are reliable.[160] These criticisms lack merit. The U.S. evidence concerning FAD and unassociated sets in the Atlantic and Indian Oceans, the WCPO, and the ETP represent the best available evidence on the level of harm to dolphins caused by purse seine sets other than dolphin sets and show that these types of sets can cause no harms to dolphins at all, and, on average, cause much lower levels of direct mortalities than dolphin sets. Mexico's evidence does not suggest a contrary conclusion and does not suggest that such sets are intrinsically dangerous to dolphins or cause the types of unobservable harms caused by dolphin sets.

75. First, all available evidence from the Atlantic and Indian Ocean purse seine fisheries shows that levels of direct dolphin mortalities in these fisheries are well below those due to dolphin sets in the ETP. The United States has submitted studies of these fisheries published in peer-reviewed journals, showing, based on observer reports of 1,389 sets in the Atlantic and 3,052 sets in the Indian Ocean, that no dolphin mortalities occurred in any of the observed sets.[161] Mexico criticizes these studies for not being based on 100 percent observer coverage of the fisheries, but has submitted no evidence suggesting that the level of dolphin mortalities these studies reported is not representative of the fisheries as a whole.[162] By contrast, an observer of the same number of sets in the ETP during the covered years would have observed (in theory, based on average mortality per set) 131.8 and 289.7 dolphin mortalities, respectively.[163]

76. Further, a study from 2015, based on logbook and observer data from 1980 through 2011, confirms the findings of the exhibits already on the record. The study was based on Spanish and French observer data covering "9.2% of total vessel activities in the Atlantic Ocean and 7.8% in

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percent of U.S.-caught and processed tuna products in the U.S. market and for 35.8 percent of vessel records associated with imported tuna and tuna products; pole and line-caught tuna accounts for approximately 1.4 percent of U.S.-caught and processed tuna product in the U.S. market and for 14.8 percent of vessel records associated with imported tuna and tuna products; and gillnet, trawl, and handline fishing account for none or a *de minimis* amount of tuna product for the U.S. market); Eric L. Gilman & Carl Gustaf Lundin, *Minimizing Bycatch of Sensitive Species Groups in Marine Capture Fisheries: Lessons from Tuna Fisheries*, at 2 (2009) (Exh. US-53) ("Purse seine, pelagic longline and pole-and-line fisheries are the primary commercial fishing methods for catching tunas.").

[158] Mexico's Second Written Submission, para. 79.

[159] *See* Mexico's Second Written Submission, paras. 79, 81.

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

[161] *See* U.S. Second Written Submission, para. 91; U.S. First Written Submission, paras. 55, 58 (describing Amande et al. 2010, at 353-58 (Exh. US-19), Amande et al. 2011, at 2113-18 (Exh. US-20), and Amande et al. 2012, at 2-3, 6 (Exh. US-21)).

[162] *E.g.*, Mexico's Second Written Submission, para. 79.

[163] *See* U.S. Second Written Submission, para. 91.

the Indian Ocean" during the period of 1980 to 2011.[164] These observers found that, in 16,096 observed sets during the period, only 3.39 percent involved any cetacean interaction and only 0.6 percent to 0.74 percent in the Atlantic and 0.36 percent in the Indian Ocean involved any cetacean encircled.[165] Further, nearly all of these cetaceans – at least 92 percent in the Atlantic Ocean and 95 percent in the Indian Ocean – were released alive.[166] Thus, the highest possible dolphin mortality rate for observed sets during the covered period was 1.3 dolphins per 1,000 sets in the Atlantic purse seine fishery and 0.3 dolphins per 1,000 sets in the Indian Ocean purse seine fishery.[167] It is also worth noting, in terms of the representativeness of these figures for the Indian and Atlantic purse seine fisheries, that EU (specifically French and Spanish) vessels account for the majority of purse seine fishing activities in both oceans.[168]

77. Second, with respect to the WCPFC reports, Mexico similarly criticizes the U.S. exhibits for being not comprehensive without providing evidence that they are not representative of the fishery. Exhibits US-109 and US-110 are the most recent comprehensive reports on the WCPFC tropical purse seine fishery. They show that, in 2014 and 2015, there were 31 and 66 observed dolphin mortalities in 46 and 63 percent of all trips.[169] This suggests a per set mortality rate of about 1.2 dolphin mortalities per 1,000 observed sets in 2014 and 2.2 dolphin mortalities per 1,000 observed sets in 2015.[170] Exhibit US-58 shows that there were 55 dolphin mortalities in 20,853 observed sets in 2010, for a mortality rate of 2.6 dolphins per 1,000 observed sets.[171] Data from 2007-2009 showed 519 dolphin mortalities in 19,136 observed sets, for a rate of 27.23

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[164] Lauriane Escalle et al., "Cetaceans and Tuna Purse Seine Fisheries in the Atlantic and Indian Oceans: Interactions but Few Mortalities," 522 *Mar. Ecol. Prog. Ser.* 255, 257 (2015) (Exh. US-145).

[165] *See* Escalle et al. 2015, at 260 (Exh. US-145).

[166] *See* Escalle et al. 2015, at 260 (Exh. US-145) (showing that, in the Atlantic Ocean, at least 142 of the 155 cetaceans encircled were released alive and that, in the Indian Ocean, at least 37 of the 39 cetaceans encircled were released alive).

[167] *See* Escalle et al. 2015, at 260 (Exh. US-145) (showing that, in 9,969 observed sets in the Atlantic purse seine fishery, there were 13 cetaceans who were encircled and potentially not released alive, giving a highest-possible dolphin mortality rate of 13 dolphins per 9,969 sets, or, 1.3 dolphin mortalities per 1,000 sets); *id.* (showing that, in 6,129 observed sets in the Indian Ocean purse seine fishery, there were a maximum of 2 cetaceans killed, giving a highest-possible dolphin mortality rate of 2 dolphins per 6,129 sets, or, .3 dolphins per 1,000 sets).

[168] *See* R. Pianet et al., IOTC "Statistics of the Main Purse Seine Fleets Fishing in the Indian Ocean (1981-2008)," at 2 (2009) (Exh. US-146) (showing that, between 1981 and 2008, the French and Spanish purse seine fleets accounted for the vast majority of purse seine vessels in the Indian Ocean purse seine fleet, 70 percent in 2008); IOTC, "Fishing Activity of Purse Seine Vessels in the IOTC Convention Area, by Flag" (Exh. US-147) (showing that, in 2015, EU vessels accounted for 63 percent of the purse seine tuna catch in the IOTC convention area); James Joseph, FAO, *Managing Fishing Capacity of the World Tuna Fleet*, "Chapter 4: The Tuna Fishing Vessels of the World," at 5 (2003) (Exh. US-148) (stating that, in the Atlantic Ocean, "[m]ost of the purse seine catch is made in the eastern Atlantic by vessels flying the flags of France or Spain").

[169] *See* U.S. Second Written Submission, para. 90; WCPFC, 7th Annual Report for the Regional Observer Programme, at 4-5 (Sept. 3, 2015) (Exh. US-109); WCPFC, 8th Annual Report for the Regional Observer Programme, at 2, 5-6 (Sept. 14, 2016) (Exh. US-110).

[170] U.S. Second Written Submission, para. 90.

[171] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13); WCPFC Cetacean Interactions Paper, Table 2a, 2b (Exh. US-58).

dolphins per 1,000 observed sets.[172] Even the highest figure is less than half the lowest-ever dolphin mortality rate due to dolphin sets in the ETP of 69.5 dolphins per 1,000 sets.[173] Mexico presented no evidence from the WCPFC as a whole refuting this level of dolphin mortality.

78. The chart below depicts the fishery-specific evidence on the record concerning per set dolphin mortality in the purse seine fisheries described in the preceding paragraphs.[174]

| Fishery | Year | Observed Sets | Observed Mortality | Mortality per 1,000 Sets |
|---|---|---|---|---|
| **ETP Purse Seine - Dolphin Sets** | 2014 | 11,382 | 975 | 85.66 |
| | 2015 | 11,020 | 765 | 69.42 |
| | Average 1997-2015 | 10,474 | 1,325 | 126.5 |
| **Atlantic Purse Seine** | 2003-2007 | 598 | 0 | 0.00 |
| | 2008-2009 | 791 | 0 | 0.00 |
| | 1980-2011 | 9,969 | 13 (maximum) | 1.30 |
| **Indian Ocean Purse Seine** | 2003-2009 | 3,052 | 0 | 0.00 |
| | 1980-2011 | 6,129 | 2 (maximum) | 0.33 |
| **WCPFC Tropical Purse Seine** | 2007-2009 | 19,136 | 519 | 27.12 |
| | 2010 | 20,853 | 55 | 2.64 |
| | 2014 | *25,760* | 31 | 1.20 |
| | 2015 | *30,240* | 66 | 2.18 |

79. Further, as the United States has explained, recent reports from WCPFC members nearly all confirm the general level of mortality reported in the comprehensive WCPFC studies. There is generally 100 percent observer coverage of the WCPO tropical purse seine fishery. In 2013 and 2014, observers covering 100 percent of fishing trips by vessels flagged to Micronesia and Kiribati reported zero cetacean mortalities.[175] Japan and Taiwan-flagged purse seine vessels likewise had 100 percent observer coverage and, in that context, fishing masters of Japan-flagged vessels reported 5 cetaceans encircled in both 2013 and 2014, with zero cetacean mortalities,[176]

[172] *See* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13); WCPFC Cetacean Interactions Paper, Table 2a, 2b (Exh. US-58).

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

[174] *See* "Dolphin Mortalities Per Set Due to ETP Dolphin Sets and in Other Fisheries" (Exh. US-111); Escalle et al. 2015, at 260 (Exh. US-145). As explained previously, the observed set figures for the WCPFC purse seine fishery in 2014-2015 are estimates based on the total number of sets in that fishery in the relevant year and the percentage of the trips covered by the observer reports documenting the observed mortalities. *See* U.S. Second Written Submission, n.410.

[175] *See* U.S. Second Written Submission, para. 87.

[176] *See* U.S. Second Written Submission, para. 87; Japan, Annual Report to the Commission, at 1, 5, 6, 16 (July 2014) (Exh. US-35) (for 2013); Japan, Annual Report to the Commission, at 5-7, 11, 13, 16 (July 31, 2015) (Exh. US-29) (for 2014).

and fishing masters of Taiwan-flagged vessels reported 23 dolphin mortalities in 2014.[177] Observers on 100 percent of Philippine vessels fishing in the high seas pocket found there were 18 cetacean mortalities in 2014.[178] The 2015 annual reports of countries participating in the purse seine fishery reported similarly low levels of mortality.[179]

80. Mexico gives no reason why the statements of these WCPFC observers or fishing masters are not reliable. Mexico claims that the "focus of observers in the WCPFC system is on monitoring catches of tuna . . . not recording cetacean interactions,"[180] but then argues that reports of PNG observers (part of the WCPFC system) *are* reliable.[181] Mexico claims the Philippines' report does not cover fisheries in domestic waters but gives no reason why the activities of Philippines vessels in the high seas pocket are not representative of the activities of Philippines vessels generally.[182] Mexico's suggestion that the vessels are "fresh/ice chilled fishing vessels"[183] is notable given the extent of Mexico's focus in this and other submissions on gillnet fishing, which does not produce for the global tuna product market.[184] Finally, Mexico's bare assertion that all fishing master reports are "self-serving" is contrary to the findings of the previous compliance panel[185] and not logical, as *unintentionally* harming cetaceans is not contrary to any WCPFC measure.

81. Further, the PNG 2014 annual report actually reveals a lower level of direct mortalities than were caused by ETP dolphin sets. Mexico claims that "PNG-flagged purse seine vessels" caught 54,770 mt. of tuna in 2014 and, therefore, the "dolphin bycatch rate associated" with the

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[177] *See* U.S. Second Written Submission, para. 87; Chinese Taipei, Annual Report to the Commission, at 14, 15, 18-19 (Nov. 3, 2015) (Exh. US-31).

[178] *See* U.S. Second Written Submission, para. 87; Philippines, Annual Report to the Commission, at 5, 9-10 (Sept. 28, 2015) (Exh. US-38). Mexico suggests that the United States asserted there was 100 percent observer coverage of all Philippine purse seine vessels, *see* Mexico's Second Written Submission, para. 81, but this is incorrect. The United States stated: "The Philippines' 2015 Annual Report stated that there were 35 Philippine vessels *fishing in the high seas pocket* in 2014, that there was 100% observer coverage of these vessels, and that there were 18 instances of cetacean bycatch due to unintentional encirclement where the cetacean subsequently died." *See* U.S. Second Written Submission, para. 87 (emphasis added).

[179] *See* "Dolphin Bycatch in the WCPFC Purse Seine Fishery from Annual Reports for 2015" (Exh. US-149) (showing that the annual reports of the WCPFC members with purse seine fleets suggest a total mortality of 119 dolphins in 2015).

[180] *See* Mexico's Second Written Submission, para. 81.

[181] Mexico claims that PNG is the only reporting nation "with data on dolphin bycatch from trained observers," but this is completely unsupported, as there is no evidence that PNG observers receive any different level of training than those on vessels flagged to Micronesia, Japan, New Zealand, Kiribati, the Philippines, and Taiwan. *See* Mexico's Second Written Submission, para. 80. In fact, there is every reason to think the training is the same, since the observers in the region are generally part of the Parties to the Nauru Agreement (PNA) program.

[182] *See* Mexico's Second Written Submission, para. 81.

[183] *See* Mexico's Second Written Submission, para. 81.

[184] *See* Gilman & Lundin 2009, at 2 (Exh. US-53); *see also* Joseph 2003, at 2 (Exh. US-148).

[185] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.210.

dolphin mortalities in the 2014 report would be .005.[186] But this is incorrect, based on the report itself. The report states that the reported dolphin mortalities reflect "cetacean interactions . . . from observer data."[187] It is not clear exactly which vessels are covered by the observer data (and Mexico has been inconsistent in its assumptions[188]) but at least all PNG-based vessels, both PNG-flagged and foreign chartered vessels, would be covered, as they carry PNG observers.[189] These vessels caught 215,203.91 mt. of tuna in 2014, suggesting a "dolphin bycatch rate" of 0.001 (255 dolphin mortalities / 215,203.91 mt.).[190] This is a mere fraction of the average rate in the ETP (0.008) and the rate in 2014, the analogous year (0.006).[191] This suggests that, on a per set basis – which, as the United States has explained, is the appropriate way to conduct cross-fishery comparisons, as the measure is applied on a per set basis[192] – direct dolphin mortalities would have been significantly lower than those caused by dolphin sets in the ETP.

82. Additionally, as the United States has explained, evidence from PNG's 2015 annual report to the WCPFC also suggests that the 2014 data is not representative of the WCPFC purse seine fishery as a whole, or even of the PNG fishery. This most recent annual report states that PNG observers documented only 55 dolphin mortalities,[193] suggesting that per set data, if it were available for the PNG fishery, would show that per set mortality was likewise a small fraction of that caused by dolphin sets in the ETP.[194]

83. Third, the ETP large purse seine fishery *itself* provides the clearest example of why Mexico's arguments fail. As discussed previously, the evidence establishes that free school and floating object sets have accounted for over half of all sets in the ETP large purse seine fishery in the past decade but have caused only 0.2% of dolphin mortalities in the fishery – the other 99.8%

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

[187] *See* Papua New Guinea, Annual Report to the Commission (Aug. 2015), at 29 (Exh. MEX-23).

[188] Specifically, Mexico has used two different figures for the tuna covered by the PNG observer report – all tuna caught in PNG waters, *see* Mexico's First Written Submission, para. 78, and all tuna caught by PNG-flagged purse seine vessels, *see* Mexico's Second Written Submission, para. 80. Mexico gives no explanation of how it chose either figure nor any citation to the text of the report to support the choice(s). In this regard,

[189] *See* U.S. Second Written Submission, para. 85, n.195. Further, as explained previously, the most natural reading of the language seems to be that the data also cover foreign-flagged vessels fishing in PNG waters, which also carry PNG observers. *See* U.S. Second Written Submission, para. 85, n.195. Including these vessels, the comparable figure would be 403,315.45 mt. of tuna, and the "dolphin bycatch rate" would be .0006 (255 dolphin mortalities / 403,315.45 of tuna).

[190] *See* Papua New Guinea, Annual Report to the Commission, at 5, 7 (Exh. MEX-23) (showing that in 2014 PNG-flagged purse seine vessels caught 54,770.86 mt. of tuna and PNG-based purse seine vessels caught 160,433.05 mt. of tuna).

[191] *See* "Dolphin Bycatch Rate Due to Dolphin Sets in the ETP and Fisheries Where Per Set Data Are Unavailable" (Exh. US-133). It is unclear why Mexico compared the data to the 2015 data in the ETP when 2014 data is available and new 2015 data is available for the PNG purse seine fishery.

[192] *See* U.S. Second Written Submission, paras. 162-163.

[193] *See* Papua New Guinea, Annual Report to the Commission, at 20 (Aug. 2016) (Exh. US-107).

[194] *See* U.S. Second Written Submission, para. 88.

being caused by dolphin sets.[195] Mexico's failure to respond to this evidence – or even acknowledge its existence at all – is telling.

84. Thus, all the available set-by-set data confirms that purse seine fishing other than by dolphin sets in the ETP causes a much lower level of direct dolphin mortality than dolphin sets. Mexico's evidence from YouTube does not contradict the dolphin mortality rate demonstrated by the U.S. evidence on the record, as it merely shows that dolphins are killed in FADs and does not suggest how frequently, on a per set or per ton of tuna basis, this occurs.[196] Further, Mexico does not even claim that purse seine fishing without setting on dolphins is *intrinsically harmful* to dolphins in the way that dolphin sets are, or cause the same types of unobservable harms.[197] Purse seine sets other than dolphin sets thus cause significantly lower levels of direct mortality than dolphin sets *and also* put dolphins at risk less often and do not cause the unobservable harms that are caused by the chase and encirclement process.

### ii. Longline Fishing

85. In its first and second submissions, the United States put forward the most recent and comprehensive evidence available concerning the dolphin harm caused by longline fishing in various fisheries around the world. This evidence establishes longlining can be used without causing any harms to dolphins, and that the risks to dolphins from longlining in general in different areas of the oceans are significantly lower than the risks to dolphins from setting on dolphins in the ETP large purse seine fishery. In particular, the evidence proves that longline fishing: 1) is not intrinsically dangerous to dolphins (in the sense of interacting with dolphins in every set);[198] 2) is not capable of causing the sort of indirect, unobservable harms that are caused by dolphin sets even if no dolphin is directly killed or seriously injured;[199] and 3) does not cause a level of direct dolphin mortalities that is even close to the level caused by dolphin sets in the ETP when compared on an apples-to-apples basis.[200]

86. In its second written submission, Mexico did not put forward any evidence that the United States is incorrect that the relative risks to dolphins from longlining in different areas of the oceans is lower than the relative risks to dolphins from setting on dolphins in the ETP large purse seine fishery. In fact, Mexico appears not to put forward evidence that is even relevant to any of the three points the United States has made. Instead, Mexico criticizes the U.S. evidence for not being "comprehensive" and claims that the United States was therefore "applying a *presumption* that there are not greater numbers of dolphins killed and other dolphin interactions in those fisheries, without any scientific basis for doing so."[201] Mexico also claims that "the fact

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[195] U.S. First Written Submission, paras. 41-42; U.S. Second Written Submission, para. 83 (citing same).

[196] *See* Mexico's Second Written Submission, paras. 82-83.

[197] *See* Mexico's Second Written Submission, paras. 79-85.

[198] *See* U.S. First Written Submission, paras. 45, 55-56, 99; U.S. Second Written Submission, para. 94.

[199] *See* U.S. First Written Submission, paras. 100-101; U.S. Second Written Submission, para. 94.

[200] *See* U.S. First Written Submission, paras. 58, 102; U.S. Second Written Submission, paras. 95-100.

[201] Mexico's Second Written Submission, para. 71.

that fishermen are unhappy with depredation does not provide an assurance that dolphins are safe from longline fishing."[202] However, neither of Mexico's arguments refute the evidence on the record showing that longline fishing is significantly less harmful to dolphins, in every relevant respect, than dolphin sets in the ETP large purse seine fishery.

87. First, Mexico criticizes the United States for applying a "presumption" but fails to introduce evidence suggesting that the U.S. evidence on the record is not correct and representative. The United States has shown that, for every tuna longline fishery for which data is available, the vast majority of sets (over 95 percent) occur without interacting with any dolphins.[203] Mexico has not contradicted this evidence.[204] The first compliance panel, based on a thorough review of the evidence, found that longline fishing is not capable of causing the type of unobservable harms caused by dolphin sets,[205] a point upheld by the Appellate Body on appeal.[206] Mexico has introduced no evidence contradicting these findings contained in the DSB recommendations and rulings.[207] Finally, the United States has shown that, for every tuna longline fishery for which evidence is available, observed direct dolphin mortalities (on an

[202] Mexico's Second Written Submission, para. 73.

[203] *See* U.S. First Written Submission, para. 55, showing: (1) in the American Samoa longline fishery, a marine mammal interaction occurred in only 0.33 percent of observed sets from 2006-2015 (19 interactions in 5,753 observed sets); (2) in the Hawaii longline fishery, a marine mammal interaction occurred in 0.26 percent of observed sets from 2004-2015 (119 interactions in 45,274 observed sets); and (3) in the Atlantic pelagic longline fishery, a marine mammal interaction occurred in 2.7 percent of observed sets from 2005-2015 (264 interactions in 9,775 observed sets); (4) a study of the EU Atlantic longline fishery showed that only 4.4 percent of the observed sets involved any marine mammal interaction; (5) recent data from non-U.S. WCPO longline fisheries show "very low" levels of marine mammal interactions; *see also* U.S. Second Written Submission, para. 94; Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 3 (Exh. US-13); Gilman & Lundin 2009, at 12 (Exh. US-53) (stating that "[c]etacean-longline interactions *occasionally* result in . . . injury and mortality") (emphasis added).

[204] *See, e.g.*, Mexico's Second Written Submission, paras. 71-73.

[205] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.131 ("[N]one of Mexico's evidence suggests that longline fishing has unobservable effects similar to those caused by setting in dolphins."); *see also id.* ("While the evidence summarized in this section clearly establishes that tuna fishing methods other than setting on dolphins pose serious threats to dolphins, we have been unable to find any indication in this evidence that fishing methods other than setting on dolphins cause the kinds of unobservable harms that are caused by setting on dolphins.").

[206] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.200-202 (rejecting Mexico's claim that the panel had erred in finding that fishing methods other than setting on dolphins have no unobservable adverse effects); *see also id.* paras. 7.195-197 (concluding that the first compliance panel had accurately reflected the previous factual findings, including that such unobservable harms "arise as a result of the 'chase itself,'" and that the Appellate Body had previously "affirmed the original panel's conclusion that 'the US objectives … to minimize unobserved consequences of setting on dolphins' would not be attainable if tuna caught by setting on dolphins were eligible for the dolphin-safe label," ultimately concluding that the compliance panel's "references to the Appellate Body report do not, in our view, mischaracterize the findings made in the original proceedings regarding the existence of unobserved effects on dolphins").

[207] *See, e.g.*, Mexico's Second Written Submission, paras. 71-73.

absolute and per set basis) are small fractions of those caused by dolphin sets in the ETP.[208] Mexico has put forward no evidence contradicting the U.S. evidence in this regard.[209]

88. Thus, Mexico's claim that the United States is acting based on a "presumption' is incorrect. In fact, the determination that longline fishing is substantially less dangerous to dolphins than dolphin sets is based on, and confirmed by, all the available evidence concerning the harms to dolphins, both direct and indirect, caused by the two fishing methods. Mexico's argument appears to be no more than a reiteration of its "zero tolerance" benchmark idea, whereby if a fishing method causes any dolphin harm it must be presumed to be as dolphin-unsafe as dolphin sets. But that is not the pertinent question. Rather, the question is whether the eligibility criteria (and, ultimately, the measure itself) are calibrated to differences in risk to dolphins.[210] As the evidence makes clear, the line that the eligibility criteria draws between longline fishing and setting on dolphins is supported by the weight of the evidence, which shows that the vast majority of tuna longline fishing sets occur without causing any harm, direct or indirect, to dolphins and, thus, tuna product produced from these sets is dolphin safe.

89. Second, Mexico's assertions that some longline fishermen in the Indian Ocean may intentionally kill cetaceans to prevent depredation does not undermine the evidence that longline fishing can be dolphin safe. These alleged incidents do not relate to any feature of longline fishing overall, but, rather to the alleged behavior of a few fishermen in a few fisheries,[211] and the resulting tuna product would not meet the conditions of the measure. Further, this claim does not refute the evidence showing that only a very small percentage of longline sets involve any dolphin interaction at all and, further, that only a small fraction of depredation events result in

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[208] *See* U.S. First Written Submission, paras. 58, 102, n.209 showing: (1) from 2009-2015, observers in the two U.S. longline fisheries in the WCPFC area reported a total of 70 and 16 dolphin mortalities *and injuries* in 25,688 and 4,677 observed sets, so that, on a per set basis, there were 2.73 and 3.42 dolphin mortalities and injuries per 1,000 observed sets in these fisheries over the last seven years; (2) in the Australia longline fishery from 2010-2014, there were 8 marine mammal "captures" in over 1.7 million observed hooks, or, approximately 1,181 observed sets, for an estimated mortality rate of 6.77 dolphins per 1,000 sets; (3) in the EU Atlantic longline fishery, there was 1 marine mammal "interaction" in 625 observed sets; and, (4) recent data from WCPO longline fisheries show that the numbers of observed marine mammal interactions and mortalities are generally zero or nearly zero; *see* Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13). In this regard, the WCPFC 2015 annual reports by the members participating in the longline fishery confirm very low levels of dolphin interaction and dolphin mortality. *See* "Dolphin Bycatch in the WCPFC Longline Fishery from Annual Reports" (Exh. US-158).

[209] *See, e.g.*, Mexico's Second Written Submission, paras. 71-73; *see also* U.S. Second Written Submission, paras. 95-100 (addressing the evidence put forward in Mexico's first written submission).

[210] *Compare US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.169 (stating that the proper analysis must include whether the measure is "calibrated to the risks to dolphins arising from different fishing methods in different areas of the oceans"), *with id.* n.492 ("Indeed, Mexico disputed the relevance of the concept of 'calibration' to the analysis of the even handedness of the amended tuna measure. . . . For Mexico, '[t]una is either dolphin safe or it is not – eligibility for the dolphin safe label *cannot be viewed as a relative assessment*'") (quoting Mexico's Second Written Submission to the 1st 21.5 Panel, para. 173) (emphasis added).

[211] *See* Mexico's Second Written Submission, para. 72 (quoting Exhibit MEX-42 stating that "there are reports of cetaceans being shot by fishermen from Thailand and Australia" and stating that it is possible that this has occurred elsewhere "within the Indian Ocean").

the death of the depredating dolphin.[212] Nor would such incidents constitute the type of indirect, unobservable harms that could occur without rendering the set in question *not* dolphin safe.[213]

90. Finally, the exhibit cited by Mexico on this point further emphasizes the difference between the intentional nature of dolphin interactions in dolphin sets and the inadvertent (indeed, undesirable) nature of these interactions in longline fisheries. Specifically, the report notes that there are a range of devices to "mitigate longline depredation" and to "reduce interactions with cetaceans."[214] There are a significant number of studies on these devices, and longline fishermen around the world would have an incentive to use them,[215] as many do.[216] Setting on dolphins, on the other hand, must involve dangerous dolphin interactions every time it is employed.

91. Thus the available evidence confirms that any dolphin interaction is very rare in longline sets, that dolphin mortality is even rarer, and that the harms caused by longline fishing are of the sort whose occurrence would render the set not dolphin safe.

### iii. Pole and Line Fishing

92. In its second written submission, Mexico again omits any mention of pole and line fishing, although it produces the third largest quantity of tuna for the U.S. tuna product market and for the global tuna industry generally.[217] From this, the United States understands that Mexico does not contest the U.S. evidence showing that pole and line fishing is not associated with dolphin harm,[218] or the conclusion that allowing tuna caught by this fishing method to be potentially eligible for the dolphin safe label, while making tuna caught in dolphin sets ineligible, is even-handed under Article 2.1 of the TBT Agreement.

### iv. Gillnet Fishing

93. As the United States explained in its second written submission, gillnet fishing can produce tuna product that can be certified dolphin safe in the way that setting on dolphins

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[212] U.S. Second Written Submission, para. 96; William Jacobson Witness Statement App. 1 (Exh. US-52).

[213] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.132.

[214] *See* R.C. Anderson, *Cetaceans and Tuna Fisheries in the Western and Central Indian Ocean,* IPNLF Technical Report 2, at 70 (2014) (Exh. MEX-42).

[215] Anderson 2014, at 70 (Exh. MEX-42); D. Hamer, S. Childerhouse & N. Gales, "Odontocete bycatch and depredation in longline fisheries: A review of available literature and of potential solutions," 28 *Marine Mammal Science*, 345, at 356-366 (Oct. 2012) (Exh. MEX-28).

[216] *See, e.g.*, Megan J. Peterson et al., "Killer Whale (*Orcinus orca*) Depredation Effects on Catch Rates of Six Groundfish Species: Implications for Commercial Longline Fisheries in Alaska," 70 *ICES J. of Marine Science* 1220, 1229 (2013) (Exh. US-68) (describing how killer whale depredation on U.S. longline fisheries "has played a major role in changing fishing practices of longline fleets, specifically: gear type, season timing, and proportion of total allowable catch harvested of certain groundfish," as well as some vessels "transitioning to pots as a result of killer whale depredation").

[217] *See* Gilman & Lundin 2009, at 2 (Exh. US-53) ("Purse seine, pelagic longline and pole-and-line fisheries are the primary commercial fishing methods for catching tunas."); U.S. Second Written Submission, n.263.

[218] *See* U.S. Second Written Submission, para. 103.

cannot. Unlike in dolphin sets, dolphins are not an essential component of gillnet fishing and, therefore, gillnet sets, and even entire gillnet fisheries, can be conducted without interacting with and harming dolphins.[219] Further, as the first compliance panel correctly found and the Appellate Body confirmed, gillnet fishing is not capable of causing the types of unobservable harms to dolphins that setting on dolphins can cause as a result of the "chase itself" even if no dolphins were directly observed to have been killed.[220]

94. Mexico fails to rebut either of these rationales in its second written submission. Mexico argues that the levels of mortality caused by gillnets in the Indian Ocean gillnet fisheries, which the United States designated under the determination provisions, means that the U.S. measure must make all "gillnet-caught tuna completely ineligible for the dolphin-safe label."[221] Mexico claims that the evidence of the gillnet fisheries that "have not been deemed dangerous to marine mammals" is not relevant because these fisheries do not target tuna and that the NOAA report identifies other gillnet fisheries that *have* been deemed to pose risks to marine mammals.[222] However, neither of these claims demonstrate that gillnets are not capable of producing tuna product that can be accurately certified as dolphin safe.

95. First, the evidence on the record concerning the Indian Ocean gillnet fisheries is not suggestive of bycatch rates in all gillnet fisheries around the world. Dolphins are not evenly distributed throughout the world's oceans, and different fisheries of the same gear-type can have vastly different bycatch levels depending on their area of operation and spatial overlap with dolphin populations.[223] Some gillnet fisheries, in particular, are carried out in areas such that there is little or no known risk to any dolphin species.[224] Further, there are techniques that can reduce dolphin interactions in gillnet fisheries, and thereby reduce the potential for dolphin harm.[225] Thus, gillnet fishing overall presents a lower risk to dolphins than dolphin sets.

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[219] *See* U.S. Second Written Submission, para. 105.

[220] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.130-132 (finding that "[w]ith respect to gillnet fishing . . . none of [Mexico's] evidence . . . suggests that gillnets have the same kind of unobservable effects as setting on dolphins"); *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.198-202 (upholding the panel's finding).

[221] Mexico's Second Written Submission, para. 69.

[222] Mexico's Second Written Submission, para. 69.

[223] *See* U.S. First Written Submission to the 1st 21.5 Panel, para. 143; U.S. Second Written Submission, paras. 57, 105.

[224] *See* U.S. Second Written Submission, para. 105; NMFS, *Proposed Rule: List of Fisheries for 2017*, 81 Fed. Reg. 54,019 (Exh. US-101) (showing that, for 2017, 14 gillnet fisheries were designated as Category III fisheries, meaning that there is "a remote likelihood of or no known incidental mortality and serious injury of marine mammals").

[225] *See, e.g.*, 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) (showing that use of acoustic pingers on UK gillnet vessels reduced dolphin and porpoise bycatch by 63 to 66 percent – the 907 hauls without pingers resulted in bycatch of 22 dolphins and porpoises (.0243 per set), compared to the 999 hauls with pingers, which resulted in bycatch of 9 dolphins and porpoises, (.0090 per set)); *id.* at 3 (noting that "EC Council Regulation 812/2004 requires certain vessels over 12m in length to use acoustic deterrent devices (pingers) to minimize the risk of accidental capture of dolphins and porpoises in static nets").

96. Second, the evidence on the record on gillnet fisheries, including in the Indian Ocean, does not mean that tuna produced from these fisheries should necessarily be ineligible for the dolphin safe label. Individual vessel operators can make different choices about how and when to fish and, in particular, how much time and effort to invest in avoiding dolphin interactions. Thus, some vessels may operate with low bycatch even in fisheries where the average is high. Moreover, because gillnet fishing does not cause the sort of unobservable harms caused by dolphin sets, tuna caught in sets where no dolphin was directly killed or seriously injured could truthfully be certified dolphin safe.[226] Dolphin sets, by contrast, depend on interactions with dolphins that pose to the dolphins involved a risk of harms that, by their nature, an observer could not certify had not occurred.[227] Gillnet fishing is not, therefore, incapable of producing dolphin safe tuna in the way that setting on dolphins is.

97. Third, Mexico's claim that Exhibit US-101 does not show that gillnet fishing can be carried out without harming marine mammals on the grounds that none of the Class III fisheries are tuna fisheries also lacks merit. It is important to note in this regard that gillnet fisheries are not widely used to target tuna, and, to the extent tuna is caught in mixed-target fisheries, it is generally sold at local markets.[228] Thus, tuna caught in gillnet fisheries is typically not sold into the global or U.S. tuna product markets.[229] Gillnet fisheries are not, therefore, relevant to the U.S. dolphin safe label, from a practical perspective. Rather, Exhibit US-101 is relevant because of what it shows about the nature of gillnet fishing, namely that it is not intrinsically dangerous to dolphins and can be carried out without putting them at risk.[230]

98. Finally, the fact that some gillnet fisheries are listed as Category I and II fisheries is not relevant to whether tuna produced by gillnet fishing can be dolphin safe. As the United States has explained, the PBR metric, on which these designations are based, does not align with the dolphin safe label because the label takes a gear-deployment-based approach to whether tuna is

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[226] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.130-132 (stating, *inter alia*, that none of Mexico's evidence "suggests that gillnets have the same kind of unobservable effects as setting on dolphins" and that the type of direct harms shown by the evidence are "the kind . . . that is observable and that must, under the amended tuna measure, be certified"); *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.198-202.

[227] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.130-132.

[228] *See* U.S. First Written Submission to the 1st 21.5 Panel; Gilman & Lundin 2009, at 2 (Exh. US-53) ("Purse seine, pelagic longline and pole-and-line fisheries are the primary commercial fishing methods for catching tunas."); Joseph 2003, at 2 (Exh. US-148) (explaining that "[o]nly a small percentage of the world catch of tunas is taken with gillnets"); *id.* at 6 ("About 12% of the world catch is taken with gear other than purse seine, longline, and pole and line. About one-half of this remaining 12% is taken by trolling vessels that fish for albacore and the rest by a variety of other fishing gears, such as anchored and drifting gillnets, harpoons, and traps.").

[229] *See* William Jacobson Witness Statement, App. 2, 3 (Exh. US-52) (showing that gillnet fishing produces none of the U.S. caught tuna products in the U.S. market and accounts for approximately 0.24 percent of vessel records associated with imported tuna and tuna products).

[230] *See* U.S. Second Written Submission, para. 105. In this regard, it is notable that none of the Category I and II gillnet fisheries list tuna as a primary target catch either. *See* NMFS, *Proposed Rule: List of Fisheries for 2017*, 81 Fed. Reg. 54,019 (Exh. US-101). Further, at least one of the Category III fisheries has caught tuna, although it is not a target species. *See* NMFS, "California Set Gillnet Observer Program Observed Catch" (2011) (Exh. US-161).

dolphin safe, whereas PBR is based on the size of the dolphin population in the fishery area.[231] Thus, for the dolphin safe label, the size of the overall dolphin population is not relevant. The fact that some gillnet fisheries are Category III fisheries is relevant because it conveys that there is either "*no* known" marine mammal mortality in the fishery or "a remote likelihood of" such mortality and, therefore, also addresses the frequency of marine mammal bycatch.[232]

99. Thus, the evidence on the record does not suggest that gillnet fishing is intrinsically dangerous to dolphins the way that setting on dolphins is or that it cannot be carried out without endangering or harming dolphins. Further, it does not suggest that gillnet fishing can cause harm to dolphins that is unrelated to the type of direct, observable mortalities, the occurrence of which would render the tuna caught in the set at issue not eligible for a dolphin safe label.[233] Where individual gillnet fisheries cause a high level of direct dolphin mortality, therefore, such harm can be addressed through the enhanced requirements applied under the determination provisions. In this regard, we note that the only evidence on the record of substantial dolphin mortality in existing tuna gillnet fisheries concern fisheries in the Indian Ocean that have been designated under the determination provisions.

### v. Trawl Fishing

100. In its first written submission, Mexico did not claim that trawl fishing caused a higher level of dolphin mortalities than dolphin sets in the ETP and, therefore, did not claim that it should be *per se* ineligible for the dolphin safe label.[234] In its second written submission, Mexico changes course, now claiming that, because trawl fishing can cause dolphin mortalities "in many types of fisheries," the potential eligibility of tuna caught by trawl fishing is based on a "presumption that this is a safe fishing method for dolphins," and is not even-handed.[235] Mexico's argument is incorrect.

101. With respect to the factual aspect, the potential eligibility of tuna caught by trawl fishing is not based on a "presumption" but on the best available information about trawl fishing and trawl fisheries. As the United States explained previously, trawl fishing is generally not used to catch tuna.[236] In particular, the slow speed of pelagic trawlers makes them ill-suited to tuna

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[231] *See* U.S. Second Written Submission, paras. 97-98, 118-123.

[232] *See* NMFS, *Proposed Rule: List of Fisheries for 2017*, 81 Fed. Reg. at 54,020 (Exh. US-101).

[233] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.132.

[234] *See* Mexico's First Written Submission, para. 108 ("Given the existence of dolphin mortalities from this fishing method, tuna that is caught must be certified as dolphin safe then accurately tracked in a verifiable manner to ensure that the tuna products that contain the tuna are accurately labelled"); *id.* para. 256 (describing five fishing methods – AIDCP-compliant dolphin sets, unregulated dolphin sets, gillnet fishing, purse seine sets other than dolphin sets, and longline fishing – and arguing: "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.' Alternatively, all five should be designated as ineligible.").

[235] *See* Mexico's Second Written Submission, para. 75.

[236] *See* U.S. First Written Submission to 1st 21.5 Panel, para. 157; William Jacobson Witness Statement, App. 2, and 3 (Exh. US-52) (showing that trawl fishing is so rare, as a method of catching tuna, that it is not listed as

fishing.[237] Further, studies of trawl fisheries indicate that, where they are used to catch tuna, bycatch is generally rare. One study commented that trawlers cause less mortality of marine mammals than other fishing methods, speculating that this might be due to "the disturbance caused by the trawling action at the bottom and at midwater warning cetaceans before they get caught."[238] With respect to tuna pelagic pair trawling in particular, the FAO explained: "In most cases [if it is] a single species fishery, bycatch rates of other species are low. . . . On few fishing ground[s], the incidental catch of dolphins and marine mammals creates some problems.[239]

102. Further, Mexico's evidence concerning EU trawl fisheries does not suggest that trawl fishing causes significant dolphin bycatch. As is clear from Mexico's exhibit, the fisheries in question are, for the most part, generally *not* tuna fisheries.[240] This is confirmed by other studies of EU trawl fisheries.[241] Due to the different distributions of dolphins across seasons and ocean areas, bycatch rates can differ by fishery species and, therefore, data on other fisheries may not be generalized to the summer albacore fishery. To that point, two studies of the EU summer trawl fishery for albacore covering 2010-2011 and 2011-2012 found that no cetacean mortalities occurred in any observed haul.[242] These studies reflected at least 10 percent observer coverage of the fishery.[243] This suggests that any dolphin deaths caused by EU fishing operations were not caused (or were caused only in very small part) by the summer albacore fishery.

103. Thus, the available evidence does not support a finding that trawl fishing generally causes the same level of direct dolphin mortalities as setting on dolphins in the ETP, when compared on an apples-to-apples basis. Further, the evidence establishes that trawl fishing does not intentionally target dolphins,[244] and no evidence exists that suggests that trawling is capable of causing the type of unobservable effects caused by dolphin sets that can occur in the absence of

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an option on the NOAA Form 370, and tuna caught by this method would be designated as caught by "other gear," which accounts for 0.24 percent of total vessel records tuna product imported into the United States).

[237] *See* William Jacobson Witness Statement, app. 1 (Exh. US-52).

[238] K.S.S.M. Yousuf et al., "Observations On Incidental Catch of Cetaceans in Three Landing Centres Along the Indian Coast", 2 *Marine Biodiversity Records*, at 4 (2009) (Exh. MEX-17).

[239] FAO, "Tuna Midwater Pair Trawling," http://www.fao.org/fishery/fishtech/1013/en (Exh. US-162).

[240] *See* Mexico's Second Written Submission, para. 74 (describing the fisheries as targeting "sea bass, mackerel, horse mackerel, hake and in summer albacore tuna).

[241] *See* Alison McCarthy et al., "Pilot Observer Programme in Irish Pelagic Trawl and Gillnet Fisheries: Implementing Council Regulation (EC) No 812/2004, at 2 (2011) (Exh. US-163) (showing that albacore is targeted for only 3 months of the year, and that mackerel, herring, horse mackerel, and blue whiting were targeted by Irish trawl fisheries); John Boyd et al., "Report on the Pilot Observer Programme in Irish Pelagic Trawl Fisheries: Implementing Council Regulation (EC) No 812/2004," at 3 (2012) (Exh. US-164) (noting that Irish pelagic trawl fisheries target albacore, blue whiting, boar fish, herring, mackerel, horse mackerel, sprat, and sardines).

[242] *See* McCarthy et al. 2011, at 5, 8 (2011) (Exh. US-163); Boyd et al. 2012, at 8 (Exh. US-164).

[243] Boyd et al. 2012, at 33 (Exh. US-164) (explaining that observers covered 11.5 percent of the albacore tuna quota); McCarthy et al. 2011, at 1 (Exh. US-163) (stating that observer coverage of the albacore tuna pair pelagic fishery was 10 percent).

[244] *See* U.S. Second Written Submission, para. 109.

direct dolphin mortalities.[245] Consequently, overall, trawl fishing for tuna has a lower risk profile for dolphins than setting on dolphins in the ETP large purse seine fishery.

### vi. Handline Fishing

104. Mexico, in its first written submission, did not argue that handline fishing caused a higher level of dolphin mortalities than setting on dolphins does in the ETP large purse seine fishery and did not claim that it should be *per se* ineligible for the dolphin safe label.[246] In its second written submission, Mexico again points to no dolphin mortalities or other harms reportedly caused by handline fishing.[247] However, Mexico argues that it has shown that "the ETP is not the only place in the world in which tuna routinely associate with dolphins" and that "other fishing methods intentionally 'target' dolphins to find tuna."[248] Further, Mexico argues that handline vessels have been known to "chas[e]" dolphins and, therefore, if chasing dolphins is intrinsically harmful, "the tuna measure must disqualify tuna caught by handlines in association with dolphins in order to be even-handed."[249] However, none of Mexico's evidence suggests that handline fishing in general or in the Indian Ocean is harmful to dolphins at all, let alone as harmful as setting on dolphins is in the ETP large purse seine fishery.

105. First, none of Mexico's evidence undermines the conclusion that the tuna-dolphin association in the ETP is unique. Mexico cites Exhibit MEX-42 in support of the proposition that the ETP is not the only place where there is a tuna-dolphin association.[250] As the United States has explained, however, this exhibit explicitly distinguishes the scale of any tuna-dolphin relationship that occurs in the western Indian Ocean (WIO) and the ETP, stating that, although "it is possible that there has been more setting on dolphins in the WIO than has been reported," this "does not imply that the tuna-dolphin fishery in the WIO is of the same scale as that in the ETP."[251] The report also noted that the "only comparative study" of the issue between the WIO and the ETP "suggested that tuna-dolphin schools were seen less frequently in the WIO than in the ETP."[252] And, in rejecting one of Mexico's DSU Article 11 appeals, the Appellate Body found that this exhibit supported the first compliance panel's finding that dolphins outside the ETP do not associate with tuna "as systematically as they do in the [ETP]."[253]

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[245] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.132.

[246] *See* Mexico's First Written Submission, para. 111 (introducing no evidence of direct mortalities but arguing that "if the Panels were to accept the United States' argument that chasing dolphins, in and of itself, has adverse effects on dolphins sufficient to justify disqualifying the dolphin encirclement method, then handline fishing in association with dolphins must be assumed to have the same adverse effects"); *id.* para. 256.

[247] *See* Mexico's Second Written Submission, paras. 76-78.

[248] *See* Mexico's Second Written Submission, para. 78.

[249] *See* Mexico's Second Written Submission, para. 78.

[250] *See* Mexico's Second Written Submission, paras. 77-78.

[251] Anderson 2014, at 67 (Exh. MEX-42).

[252] Anderson 2014, at 67 (Exh. MEX-42).

[253] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.224.

106. Second, Mexico has provided no evidence suggesting that handline fishing "intentionally target[s]" dolphins. With respect to the general point, it is clear from the definition of handlining in Mexico's first written submission that dolphins are not an essential component of the fishing method, in general, and, therefore, that handline vessels do not interact with dolphins in 100 percent of gear deployments.[254] Mexico's evidence also does not suggest that this is the case in the WIO. Exhibit MEX-42 did not suggest that handline vessels "target" dolphins, but rather that some fishermen use dolphins or seabirds to "locate" large yellowfin.[255] There is no suggestion that the fishermen *ever* try to capture or hook the dolphins.[256] In fact, the report states explicitly that "[r]eports from Maldives and Sri Lanka have indicated that no dolphins are caught during this fishery," let alone that they are caught intentionally.[257]

107. Third, the evidence on the record does not suggest that any handline vessels chase dolphins so as to risk causing the unobservable effects caused by ETP dolphin sets. Exhibit MEX-42 contains no suggestion that handline vessels in the WIO chase dolphins. It states that the vessels "move ahead" of the dolphins,[258] which does not suggest that the dolphins are fleeing the handline vessels and the vessels are in pursuit. Further, the report even states that, in contrast to the ETP, in the WIO it seems that the dolphins follow the tuna, which would render a chase useless.[259] The Panels will, of course, draw their own conclusion about what is shown in the video provided by Mexico, but it does not appear to the United States that the vessel (seemingly a canoe with an outboard motor) is chasing the dolphins.[260] In fact, the boat seems to be first at right angles to the dolphins and then in front of them. Further, in contrast to the scientific literature on dolphin sets in the ETP, no study or report has suggested that handline fishing caused the types of unobservable harms caused by dolphin sets.

108. Thus, based on the evidence on the record, there is every reason to consider that handline fishing is capable of producing dolphin safe tuna (and, indeed, that it is one of the least dangerous fishing methods in the world for dolphins).

### d. The Eligibility Criteria Are Calibrated to the Difference in Risk to Dolphins Posed by Setting on Dolphins and Eligible Fishing Methods

109. The differences between setting on dolphins and the potentially eligible fishing methods are such that the eligibility criteria are commensurate with the overall relative risk to dolphins posed by different fishing methods and, therefore, are even-handed. Based on the holistic and relative approach set out by the Appellate Body in the first compliance proceeding, the eligibility

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[254] *See* Mexico's First Written Submission, para. 109.

[255] *See* Mexico's Second Written Submission, para. 77; Anderson 2015, at 70 (Exh. MEX-42).

[256] *See* Anderson 2015, at 69-70 (Exh. MEX-42).

[257] Anderson 2015, at 70 (Exh. MEX-42).

[258] Anderson 2015, at 70 (Exh. MEX-42).

[259] Anderson 2015, at 70 (Exh. MEX-42).

[260] *See* http://www.allreadable.com/6c4b2qFG (at the 50 second mark and onwards).

criteria are calibrated because they distinguish between, on the one hand, a fishing method that (1) necessarily poses a risk to dolphins every time it is used, (2) causes unobservable harms even in the absence of direct mortalities, and (3) generally causes more direct dolphin mortalities on a per set basis, and, on the other hand, fishing methods that (1) can be (and generally are) used without putting any dolphins in danger, (2) do not cause unobservable harms in the absence of direct mortalities, and (3) generally cause lower levels of such direct dolphin mortalities. Tuna caught using the former fishing method is ineligible for the label, while tuna caught by using the other methods is potentially eligible, provided no dolphin mortality or serious injury occurred in the set or gear deployment in which tuna were caught.

110. Mexico has failed to rebut the legal framework the United States has put forward or the factual bases underlying the conclusion that the eligibility criteria are even-handed. Mexico's attempt to convince the Panels not to employ the comprehensive approach to assessing the risk profile of setting on dolphins and the potentially eligible fishing methods outlined by the Appellate Body in the previous compliance proceeding should be rejected. Further, Mexico has failed to show that setting on dolphins is not inherently harmful to dolphins and does not cause unobservable harms, or that other fishing methods fulfill either of these characteristics. Mexico also has failed to show that, as a general matter, any of the potentially eligible fishing methods cause as high a level of direct dolphin mortalities as setting on dolphins does in the ETP large purse seine fishery.

111. For these reasons, the eligibility criteria cannot support a finding of less favorable treatment under Article 2.1.

### 2. The Certification Requirements Are Even-Handed

112. In its previous written submissions, the United States has explained that the ETP large purse seine fishery has a "special risk profile" for dolphins distinct from those of other fisheries because it is the only fishery where vessels are capable of and permitted to use the uniquely dangerous fishing method of setting on dolphins.[261] Moreover, the United States has explained that the difference in certification requirements is commensurate with those differences in risk, and, as such, the requirements are calibrated to the risk – *i.e.*, they are even-handed.

113. In section IV.B of its second written submission, Mexico again elects not to present its argument within the legal framework provided by the Appellate Body but to continue to claim that the certification requirements are not even-handed under alternative legal tests that contradict the legal test that applies in this dispute. The United States has already explained why those alternative legal tests are incorrect and will not repeat those arguments here.[262] Rather, this section shows that Mexico has failed to rebut the U.S. points concerning the ETP large purse seine fishery and responds to Mexico's allegations concerning the differences in the certification requirements. Specifically, subsection (a) reviews the evidence showing that the ETP large purse seine fishery has a higher risk profile for dolphins than the fisheries where only a captain certification is required. Subsection (b) responds to Mexico's assertions concerning the

[261] *See* U.S. First Written Submission, paras. 124-131; U.S. Second Written Submission, paras. 142-144.

[262] *See supra*, sec. II.A..

certification requirements and shows that differences in the requirements are calibrated to these differences in risk to dolphins posed by different fisheries.

### a. The ETP Large Purse Seine Fishery Has a Different Risk Profile than Other Fisheries

114. As explained previously, the evidence on the record establishes that the ETP large purse seine fishery has a "special risk profile"[263] distinct from other fisheries because it is the only fishery where widespread and systematic setting on dolphins occurs.[264] Indeed, intentional sets on cetaceans are banned in many purse seine fisheries in other ocean areas.[265] Further, data from other purse seine fisheries, as well as other types of fisheries, demonstrate that the frequency and intensity of interactions between dolphins and fishing vessels in the ETP large purse seine fishery is unparalleled.[266] This unique level of interaction is also reflected in direct mortality figures, which are generally higher in the ETP large purse seine fishery than in other fisheries.[267]

115. Mexico has largely declined to respond to the evidence on the record in these proceedings. In its first written submission, Mexico merely stated that dolphins suffer adverse effects in other fisheries.[268] In its second written submission, Mexico reiterated that "other fishing methods . . . regularly affect dolphins."[269] The only fisheries Mexico referenced were gillnet fisheries other than those designated under the determination provisions, and Mexico provided no evidence on such fisheries.[270] These claims do not rebut the U.S. showing in this regard. The fact that other fisheries can "affect dolphins," (even "regularly," which is refuted by the evidence on the record with respect to many fisheries[271]) does not show that they have an equivalent risk profile to the ETP large purse seine fishery. Further, there is no evidence on the record showing high levels of dolphin mortality in any currently operating gillnet fishery for tuna other than the Indian Ocean fisheries designated under the determination provision.[272]

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[263] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.398 (referring to the "special risk profile of the ETP large purse seine fishery"); *see also id.* paras. 7.240-242, 7.244-245, and the minority panelist opinion at paras. 7.278-283.

[264] *See* U.S. First Written Submission, paras. 48-59, 124-131; U.S. Second Written Submission, para. 143.

[265] U.S. First Written Submission, para. 47 (citing WCPFC Resolution 2011-03 (Exh. US-54); IOTC Resolution 13/04 (Exh. US-55); 16 U.S.C. § 1372(a)(1)-(2) (Exh. US-57)).

[266] *See* U.S. First Written Submission, paras. 127-129.

[267] *See* U.S. First Written Submission, para. 130 (citing, among other things, Tables Summarizing Fishery-by-Fishery Evidence on the Record, table 2 (Exh. US-13)).

[268] *See* Mexico's First Written Submission, para. 283.

[269] Mexico's Second Written Submission, para. 91.

[270] Mexico's Second Written Submission, para. 91.

[271] *See* U.S. First Written Submission, para. 55 (showing, for example, that the best available evidence indicates that in every fishery for which data are available, *any* dolphin interaction occurred in less than 5 percent of sets, and in less than 1 percent of sets for most fisheries).

[272] *See* U.S. Second Written Submission, para. 107 (describing Mexico's evidence concerning particular gillnet fisheries).

116. Thus, the evidence on the record establishes that the ETP large purse seine fishery has a high risk profile for dolphins, relative to other fisheries. Indeed, the previous compliance panel suggested that this was also the case based on the evidence on the record in that proceeding.[273]

### b. The Certification Requirements Are Calibrated to the Differences in Risk to Dolphins

117. As the United States has explained, the difference in the certification requirements between the ETP large purse seine fishery and other fisheries is commensurate with the different risk profiles of these fisheries, and thus is calibrated to the different risks to dolphins posed by tuna fishing in different ocean areas.[274] First, the evidence does not suggest that there *is* a difference in accuracy between certifications made in the ETP large purse seine fishery and those made in other fisheries, particularly since verifying that tuna meets the eligibility criteria is more difficult in the ETP large purse seine fishery.[275] Second, any difference that might exist in the "margin of error" between certifications made inside and outside the ETP large purse seine fishery has a rational connection to the difference in risk profiles, as discussed by the minority panelist in the first compliance panel's report.[276]

118. Mexico has not proven otherwise. Mexico appears to make two factual arguments with regard to the certification requirements: 1) that the captain training requirement created by the 2016 IFR is "meaningless"[277] because the training is "ambiguous" as to how "intentional" and "mortality or serious injury" are defined[278] and there is "no mechanism to verify" that captains have taken the training[279]; and 2) that certifying compliance with the eligibility criteria in the ETP large purse seine fishery is not "much more difficult" as the United States has claimed.[280] However, the evidence establishes that both of Mexico's arguments are incorrect.

119. First, both of Mexico's arguments that the captain training is "meaningless" are contradicted by the evidence with regard to Mexico's claim regarding the clarity of the captain training program. The United States notes that it is, in fact, much more detailed and clear with

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[273] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.245.

[274] *See* U.S. First Written Submission, paras. 132-142; U.S. Second Written Submission, paras. 142-146.

[275] *See* U.S. First Written Submission, paras. 132-139.

[276] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.276 (min. op.) ("[W]here the probability of dolphin mortality or serious injury is smaller – because, for instance, the degree of tuna-dolphin association is less likely – the United States may accept a proportionately larger margin of error. Conversely, where the risks are higher, it may be appropriate to tolerate only a smaller margin of error."); *id.* para. 7.277 ("As I see it, it is entirely reasonable for governments, in the course of enforcing regulations, to vary the intensity of their detection mechanisms in accordance with the historical incidence of and future potential for violations. Provided 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.").

[277] Mexico's Second Written Submission, para. 88.

[278] Mexico's Second Written Submission, para. 88.

[279] Mexico's Second Written Submission, para. 88; *see also id.* para. 93.

[280] Mexico's Second Written Submission, para. 89.

respect to the dolphin safe certifications than the analogous trainings for the ETP large purse seine fishery. For example, Mexico claims that it is ambiguous how the word "intentional" is applied, but the training states that if deploying the net or gear on or around dolphins was "intentional[]" (*i.e.*, deliberate or on purpose) then the tuna is not dolphin safe, whereas if the encirclement of a dolphin is "accidental" (in the sense of the dolphin being seen only after the set was commenced), then there is no "intentional deployment".[281] This is significantly more guidance than is given to captains in the AIDCP training,[282] and at least equal to the guidance given by the RFMOs that proscribe intentionally setting on cetaceans.[283]

120. The NOAA training is also much more detailed concerning identifying mortalities and serious injuries than the AIDCP captain training and the AIDCP requirements for observers.[284] None of the 160 slides in the AIDCP captain training presentation cover identifying dolphin mortality or serious injury,[285] despite the fact that the AIDCP definition of "dolphin safe" refers to both.[286] The guidelines for the training of observers also do not address this issue.[287] Further, Mexico's suggestion that only a marine biologist could identify whether a hook is placed "in lip only" and with "no trailing gear" or whether it has the potential to "become snagged on something in the environment" is illogical, as these descriptions are self-explanatory, and unsupported, in that Mexico points to no aspect of the college education of a marine biologist

[281] "Dolphin-Safe Captain's Training Course," at 5 (Mar. 23, 2016) (Exh. US-10). Mexico appears to have submitted this same exhibit as Exhibit MEX-56. *See* "Dolphin-Safe Captain's Training Course" (Mar. 23, 2016) (Exh. MEX-56).

[282] *See* IATTC, "Captains' Training" (Exh. US-70) (providing no information on whether a set on a dolphin is intentional or not, although vessel captains are prohibited from making dolphin sets "after reaching the DML" and making dolphin sets "without a DML" and also providing no information on whether a set on a live whale shark is intentional, although captains are prohibited from setting "on live whale sharks"); AIDCP, Training Module: Dolphins (Exh. US-71) (same).

[283] *See* WCPFC, Conservation and Management Measure 2011-03 (Mar. 2013) (Exh. US-54) (requiring that parties "prohibit their flagged vessels from setting a purse seine net on a school of tuna associated with a cetacean in the high seas and exclusive economic zones of the Convention Area, *if the animal is cited prior to commencement of the set*") (emphasis added); IOTC, Resolution 13/04 on the Conservation of Cetaceans (2013) (Exh. US-55) (1st 21.5 Exh. US-12) (requiring that parties "prohibit their flagged vessels from *intentionally* setting a purse seine net around a cetacean in the IOTC area of competence, *if the animal is sighted prior to the commencement of the set*") (emphasis added); ICCAT, Draft Recommendation on Monitoring and Avoiding Cetacean Interactions in ICCAT Fisheries (2014) (Exh. US-56) (stating that parties "shall prohibit their flag vessels from using a purse seine net to *intentionally encircle* a cetacean in the Convention area") (emphasis added); *see also* IATTC, Resolution C-13-04 on the Collection and Analysis of Data on Fish-Aggregating Devices," at 3 (June 2013) (Exh. US-165) (stating that parties "shall prohibit their flag vessels from setting a purse seine on a school of tuna associated with a live whale shark, if the animal is sighted prior to the commencement of the set").

[284] *See* Dolphin-Safe Captain's Training Course," at 6-8 (Exh. US-10) (providing a definition of "serious injury" and two indicative lists of serious and potentially serious injuries).

[285] *See* IATTC, "Captains' Training" (Exh. US-70); AIDCP, Training Module: Dolphins (Exh. US-71).

[286] Agreement on the International Dolphin Conservation Program, at 3 (2009) (Exh. US-5) (referring to tracking "tuna harvested with and without *mortality or serious injury* of dolphins") (emphasis added).

[287] *See* AIDCP, Guidelines for Technical Training of Observers, Doc. OBS-2-03b (Exh. US-72).

that addresses this issue.[288] Further, the claim that the captain "may not even be watching"[289] does not distinguish captains from observers. An observer could also not be watching except that both certifiers are *required* to be watching so as to make the certification.

121. With regard to Mexico's argument regarding a "mechanism to verify" compliance, Mexico repeatedly claims that because other national governments do not impose the training requirement, or because other national governments have compliance issues with RFMO or other fishing-related rules, there is no mechanism to ensure captains take the course.[290] But this claim is at odds with the nature of the tuna industry and the U.S. measure. As the United States has explained, and as Mexico acknowledges, the U.S. tuna product market is served by private tuna companies (predominantly large international companies).[291] These companies are subject to the requirements of the U.S. measure (as well as numerous other requirements), and it is they that must ensure that the products they sell meet the conditions of U.S. law, including that the captain certifications are accurate.

122. Mexico's own evidence explains that this is the case. Exhibit MEX-58 is a statement by Tri Marine, one of the "world's largest tuna suppliers" serving the U.S. market that "own[s] and operate[s] vessels, canneries, and suppl[ies] major US private labels and brands of canned tuna."[292] Tri Marine objected to the training program because "it places a significant and undue administrative burden on US tuna businesses and international supply chains."[293] Tri Marine further explained that there are various "complications *we face* implementing this interim final rule" and referred to the "substantial administrative burden *companies like Tri Marine face in ensuring the requirements are met* across large and sometimes complex supply chains."[294] Tri Marine's statement makes it clear that it does not rely on any of the countries with which it deals to "ensur[e] the requirements are met" across its supply chain, but rather assumes the "administrative burden" itself.[295]

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[288] *See* Mexico's Second Written Submission, para. 89.

[289] Mexico's Second Written Submission, para. 89.

[290] *See, e.g.*, Mexico's Second Written Submission, para. 93.

[291] *See* U.S. Written 22.6 Submission, para. 16 (explaining that 80 percent of the U.S. canned tuna market is served by Bumblebee, Chicken of the Sea, and StarKist, and that half the market is supplied by canneries located in the United States and its territories); *see also* Mexico's Second Written Submission, para. 98 (noting that "processors in Thailand (the largest exporter of tuna products to the United States) obtain 80 percent of their supply of tuna from the world's three major tuna trading companies – FCF, TriMarine, and Itochu"); FFA, Market and Industry Dynamics, at 26 (Exh. MEX-76) (explaining that, globally, there are about "144 tuna processing facilities in operation producing canned tuna products and/or frozen cooked tuna loins"); *id.* at 169-177 (explaining the dominance of Bumble Bee, StarKist, and Chicken of the Sea in the U.S. market, including that they "command upwards of 80% of the US market").

[292] *See* Letter to William Stelle, NMFS West Coast Region, from Matthew Owens, Director of Environmental Policy and Social Responsibility, Tri Marine, LLC, Apr. 22, 2016, at 1 (Exh. MEX-58).

[293] Letter to William Stelle from Matthew Owens, at 1 (Exh. MEX-58).

[294] Letter to William Stelle from Matthew Owens, at 1-2 (Exh. MEX-58) (emphasis added).

[295] The same dynamic occurs in the tracking and verification realm, as discussed further in the next section.

123. Further, U.S. law directly requires companies and captains that produce tuna product for the U.S. market to ensure that their products comply with U.S. law. For example, and as discussed in the first compliance proceeding,[296] there are legal consequences for submitting false certifications to NMFS, including under the following statutory provisions:

- *Criminal Penalties for Fraudulently Importing or Bringing in Merchandise.* 18 U.S.C. § 545 establishes criminal liability for any person who "knowingly and willfully, with intent to defraud the United States" brings or attempts to bring into the United States "any merchandise which should have been invoiced, or makes out or passes . . . through the customhouse any false, forged, or fraudulent invoice, or other document or paper."[297] Penalties include fines of up to $250,000 and up to 5 years imprisonment,[298] and merchandise entered in violation of this law may be forfeited.[299] Depending on the facts of the particular case, tuna product companies, as well as U.S. and foreign captains, could be held liable under this provision for false dolphin safe certifications.

- *Penalties for False Labeling.* Under the Lacey Act Amendments of 1981, 16 U.S.C. § 3372(d), it is unlawful for any person "to make or submit any false record, account, or label for, or any false identification of" any fish that has been or is intended to be imported, transported, sold, purchased, or received from a foreign country or transported in interstate or foreign commerce.[300] Administrative penalties of up to $25,464 per offense may be available,[301] as well as criminal penalties of up to $250,000 and 5 years imprisonment for knowing violations,[302] and forfeiture of the product.[303] As essentially all tuna product is transported in interstate or foreign commerce, tuna product companies and U.S. and foreign captains could be held liable under this statute for false dolphin safe certifications.[304]

- *Criminal Penalties for Making a False Statement or Writing.* 18 U.S.C. § 1001 establishes criminal liability for any person who "knowingly and willfully" "makes a

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[296] *See* U.S. Response to 1st 21.5 Panel Question 18(a), paras. 92-100.

[297] 18 U.S.C. § 545 (Exh. US-166).

[298] 18 U.S.C. § 545 (Exh. US-166_) (referring to fines under "this title"); 18 U.S.C. § 3571(b)(3) (Exh. US-167) (showing the maximum fine for a felony as US$250,000); 18 U.S.C. § 3559(a) (Exh. US-168) (classifying an offense that is not specifically classified by letter grade but which provides for a penalty as "less than twenty-five years but ten years or more years" as a Class C felony).

[299] 18 U.S.C. § 545 (Exh. US-166).

[300] 16 U.S.C. § 3372(d) (Exh. US-169).

[301] *See* U.S. Dep't of Commerce, "Civil Monetary Penalty Adjustments for Inflation," 81 Fed. Reg. 36,454 (June 7, 2016) (Exh. US-170).

[302] 16 U.S.C. § 3373(d)(3) (Exh. US-171); 16 U.S.C. § 3374(a)(1) (Exh. US-172); 18 U.S.C. § 3571 (Exh. US-167).

[303] 16 U.S.C. § 3373(d)(3) (Exh. US-171); 16 U.S.C. § 3374(a)(1) (Exh. US-172).

[304] In addition, as also noted in the U.S. Response to 1st 21.5 Panel Question 18(a), there are penalties for selling fish caught or sold in violation of foreign law.

materially false, fictitious, or fraudulent statement or representation" or "makes or uses any false writing or documents knowing the same to contain any materially false, fictitious, or fraudulent statement or entry" to the U.S. government in any matter within its jurisdiction.[305] Violation of this provision may be punished by a fine of up to $250,000 and/or up to 5 years imprisonment.[306] Section 1001 could potentially cover false statements on a Form 370 or a dolphin safe certification, if the captain or observer intentionally lied. Both U.S. and foreign captains could potentially be liable under § 1001 for making a false certification.

- *Administrative Penalties for Violating the Dolphin Safe Regulations.* 16 U.S.C. § 1375 provides for a civil administrative penalty for "any person who violates any provision of this subchapter or of any permit or regulation issued thereunder."[307] The penalty may be up to $27,500 per violation and up to $100,000 and/or up to a year's imprisonment per knowing violation.[308] The dolphin safe regulations fall within the scope of this provision. Thus making a false statement or certification about the dolphin safe status of tuna on an FCO would violate 50 C.F.R. §§ 216.24(f)(2) and (4), which require that a "properly completed" and "accurate" Form 370 accompany all imported tuna product.[309] This provision covers those who produce, import, distribute, or sell tuna product.

124. Second, contrary to Mexico's claim,[310] the United States has shown that the task of making the dolphin safe certification is potentially much more difficult in the ETP large purse seine fishery than outside it. Specifically, the United States has established that both the number and frequency of interaction is exponentially greater in the ETP large purse seine fishery than it is for other fisheries.[311] When multiple vessels and divers are interacting with hundreds of dolphins for an extended period of time, particularly where some of those interactions happen far from the observer's location on the seiner, it is obviously more difficult to ascertain the fate of every dolphin involved than when only a few dolphins (or one) are encountered every 100 sets or so.[312] The previous compliance panel confirmed that this is the case, explaining:

> [G]iven 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

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[305] 18 U.S.C. § 1001(a) (Exh. US-173).

[306] 18 U.S.C. § 1001(a) (Exh. US-173) (referring to fines under "this title"); 18 U.S.C. § 3571(b)(3) (Exh. US-167) (showing the maximum fine for a felony as US$250,000); 18 U.S.C. § 3559(a) (Exh. US-168) (classifying an offense that is not specifically classified by letter grade but which provides for a penalty as "less than ten years but five or more years" as a Class D felony).

[307] 16 U.S.C. § 1375(a)(1) (Exh. US-174).

[308] 16 U.S.C. § 1375(b) (Exh. US-174); 18 U.S.C. § 3571 (Exh. US-167); 81 Fed. Reg. 36,454 (Exh. US-170).

[309] 50 C.F.R. §§ 216.24(f)(2), (f)(4) (Exh. US-3).

[310] *See* Mexico's Second Written Submission, para. 89.

[311] *See* U.S. First Written Submission, paras. 134-138.

[312] *See* U.S. First Written Submission, paras. 55, 137-138.

> net on the other, the AIDCP parties concluded that it was appropriate to require a vessel *capable and permitted* to engage in such a dangerous activity to carry a *single* person to observe the impact of the vessel on the dolphins that it was chasing and capturing.[313]

125. Thus, as the United States has explained, Mexico has not shown a difference in accuracy between the certifications made in the ETP large purse seine fishery and the certifications made outside it. Further, as the United States has explained,[314] to the extent that there is any difference in the "margin of error" between certifications made inside and outside the ETP large purse seine fishery, that difference is commensurate with the difference in risk profiles, as discussed by the minority panelist in the first compliance panel's report.[315]

126. In light of the above, Mexico has not rebutted the U.S. showing that the certification requirements are calibrated to the risk profiles of different fisheries and, as such, are even-handed and thus cannot support a finding of less favorable treatment.

### 3. The Tracking and Verification Requirements Are Even-Handed

127. In its previous submissions, the United States explained that the evidence on the record shows that the ETP large purse seine fishery has a "special risk profile" for dolphins distinct from those of other fisheries.[316] Moreover, the United States has explained that the difference in the tracking and verification requirements that apply in the ETP large purse seine fishery and those that generally apply in other fisheries, as to depth, accuracy, and degree of government oversight, is commensurate with those differences in risk, and, as such, the requirements are calibrated to the risks to dolphins posed by different tuna fisheries and, thus, are even-handed.[317]

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[313] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.239-245 (citing U.S. Response to 1st 21.5 Panel Question No. 30, para. 168, rejecting Mexico's argument that the ETP is not "unique or different in any way that would justify the United States' different treatment of the ETP purse seine fishery and other fisheries," and finding, based on the U.S. argument, that it "would find that the United States has made a *prima facie* case that the different certification requirements stem exclusively from a legitimate regulatory distinction") (emphasis added).

[314] *See* U.S. First Written Submission, paras. 140-141.

[315] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.276 (min. op.) ("[W]here the probability of dolphin mortality or serious injury is smaller – because, for instance, the degree of tuna-dolphin association is less likely – the United States may accept a proportionately larger margin of error. Conversely, where the risks are higher, it may be appropriate to tolerate only a smaller margin of error."); *id.* para. 7.277 ("As I see it, it is entirely reasonable for governments, in the course of enforcing regulations, to vary the intensity of their detection mechanisms in accordance with the historical incidence of and future potential for violations. Provided 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."); *see also* U.S. First Written Submission, paras. 140-141; U.S. Second Written Submission, para. 145.

[316] *See* U.S. First Written Submission, para. 171; *id.* secs. IV.B, V.C.2.b.iii.A; *see also US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.398 (referring to the "special risk profile of the ETP large purse seine fishery").

[317] *See* U.S. First Written Submission, paras. 149-168 (describing the similarities and differences of the two systems); *id.* at paras. 172-178 (describing how the differences are calibrated to the different risk profiles).

128. In section IV.C of its second written submission, Mexico again elects not to present its argument within the legal framework provided by the Appellate Body but to continue to claim that the certification requirements are not even-handed under alternative legal tests that contradict the legal test applicable in this dispute. The United States has already explained why those alternative legal tests are incorrect and will not repeat those arguments here.[318] Rather, subsections (a) and (b) explain that the ETP large purse seine fishery has a higher risk profile for dolphins than the fisheries where the regular NOAA requirements apply, and that the differences in tracking and verification requirements are calibrated to these differences in risk. In this regard, the United States responds to the allegations that Mexico has made that bear on the differences in tracking and verification requirements.

### a. The ETP Large Purse Seine Fishery Has a Different Risk Profile than Other Fisheries

129. For the reasons summarized in section II.B.2.a above and described in detail in previous submissions, the evidence on the record establishes that the ETP large purse seine fishery has a "special risk profile" distinct from other fisheries because it is the only fishery where widespread and systematic setting on dolphins occurs.[319] Mexico has not responded to this evidence in the context of the tracking and verification requirements,[320] and has not otherwise rebutted it.[321] Thus, the evidence on the record establishes that the ETP large purse seine fishery has a high risk profile for dolphins, relative to other fisheries in general.

### b. The Tracking and Verification Requirements Are Calibrated to the Differences in Risk to Dolphins

130. The difference in the tracking and verification requirements for tuna caught in the ETP large purse seine fishery (the AIDCP system) versus the general rule for other fisheries (the NOAA system) is commensurate with the different risk profiles of these fisheries and thus is calibrated to the risks to dolphins posed by tuna fishing in different ocean areas. As the United States explained in its first written submission, the difference between the two regimes in terms of accuracy, depth, and degree of government oversight is small.[322] Further, the difference in the requirements, and any resulting "margin of error" of the two systems, has a rational connection to the different risk profiles of the ETP large purse seine fishery and other fisheries, in general.[323] Mexico's evidence and arguments do not refute this conclusion.

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[318] *See, supra*, sec. II.A..

[319] *See supra*, sec. II.B.2.a; U.S. Second Written Submission, paras. 142-144; U.S. First Written Submission, secs. IV.B, V.C.2.b.

[320] *See* Mexico's First Written Submission, paras. 285-300; Mexico's Second Written Submission, paras. 95-103.

[321] *See supra*, sec. II.B.2.a.

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

[323] *See* U.S. First Written Submission, paras. 172-178.

131. First, Mexico has not rebutted the U.S. explanation that there is no difference in the "depth" to which the two systems track tuna. In this regard, Mexico's claim that the first compliance panel found that the United States "failed to prove that tuna products companies could trace tuna back to the vessel from which it was caught and to a related dolphin-safe certificate" is not accurate.[324] In fact, that panel found that "on the basis of the evidence submitted to us by the United States, it appears that outside the ETP, tuna can be traced back to the *vessel* and trip on which it was caught."[325] The first compliance panel found that the tuna was not traceable back to the *well* in which it was stored under the NOAA system but was traceable to the well under the AIDCP system.[326] As the United States has explained, however, under the 2016 amended measure, the depth of tracking required under the two systems is the same, for purposes of segregating dolphin-safe and non-dolphin safe tuna.[327]

132. Second, Mexico's assertions that the supply chain of many tuna companies is "complex" does not suggest a difference in the "accuracy" of the tracking and verification systems inside and outside the ETP large purse seine fishery. Mexico suggests that the relevant comparison is between "the Mexican industry," which is "vertically integrated" and other "major tuna products companies,"[328] but this is not the case. Rather, the relevant comparison is between the record-keeping required under the AIDCP and the record keeping required under the NOAA system.[329] And as the United States has explained, the requirement is the same: all owners or transporters of tuna must keep dolphin-safe and non-dolphin safe tuna separate and must keep the captain certification (and, if applicable, the observer certification) associated with the tuna (either physically or electronically).[330] Companies serving the U.S. tuna product market have systems in place for meeting this requirement.

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[324] *See* Mexico's Second Written Submission, para. 95 (citing *US – Tuna II (Mexico) (Article 21.5 – Mexico) (Panel)*, paras. 7.356-7.359 (BCI) and 7.361).

[325] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.356.

[326] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.359.

[327] *See* U.S. First Written Submission, paras. 156-159.

[328] *See* Mexico's Second Written Submission, paras. 96-100.

[329] *See* U.S. First Written Submission, para. 161.

[330] *See* U.S. First Written Submission, paras. 161-162; *see also* 50 C.F.R. § 216.91(a)(5) (Exh. US-2) ("(5) Other fisheries – chain of custody recordkeeping. By a vessel in a fishery other than one described in paragraph (a)(1) or (2) of this section unless: (i) For tuna designated dolphin-safe that was harvested on a fishing trip that began on or after May 21, 2016, in addition to any other applicable requirements: (A) The importer of record or U.S. processor of tuna or tuna products, as applicable, maintains information on the complete chain of custody, including storage facilities, transshippers, processors, re-processors, and wholesalers/distributors to enable dolphin-safe tuna to be distinguished from non-dolphin-safe tuna from the time it is caught to the time it is ready for retail sale …"); 2016 IFR, at 15,447 (Exh. US-7).

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134. Other tuna companies have similar systems. [[

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[331] *See* "Lot Tracking Procedures," at 1 (2016) (BCI) (Exh. US-175); *see also* "Tracking System Overview," at 1-2 (2014) (BCI) (Exh. US-176) [[

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[332] *See* "Lot Tracking Procedures," at 1 (BCI) (Exh. US-175); *see also id.* at 3 [[

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[333] *See* "Lot Tracking Procedures," at 1 (BCI) (Exh. US-175); *see also* Tracking System Overview," at 1-2 (BCI) (Exh. US-176) [[

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[334] *See* "Lot Tracking Procedures," at 1 (BCI) (Exh. US-175); *see also id.* at 4 [[

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]]; *see also* Tracking System Overview," at 1-2 (BCI) (Exh. US-176) [[

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[335] *See* "Lot Tracking Procedures," at 1 (BCI) (Exh. US-175); *see also id.* at 6 [[
]]; "Tracking System Overview," at 1-2 (BCI) (Exh. US-176) [[

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[336] *See* "Reference Reports for NMFS Periodic Audit," at 2 (2014) (BCI) (Exh. US-177) [[

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[337] *See* "Reference Reports for NMFS Periodic Audit," at 4-15 (BCI) (Exh. US-177) [[

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[338]]] Further, the United States is a party to the AIDCP and has promulgated regulations implementing its tracking and verification system.[339] [[

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135. Third, and relatedly, Mexico's assertions concerning the regulatory requirements of third countries are not relevant to the accuracy of the AIDCP or NOAA systems. The requirements of the NOAA system are imposed directly on tuna companies that produce dolphin safe tuna product for the U.S. market.[340] Specifically, the record-keeping requirements are imposed on U.S. processors or importers – and through them on the storage facilities, transshippers, processors, re-processors, and wholesalers/distributors that supply them – and the physical segregation requirements are imposed directly on the producers of dolphin safe tuna product for the U.S. market.[341] And, as described above, the companies that produce for the U.S. market have systems in place to meet these requirements, *i.e.*, systems that track tuna processed by the company from the harvesting vessel and trip (and associated captain's statement), through any carrier vessel or loining plant, and through processing. Whether other governments have tracking and verification requirements is thus not relevant to the accuracy of the NOAA system.

136. Finally, the United States has already explained why Mexico's argument that any difference in the AIDCP and NOAA systems necessarily means that the tracking and verification requirements are not even-handed is incorrect.[342] Rather, the test is whether any difference in the requirements is calibrated to "the risks to dolphins arising from different fishing methods in different areas of the oceans."[343] Mexico has not shown that there is a substantial difference in the AIDCP and NOAA tracking and verification systems or refuted the U.S. showing that any difference that exists is reasonable in light of the significant differences in the risk profile of the

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[338] *See, e.g.*, "Reference Reports for NMFS Periodic Audit" (BCI) (Exh. US-177).

[339] *See* 50 C.F.R. 216.93(c)(1) (Exh. US-2).

[340] *See* U.S. First Written Submission, para. 146. In this regard, we note that there is a finite number of such companies – about 150 prepared tuna product companies in the world – and that three of these supply 80 percent of the U.S. market. *See* FFA, Market and Industry Dynamics, at 26 (Exh. MEX-76) (explaining that, globally, there are about "144 tuna processing facilities in operation producing canned tuna products and/or frozen cooked tuna loins"); *id.* at 169-177 (explaining that Bumble Bee, StarKist, and Chicken of the Sea "command upwards of 80% of the US market").

[341] *See* U.S. First Written Submission, para. 146.

[342] *See supra*, sec. II.A.2.b; U.S. Second Written Submission, paras. 39-43.

[343] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.169 ("[I]n the light of the circumstances of this dispute and the nature of the distinctions drawn under the amended tuna measure, we are of the view that, in applying the second step of the 'treatment no less favourable' requirement under Article 2.1 of the TBT Agreement, 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.") (emphasis added); *id.* n.586 ("We also agree with the United States that acceptance of such an approach is implicit in the Appellate Body's statement *that requiring certification by an observer*, rather than by a captain, 'may be appropriate in circumstances *in which dolphins face higher risks of mortality or serious injury*.") (emphasis added).

ETP large purse seine fishery and other fisheries, as a general matter.[344]

137. Thus, Mexico has not rebutted the U.S. showing that the tracking and verification requirements are even-handed and cannot support a finding of less favorable treatment.

### 4. The Determination Provisions Are Even-Handed

138. As the United States has explained, the 2016 IFR amended the design of the determination provisions to address the two issues identified in the DSB recommendations and rulings as the basis for the finding that the detrimental impact of the U.S. measure did not stem exclusively from legitimate regulatory distinctions.[345] Additionally, the United States has now designated the ten Indian Ocean gillnet fisheries under the provisions, such that tuna product produced from these fisheries is subject to enhanced certification and tracking and verification requirements.[346] There is no known or readily available evidence that any other fishery exhibits a "regular and significant" level of dolphin mortality and serious injury.[347] Accordingly, in design and application, the determination provisions are even-handed in that they "ensure that similar situations are treated similarly under the amended tuna measure."[348]

139. Mexico does not appear to contest that the current design of the determination provision under the measure is even-handed, and thus the issue does not seem to be in dispute in these proceedings.[349] With respect to application, Mexico advances several arguments that the determination provisions are not applied in an even-handed manner, namely: (1) the designated fisheries do not produce for the U.S. tuna product market;[350] (2) that the U.S. explanation of the methodology behind the designations is "convoluted";[351] and, (3) that the United States should have designated other fisheries as well.[352] None of these arguments establish that the application of the determination provisions is not even-handed.

140. With respect to Mexico's first argument, it is correct that the Indian Ocean gillnet fisheries do not produce for the U.S. tuna product market. Indeed, as the United States has

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[344] *See* U.S. First Written Submission, paras. 172-178.

[345] *See* U.S. First Written Submission, paras. 74-81.

[346] U.S. Second Written Submission, paras. 169-174; NOAA, "Taking and Importing of Marine Mammals and Dolphin-Safe Tuna Products," 81 Fed. Reg. 66,625 (Exh. US-131).

[347] *See* U.S. Second Written Submission, paras. 167-168.

[348] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.256; *see also US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.263.

[349] *See* Mexico's Second Written Submission, paras. 104-113.

[350] *See* Mexico's Second Written Submission, para. 104.

[351] *See* Mexico's Second Written Submission, paras. 106-107.

[352] *See* Mexico's Second Written Submission, paras. 108-110.

explained, essentially *no* gillnet fisheries produce for the U.S. tuna product market.[353] If these proceedings were confined to the application of the measure to fisheries that actually serve the U.S. tuna product market or the global canning industry, it would concern only purse seine fisheries, certain longline fisheries, pole and line fisheries, and a few handline fisheries. But, in fact, Mexico has often relied on arguments concerning fisheries that do not produce for the U.S. or global canned tuna markets. In any event, the United States designated these fisheries, not due to any factors concerning the U.S. market (although the United States is mindful of the potential for trade), but because the available evidence suggested that "regular and significant" dolphin mortality and serious injury is occurring and did not designate other tuna fisheries because no known or readily available evidence suggested this was the case.[354]

141. With respect to Mexico's criticism of the methodology by which the determination provisions have been applied, the United States considers that the methodology is consistent with the structure and purpose of the determination provisions and the U.S. measure as a whole, and Mexico does not prove otherwise. A per set measure of dolphin mortality is consistent with the purpose and structure of the measure because it reflects the frequency with which captains would have to determine whether a dolphin was killed or seriously injured in a fishery.[355] Further, it has a solid management basis, as it is used by RFMOs and other regulating authorities to assess dolphin and other bycatch.[356] Taking the ETP large purse seine fishery as a benchmark, although not a perfect method, is consistent with the Appellate Body's suggestion in the previous proceeding.[357] Since the ETP large purse seine fishery was subjected to enhanced certification and tracking and verification requirements in 1997, if a single year were used, 1997 would have been the most appropriate year. However, because using an average is generally preferable from a scientific perspective, NOAA used a 20-year average ending at the present day.[358]

142. Further, given the lack of comprehensive data on per set dolphin mortality in every fishery, NOAA faced a choice between not applying the determination provisions where such

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[353] *See supra*, sec. II.B.1.c.iv; U.S. First Written Submission to the 1st 21.5 Panel; Gilman & Lundin 2009, at 2 (Exh. US-53); Joseph 2003, at 2, 6 (Exh. US-148); William Jacobson Witness Statement, App. 2, 3 (Exh. US-52).

[354] *See* U.S. Second Written Submission, paras. 167-168.

[355] *See* U.S. Second Written Submission, paras. 161-162.

[356] *See* U.S. Second Written Submission, para. 162, n.401 (citing, for example, IATTC, Tunas, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2015, at 121 (2016) (Exh. MEX-6); *id.* at 145; *id.* at Table 3; 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); WCPFC, Fifth Regular Session Summary Report, at xiv (Exh. US-18)).

[357] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.257; U.S. Second Written Submission, para. 135 (noting that the ETP large purse seine fishery "is a somewhat imperfect comparator" in that dolphin safe tuna product produced from the ETP large purse seine fishery is subject to enhanced certification and tracking and verification requirements based on *both* a unique tuna-dolphin association and regular and significant dolphin mortality, and that even if dolphin mortality in the ETP large purse seine fishery fell to zero, the measure would still require enhanced certification and tracking and verification requirements in recognition that setting on dolphins is inherently dangerous for dolphins).

[358] *See* U.S. Second Written Submission, paras. 165-166.

data are unavailable and taking account of the best fishery-specific data available. The United States considered that it was more consistent with the purpose of the measure and the direction of the Appellate Body in the previous proceeding to take the latter course. Evidence of the bycatch rate in certain Indian Ocean fisheries suggested that direct dolphin mortalities were occurring at a comparable or higher rate, on a per set basis, than under the ETP benchmark.[359] Consequently, NOAA requested further information regarding those fisheries, and, having received no new relevant evidence from the governments in question, designated each of the fisheries under the determination provisions based on the best available evidence.[360]

143. Finally, with respect to Mexico's claim that the United States should have also designated other tuna fisheries, as explained previously, the evidence does not support any such designation. From 1997 to 2015, the dolphin mortality rate of dolphin sets in the ETP purse seine fishery was 0.1265 dolphins per set (126.5 dolphins per 1,000 sets).[361] For no other fishery for which per set dolphin mortality data are available does the comparable figure reach anywhere close to that figure.[362] Thus, Mexico is wrong that NOAA did not take into account the evidence regarding other fisheries under the determination provision.[363] NOAA did take such evidence into account and the evidence did not support designating any other tuna fishery. In this regard, it is notable that Mexico points to *no* fishery where the per set mortality exceeds 0.1265 dolphins per set.[364] Indeed, *none* of Mexico's evidence suggests a high rate of dolphin mortalities occurring in any fishery *other* than the Indian Ocean gillnet fisheries.[365]

144. Further, and contrary to Mexico's suggestion, the findings of the original panel do not suggest that the United States should designate other fisheries. Mexico seems to argue that any "lack of information" must be construed to support designation of a particular fishery.[366] But that interpretation of the determination provisions would not be consistent with the guidance of the Appellate Body, which identified two particular problems with the determination provisions and did not suggest that their general structure had to be inverted such that all fisheries were

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[359] *See* U.S. Second Written Submission, paras. 169-173.

[360] *See* U.S. Second Written Submission, para. 174; NOAA, "Taking and Importing of Marine Mammals and Dolphin-Safe Tuna Products," 81 Fed. Reg. 66,625 (Exh. US-131).

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

[362] *See* U.S. Second Written Submission, paras. 167-168; "Dolphin Mortalities Per Set Due to ETP Dolphin Sets and in Other Fisheries" (Exh. US-111); "Tables Summarizing Fishery-by-Fishery Evidence on the Record" (Exh. US-13). Indeed, no other fishery for which per set dolphin mortality data are available does the comparable figure reach anywhere close to the 2015 per set mortality rate.

[363] *See* Mexico's Second Written Submission, para. 112.

[364] *See* Mexico's Second Written Submission, paras. 108-112.

[365] *See* Mexico's Second Written Submission, para. 109 (citing exhibit MEX-78 and stating that it "identified dolphin mortalities in a number of fisheries other than the ETP"); *supra*, sec. II.B.2.a (explaining that Mexico has not identified any evidence of another fishery with a similar risk profile for dolphins to the ETP large purse seine fishery).

[366] *See* Mexico's Second Written Submission, paras. 110-111 (stating that the original panel quoted Exhibit MEX-73's comments concerning lack of data on dolphin mortalities in certain fisheries and claiming that the United States "disregarded this report . . . in deciding how to apply the determination provisions").

designated absent conclusive evidence that there was *no* regular and significant dolphin mortality.[367] Indeed, this would be the exact opposite of a risk-based, even-handed approach. It also would not be consistent with the principle of treating similar fisheries similarly,[368] as many of the fisheries for which comprehensive bycatch data are not available – pole and line fisheries, for example – are known to cause little or no mortality. (Indeed, this is why they have not been prioritized for scientific study.) Mexico's suggestion is thus inconsistent with the previous panel and Appellate Body reports in this dispute.

145. Thus, Mexico has failed to rebut the showing that the application of the determination provision is even-handed.

### 5. The Measure, as a Whole, Is Even-Handed

146. As in its previous submissions, the United States has separately analyzed the four elements of the dolphin safe labeling measure to show that each, standing alone, is even-handed. The reason for discussing the elements separately is that the relationship between each element and the risk profile of the fishing methods or fisheries at issue is most clearly examined on an individual basis, particularly since some aspects of the measure distinguish between fishing methods and others distinguish between fisheries.[369] As the United States has explained, each of the elements is even-handed.

147. Additionally, as the United States has explained in previous submissions, for much the same reasons, the U.S. measure as a whole is also even-handed and thus does not support a finding of less favorable treatment.[370] The eligibility criteria draw a risk-based distinction among fishing methods, making ineligible for the label tuna product produced by a fishing method that is inherently unsafe for dolphins, while allowing tuna produced by other methods to be potentially eligible, provided no direct dolphin mortalities or serious injuries occurred during a particular set or gear deployment. The certification and tracking and verification requirements distinguish between tuna product produced in the high risk ETP large purse seine fishery, where dolphins are "systematically" targeted, and tuna product produced from other fisheries. The determination provisions distinguish high-risk fisheries other than the ETP large purse seine fishery from lower-risk fisheries and subject tuna caught in such fisheries to enhanced certification and tracking and verification requirements similar to those for tuna product produced from the ETP large purse seine fishery.

148. Thus, an analysis of how the measure's four interrelated elements treat the ETP large purse seine fishery and other fisheries shows that the measure, as a whole, is even-handed with regard to the risks of setting on dolphins in the ETP large purse-seine fishery versus other fishing

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[367] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.258, 7.265.

[368] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.256 (stating that the determination provisions "ensure that similar situations are treated similarly under the amended tuna measure").

[369] *See* U.S. First Written Submission, para. 179.

[370] *See* U.S. First Written Submission, paras. 179-186; U.S. Second Written Submission, paras. 176-178.

methods outside that fishery.[371] Accordingly, the detrimental impact stems exclusively from legitimate regulatory distinctions, and the measure does not provide less favorable treatment for purposes of Article 2.1. The Appellate Body in the previous compliance proceeding was clear that the Panels should assess the even-handedness of the measure overall.[372] Mexico fails to address this point. Indeed, as noted above, Mexico argues for the Panels to adopt different legal tests for different regulatory distinctions, which would prevent the Panels from making the holistic assessment of the measure that the Appellate Body has explained is required.[373]

## III. THE AMENDED MEASURE IS JUSTIFIED UNDER ARTICLE XX OF THE GATT 1994

149. The United States has previously explained that the measure meets the conditions of Article XX of the GATT 1994 for the same reasons that it is consistent with Article 2.1,[374] a point that is completely consistent with the Appellate Body's guidance that a measure that is appropriately calibrated to the risk to dolphins will meet the standards of both Article 2.1 and the chapeau of Article XX.[375]

150. In its second written submission, Mexico now claims that the United States has not replied to Mexico's arguments regarding Article XX, stating that "the United States relies on its submissions regarding Article 2.1 of the TBT Agreement in its argument that the requirements of the chapeau to Article XX are met."[376] The United States is perplexed by Mexico's argument. Mexico has not presented a stand-alone argument for Article XX, relying entirely on its Article

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[371] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.159 ("Assessing these discrete sets of requirements in isolation from the other elements of the measure may thus hinder a comprehensive analysis of the design and structure of the measure and how it pursues its objectives. Moreover, the Panel's segmented analysis of the amended tuna measure also appears to have led the Panel to overlook that, at least when *compared* to the original tuna measure, the amended tuna measure as a whole furthers the objectives of providing information to consumers and protecting dolphins from harms arising from tuna fishing.") (emphasis in original); *id.* para. 7.335 ("Furthermore, the fact that the Panel conducted a segmented and isolated analysis of the three sets of requirements under the amended tuna measure was also problematic in the context of an analysis under the chapeau of Article XX. Indeed, a conclusion that a particular element of the amended tuna measure results in arbitrary or unjustifiable discrimination because it is not balanced in relation to particular risk profiles in different fisheries *may not be sustainable* if other integral elements of the measure are also examined. This, in our view, underscores the importance of making an assessment of arbitrary or unjustifiable discrimination in respect of relevant elements of the measure, taking into account relevant interlinkages.") (emphasis added).

[372] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.249; *see also id.* para. 7.342 (making the same point in the context of the GATT 1994 analysis).

[373] *See supra*, sec. II.A.2.b.

[374] *See* U.S. First Written Submission, paras. 191-233.

[375] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.347.

[376] Mexico's Second Written Submission, n.23 ("The United States' reply is limited to Mexico's submissions under Article 2.1. It does not reply to Mexico's submissions regarding the United States' failure to demonstrate that the requirements of the chapeau to Article XX are met. See United States' second written submission, para. 179. In its first written submission, the United States relies on its submissions regarding Article 2.1 of the TBT Agreement in its argument that the requirements of the chapeau to Article XX are met. *See* United States' first written submission, paras. 198-223.").

2.1 argument in both submissions.[377] As the United States has fully rebutted Mexico's argument with regard to Article 2.1, it has done the same with regard to Mexico's Article XX argument.

## IV. CONCLUSION

151. 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.

[377] *See* Mexico's First Written Submission, para. 337 ("Thus, given 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 Written 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.").