UNITED STATES – MEASURES CONCERNING THE IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA PRODUCTS

(AB-2012-2 / DS381)

APPELLEE SUBMISSION OF THE UNITED STATES OF AMERICA

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February 7, 2012

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TABLE OF CONTENTS

Table of Reports Cited

Short Form	Full Citation
Panel Report	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, circulated 15 September 2011
Argentina – Hides and Leather (Panel)	Arbitrator Award, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather – Recourse to Arbitration under DSU Article 21.3(c)*, WT/DS155/10, circulated 31 August 2001
Australia – Apples (AB)	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/R, adopted 17 December 2010
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Belgian Family Allowances (GATT)	GATT Panel Report, *Belgian Family Allowances,* BISD 1S/59, adopted 7 November 1953
Brazil – Tyres (Panel)	Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 17 December 2007, as modified by the Appellate Body Report, WT/DS332/AB/R
Canada – Autos (Panel)	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry,* WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by the Appellate Body Report, WT/DS139/AB/R, WT/DS142
Canada – Wheat Exports (Panel)	*Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted on 27 September 2004, as modified by the Appellate Body Report, WT/DS276/AB/R
China – Auto Parts (AB)	Appellate Body Report, *China – Measures Affecting Imports of Automobile Parts* WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009
Dominican Republic – Cigarettes (AB)	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005

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EEC – Parts and Components (GATT)	GATT Panel Report, *EEC – Regulations on Imports of Parts and Components,* BISD 37S/132, adopted 16 May 1990
EC – Asbestos (Panel)	Panel Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R
EC – Asbestos (AB)	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, adopted 5 April 2001
EC – Bananas III (AB)	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997
EC – Biotech (Canada) (Panel)	Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006
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EC – Sardines (Panel)	Panel Report, *European Communities – Trade Description of Sardines,* WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R
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India – Autos (Panel)	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS/146/R, WT/DS175/R, and Corr.1, adopted 5 April 2002

Indonesia – Autos (Panel)	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry,* WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, and Corr.1 and 2, adopted 23 July 1998, and Corr. 3 and 4
Italian Agricultural Machinery (GATT)	GATT Panel Report, *Italian Discrimination Against Imported Agricultural Machinery,* L/833 BISD, 7S/60, adopted 23 October, 1958
Japan – Alcohol (AB)	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages,* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
Japan – Film (Panel)	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998
Korea – Alcohol (AB)	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages,* WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999
Korea – Beef (AB)	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
Mexico – Soft Drinks (AB)	Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006
Philippines – Distilled Spirits (AB)	Appellate Body Report, *Philippines – Taxes on Distilled Spirits*, WT/DS396/AB/R, WT/DS403/AB/R, adopted on 20 January 2012
Turkey – Rice Licensing (Panel)	Panel Report, *Turkey – Measures Affecting the Importation of Rice*, WT/DS334/R, adopted 22 October 2007
US – Corrosion-Resistant Steel Sunset Review (AB)	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – Carbon Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002

US – Certain EC Products (AB)	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001
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US – COOL (Panel)	Panel Report, *United States – Certain Country of Origin Labeling Requirements*, WT/DS384/R, WT/DS386/R, circulated 18 November 2011
US – FSC (Art. 21.5) (Panel)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002
US – Gasoline (Panel)	Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by the Appellate Body Report, WT/DS2/AB/R
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – Poultry (Panel)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010
US – Section 337 (GATT)	GATT Panel Report, *United States – Section 337 of the Tariff Act of 1930*, BISD 36S/345, adopted 7 November 1989
US – Shrimp (AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998
US – Steel Safeguards (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, and Corr.1, adopted 10 December 2003
US – Tyres (AB)	Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 September 2011

US – Wheat Gluten (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001
US – Wool Shirts (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1

I. Introduction and Executive Summary

1. Under the U.S. voluntary "dolphin safe" labeling provisions that are at issue in this dispute, a producer may opt to inform consumers that a tuna product is "dolphin safe" by including a dolphin-safe label on its tuna product if certain conditions are met. Those conditions include that the tuna used in the product was not caught by intentionally chasing, encircling, and deploying purse seine nets on dolphins (commonly referred to as "setting on dolphins").[1] As the Panel correctly found, these measures do not accord "less favorable treatment" to Mexican tuna products within the meaning of Article 2.1 of the TBT Agreement – in fact, they are origin-neutral in design and application, a reasonable response to a fishing practice that all parties acknowledge is harmful to dolphins[2] and that, because of the regular and significant tuna-dolphin association in the Eastern Tropical Pacific ("ETP") Ocean, is uniquely practiced there on a wide-scale commercial basis.[3] The United States, acting out of concern for the protection of animal life and health[4], developed a standard to ensure consumers are not misled about an issue about which they care greatly[5] – dolphin safety in the harvesting of tuna.

2. Mexico seeks to overturn the Panel's findings on Article 2.1, on the theory that it should be entitled to call its tuna products "dolphin safe" when marketed in the United States, regardless of whether the tuna they contain was caught by setting on dolphins. It asserts that any difference in the proportion of its tuna products that qualify for the label as compared to those of the United States or other Members constitutes an automatic breach of Article 2.1, regardless of why or how the difference arose. Mexico's allegations of discrimination, however, amount to dissatisfaction with a condition that all tuna fishing vessels (whether U.S., Mexican, or otherwise) face: if they wish to have their tuna used in a tuna product labeled "dolphin safe" in the United States, they must meet the conditions established in the U.S. measures, including by not setting on dolphins to catch the tuna. And, Mexico's complaint about the market consequences of the U.S. measures for its tuna products merely reflect the choices that its own producers have made: they continue to set on dolphins to catch tuna and continue to use such tuna in their tuna products, notwithstanding the reality that most U.S. consumers choose not to purchase tuna caught in that manner.

3. Contrary to what Mexico asserts, Article 2.1 of the TBT Agreement does not guarantee Members' producers identical competitive opportunities in each others' markets, regardless of the commercial strategies they choose or how their product is made. It is designed to address measures that result (either in law or in fact) in origin-based discrimination – not to address every difference in how products fare in a given market. By condemning every instance where a measure may accord different treatment to some like products as compared to others, regardless

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[1] *See* Panel Report, para. 7.438 ("It is undisputed, in particular, that the fishing method known as setting on dolphins may result in a substantial amount of dolphin mortalities and serious injuries.").

[2] Panel Report, para. 7.495.

[3] Panel Report, para. 7.306.

[4] *See* TBT Agreement, Preamble, Sixth Recital.

[5] *See* Panel Report, para. 7.182.

of whether the basis for that treatment is (in law or in fact) based on origin, Mexico's theory of Article 2.1 is at odds with the text of Article 2.1, in context and in light of the object and purpose of the TBT Agreement, as well as numerous panel and Appellate Body reports interpreting similar nondiscrimination obligations. It is also at odds with the Members' right to adopt standards and technical regulations under the TBT Agreement.

4. Standards and technical regulations, by definition, set out characteristics for products and their related processes and production methods. By nature, they establish distinctions between products. Products that possess certain characteristics will be considered to conform to a particular technical regulation or standard while those that posses other characteristics will not. Being able to distinguish among products on this basis serves a wide range of important purposes such as helping to facilitate the connectivity and compatibility of inputs sourced in global markets; managing the flow of product-related information through complex and increasingly global supply chains; helping achieve important regulatory and societal objectives, such as allowing regulators and consumers to discern between safe and unsafe products or products that contribute or detract from environmental protection; and promoting more environmentally-sound or socially-conscious production methods. If the mere fact that a technical regulation distinguishes between like products renders it incompatible with Article 2.1, it is difficult to understand how any technical regulation would not survive WTO scrutiny. In short, beyond contradicting ample legal authority, Mexico's interpretation of the relevant obligations is fundamentally at odds with the fact that the TBT Agreement expressly recognizes Members' right to adopt technical regulations to fulfil legitimate objectives.

5. Perhaps recognizing the error of its legal approach, Mexico offers a novel interpretation of Article 2.1 that would essentially read the sixth preambular paragraph of the TBT Agreement into the text of Article 2.1 and deem any technical regulation a breach of Article 2.1 if it could not be justified under a quasi-Article XX analysis. As elaborated below, there is no basis for Mexico's interpretation.

6. Contrary to Mexico's assertions, the Panel properly interpreted Article 2.1 of the TBT Agreement and applied this interpretation to the evidence before it. The Panel examined the U.S. measures and found that on their face they do not afford different treatment to Mexican tuna products than to like domestic products or tuna products originating in other countries. It then considered the evidence before it regarding whether the U.S. measures – although origin-neutral on their face – in fact accorded less favorable treatment to imported products. In doing so it considered the range of evidence before it, concluding that none of the evidence supported the conclusion that the U.S. measures accorded less favorable treatment to Mexican tuna products.

7. For example, the Panel considered that in 1990, the year the U.S. Dolphin Protection Consumer Information Act ("DPCIA") (the law containing the requirement that tuna products labeled dolphin safe not contain tuna caught by setting on dolphins) was enacted, the United States and Mexico had comparable numbers of purse seine vessels fishing in the ETP, and nearly

half of the U.S. purse seine tuna fleet operated in the ETP.[6] Since the enactment of the DPCIA, the U.S. fleet has chosen to discontinue the practice of setting on dolphins in the ETP.[7] Similarly, vessels of other fleets fishing in the ETP, such as Ecuador's, have chosen in recent years not to set on dolphins.[8] Importantly, the Panel found that the decisions vessel operators have made as to whether to continue or discontinue setting on dolphins are the result of a private choice[9], a choice that Mexico confirms in its most recent submission.[10] The Panel also considered evidence regarding whether the U.S. measures denied Mexican tuna products access to the U.S. market. The Panel observed that it is undisputed that tuna products containing tuna caught by setting on dolphins may be sold in the United States.[11] Moreover, it found that it is undisputed that Mexican tuna products are in fact sold on the U.S. market.[12] It also found that a portion of the Mexican fleet does not set on dolphins to catch tuna and that other parts of its fleet use techniques other than setting on dolphins to catch tuna.[13] The portion of Mexico's fleet that does not set on dolphins, if it wished, could sell its tuna to producers for use in tuna products eligible for dolphin-safe labeling in the United States.[14] Further, the Panel found that the U.S. measures do not require the country from which tuna products are exported to the United States to comply with any particular fishing method and do not state that no tuna may be imported if it originates in a country where tuna is caught by setting on dolphins.[15] The Panel also considered and rejected Mexico's contention that consumers would accept tuna products that contain tuna caught by setting on dolphins if they could be labeled dolphin-safe. Instead, the Panel found that U.S. market operators had a preference for tuna products that do not contain tuna caught by setting on dolphins and that there is "only a marginal relationship between the US measures and the practices of operators on the US market."[16]

8. Having reviewed and considered this evidence as well as other evidence as elaborated below, the Panel concluded that Mexico had not established that the U.S. measures accord

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[6]Panel Report, paras. 7.320-7.324.

[7]Panel Report, paras. 7.315-7.316.

[8]Panel Report, paras. 7.329-7.330.

[9]Panel Report, paras. 7.333-7.334. The Panel found the same with regard to the decision of tuna processors not to use tuna that has been caught by setting on dolphins. Panel Report, paras. 7.180-7.181.

[10]Mexico Other Appellant Submission, para. 14.

[11]Panel Report, para. 7.118.

[12]Panel Report, paras. 7.354-7.357.

[13]Panel Report, 7.313-7.314.

[14]Panel Report, paras. 2.12, 7.313-7.314, 7.349-7.350; *see also id.,* paras. 7.317, 7.347 (recognizing that most but not all tuna caught by Mexican vessels is caught by setting on dolphins).

[15]Panel Report, para. 7.372.

[16]Panel Report, paras. 7.366; *see also*, para. 7.364.

Mexican tuna products less favorable treatment than U.S. tuna products or tuna products originating in any other country. Mexico raises two Article 11 claims with respect to the Panel's consideration of the evidence, but as reviewed below, Mexico's claims are without merit, as are its assertions that the Panel misapplied the guidance contained in the Appellate Body's reports in *Dominican Republic – Cigarettes* and *Korea – Beef*. As both the Panel's assessment of the facts before it as well as its interpretation and application of Article 2.1 were sound, Mexico's contention that the Panel erred in finding that the U.S. measure is not inconsistent with Article 2.1 should be rejected.

9. The Appellate Body should also reject Mexico's appeal that the Panel erred in exercising judicial economy with respect to its claims under Articles III:4 and I:1 of the GATT 1994. As elaborated below, the Panel properly exercised judicial economy in light of the claims raised in this dispute.

10. Regarding Mexico's appeal of the Panel's findings that the U.S. measures are not inconsistent with Article 2.4 of the TBT Agreement, Mexico's claims center on its view that the standard set out in two resolutions adopted by the parties to the Agreement on International Dolphin Conservation Program ("AIDCP") – the *Resolution to Adopt the Modified System for Tracking and Verification of Tuna* and the *Resolution to Establish Procedures for AIDCP Dolphin Safe Tuna Certification* – would be effective and appropriate to fulfill the objectives of the U.S. measures. Yet, despite this assertion Mexico does not contest the Panel's finding that the standard in the AIDCP resolutions would not fulfil the objectives of the U.S. measures with respect to unobserved mortality and serious injury to dolphins caused by setting on them to catch tuna. While Mexico argues that the Panel incorrectly applied the Appellate Body's guidance in *EC – Sardines* in evaluating whether that standard would be effective and appropriate to achieve the objective of the U.S. measures, it is in fact Mexico that misapplies that guidance. As the Appellate Body stated in *EC – Sardines*, a relevant international standard "would be *effective* if it had the capacity to accomplish all three of these objectives [of the EC measure], and it would be *appropriate* if it were suitable for the fulfilment of all three of these objectives."[17] As the Panel correctly found, the standard set forth in the AIDCP resolutions would not be an effective or appropriate means of fulfilling the objectives of the U.S. measures because it would allow tuna products to be labeled dolphin-safe when they nonetheless contained tuna caught by setting on dolphins, a technique that the Panel found results in unobserved adverse consequences for dolphins.[18] The AIDCP standard, therefore, would neither ensure consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins nor ensure the U.S. market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects, with respect to those unobserved consequences.[19]

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[17] *EC – Sardines (AB)*, para. 288 (italics original, underline added).

[18] Panel Report, paras. 7.729-7.731; *see also* para. 7.504 (finding that setting on dolphins to catch tuna unobserved adverse impacts on dolphins beyond dolphin mortality or serious injury that is observed in the set).

[19] Panel Report, paras. 7.731, 7.740.

11. Mexico also alleges with respect to the Panel's findings under Article 2.4 that the Panel failed to observe its obligations under Article 11 of the DSU, but as set out below, the Panel's consideration of the applicability of the standard in the AIDCP resolutions with respect to tuna caught outside the ETP as well as its focus on the whether that standard would be effective and appropriate means to fulfil the objectives of the U.S. measures with respect to tuna caught inside the ETP were proper and are not a basis to conclude the Panel failed to make an objective assessment of the matter under Article 11 of the DSU.

12. Finally, Mexico raises a conditional appeal regarding Article 2.2 of the TBT Agreement. Specifically, Mexico appeals (1) the Panel's finding that the objective of the U.S. measures of contributing to the protection of dolphins by ensuring the U.S. market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins is legitimate and (2) the Panel's legal approach to consider whether Mexico's proposed alternative measures would fulfil the objectives of the U.S. measures after having found that the U.S. measures "only partially achieve" their objectives. Regarding the first, Mexico's attempts to recast the objective of the U.S. measures as "coercion" and "trade-restrictive" and thus inherently illegitimate should be rejected, in particular because Mexico does not appeal the Panel's factual findings that the relevant objective of the U.S. measures is contributing to the protection of dolphins,[20] not coercing Mexican fishing vessels to change their fishing practices, an assertion the Panel also rejected.[21] Mexico also fails to establish that the Panel's application of the term "legitimate" to the objectives of the U.S. measures reflects an improper interpretation of that term. Regarding Mexico's second basis for its conditional appeal, that too should be rejected as Mexico's proffered legal approach finds no basis in the text of Article 2.2 of the TBT Agreement and would limit Members' ability to adopt technical regulations to only those instances where the level at which the Member seeks to fulfil its objective is the utmost extent.

13. Thus, as summarized above and elaborated below, Mexico has failed to demonstrate that the Panel's findings under Article 2.1, 2.2, and 2.4 , as well as its exercise of judicial economy, constitute legal error.

14. In addition to its appeal of the Panel's findings under Articles 2.1, 2.2 and 2.4, Mexico's Other Appellant Submission includes a lengthy recitation of the relevant facts in this dispute from Mexico's perspective. In several instances, this recitation either mischaracterizes or obfuscates the facts or their relevance in this dispute. Mexico made many of these same mischaracterizations and obfuscations in its submissions to the Panel, which the United States addressed in turn in its submissions to the Panel. However, the United States believes it would be of assistance to the Appellate Body to also address a few of those facts here.

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[20]Panel Report, paras. 7.400, 7.425.

[21]Panel Report, para. 7.372.

15. First, the AIDCP is distinct from the two resolutions adopted by the parties to the AIDCP several years later. The AIDCP is a binding intergovernmental agreement, concluded in 1998 and effective in 1999, that sets out various provisions to reduce observed dolphins mortality and serious injury when dolphins are set upon to catch tuna in the ETP. These provisions include limits on the number of dolphins that may be killed each year ("dolphin mortality limits"). The provisions also include measures that the parties to the agreement must take to implement and monitor those limits, including ensuring that all purse seine vessels with a carrying capacity greater than 363 metric tons have on board an observer on 100 percent of fishing trips to document whether they observe dolphins being killed or seriously injured in any sets. The AIDCP also requires parties to ensure that vessels meet a significant number of operational requirements such as equipment and procedures to facilitate the release of dolphins from purse seine nets and to minimize dolphin mortalities and injuries. The AIDCP does not address unobserved mortalities associated with setting on dolphins to catch tuna.[22] Instances where the U.S. submissions to the Panel indicate that the United States agrees that the AIDCP has made an important contribution to reducing observed dolphin mortalities and serious injuries or to dolphin protection in the ETP, are referring to the AIDCP itself, not the AIDCP resolutions or their definition of "dolphin-safe."

16. The resolutions on tracking and verification of tuna and dolphin-safe certification are resolutions adopted by the parties to the AIDCP in 2001. It is these resolutions which the Panel considered comprised the "AIDCP standard", not the AIDCP itself.[23] The AIDCP resolution on dolphin-safe certification is non-binding, stating that its procedures "shall be voluntary for each Party, especially in the event that they may be inconsistent with the national laws of a Party."[24] This language was included at the request of the United States because its domestic law prevented it from applying the procedures, given the fact that under the procedures tuna products may be labeled dolphin-safe if they contain tuna caught by setting on dolphins whereas under U.S. law they may not.[25]

17. Mexico obfuscates the distinction in several places in its Other Appellant Submission, for

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[22]Panel Report, para. 7.504

[23]Panel Report, paras. 7.673-7.677.

[24]U.S. First Written Submission, para. 83.

[25]U.S. First Written Submission, para. 83. Mexico's assertion that there was a belief by the parties to the AIDCP that the United States would adopt the procedures for labeling tuna dolphin safe set out in the AIDCP resolution on dolphin-safe certification is incorrect. Paragraphs 2.37 and 2.38 of the Panel Report, which Mexico cites for this assertion, concern the contents of the 1995 Panama Declaration, in which the countries that would eventually become party to the AIDCP agreed to negotiate a binding international dolphin conservation agreement if certain changes were made to U.S. law. (Panel Report, paras. 2.37-2.38). At the time the AIDCP resolution on dolphin-safe certification was adopted in 2001, U.S. law did not permit tuna products that contain tuna caught by setting on dolphins to be labeled dolphin safe. Thus, as noted above, the United States successfully requested that language be included in that resolution that no country was obligated to implement its procedures especially where they would be inconsistent with U.S. law.

example, suggesting that the AIDCP itself sets out conditions for labeling tuna "dolphin-safe" or "establishes a dolphin-safe scheme for tuna fishing in the ETP."[26] To the contrary, it is the AIDCP resolutions that address the tracking and labeling of tuna "dolphin-safe."

18. Second, there is a much lower likelihood that dolphins may be killed or seriously injured in the course of commercial tuna fishing operations outside the ETP than inside the ETP. As explained in the U.S. Appellant Submission and the U.S. submissions to the Panel, this is because in the ETP there is a regular and significant tuna-dolphin association that is commercially exploited on a wide-scale commercial basis to catch tuna (millions of dolphins are chased and encircled each year to catch tuna in the ETP) and for which dolphin mortality and serious injury are a regular, foreseeable, and expected consequence of exploiting that association.[27] In other oceans, there is no regular and significant tuna-dolphin association, much less one that is or could be exploited in any way comparable to the ETP, nor are dolphins regularly and systematically killed in the course of tuna fishing operations in other oceans as they are in the ETP. [28] To the extent that there is regular and significant association of tuna and dolphins in an ocean outside the ETP, or there is regular and significant dolphin mortality or serious injury in an ocean outside the ETP, the U.S. measures would condition the dolphin-safe labeling of tuna products containing tuna caught in that fishery on an observer statement that no dolphins were killed or seriously injured in the set in which the tuna was caught (in addition to certification that dolphins were not set upon to catch the tuna).[29]

19. Where there is no such regular or significant tuna-dolphin association or regular and significant dolphin mortality exists, the U.S. measures do not condition use of a dolphin-safe label on a certification that no dolphins are killed or seriously injured. This reflects the balance struck in the U.S. measures in establishing the documentation necessary to substantiate dolphin safe claims: where the risk that a dolphin may be accidentally killed or seriously injured is very low (as is the case in a fishery where there is no regular and significant tuna-dolphin association or no regular and significant dolphin mortality), the U.S. measures do not require an observer certification that no dolphins were killed or seriously injured; whereas where the risk is high (as is the case in the ETP where there is a regular and significant tuna-dolphin association and regular and significant dolphin mortality), the U.S. measures require an observer certification that no dolphins were killed or seriously injured in the set.[30] This is particularly relevant given the cost associated with having an observer certify that no dolphins were killed or seriously injured in the set. The AIDCP requires observers on 100 percent of tuna fishing trips by large purse seine vessels in the ETP to monitor dolphin mortalities and serious injuries; the U.S. measures

[26]E.g., Mexico Other Appellant Submission, paras. 9, 20, 38, 45, 131.

[27]E.g., U.S. Second Written Submission, para. 42.

[28]Panel Report, para. 7.306.

[29]E.g., U.S. Second Written Submission, para. 39.

[30]E.g., U.S. Second Written Submission, paras. 38, 41, 45, 149.

reflects that this requirement exists and makes possible the provision of certifications that no dolphins were killed or seriously injured in the set.[31] By contrast, outside the ETP there is no intergovernmental agreement whereby nations have agreed to require independent observers on board 100 percent of their flagged vessels to monitor dolphin mortality and serious injury. Thus, if the U.S. measures were to require an observer certification that no dolphins were killed or seriously injured in the set in which tuna is caught in a fishery outside the ETP, that would impose the additional cost of maintaining 100 percent observer coverage on vessels in that fishery – a fishery where there is no regular and significant tuna-dolphin association and no regular and significant dolphin mortality, and for which there is no intergovernmental agreement that such observer coverage would be warranted.[32]

20. In its Other Appellant Submission, Mexico ignores these facts, suggesting that conditions for labeling tuna dolphin safe should be the same regardless of the relative costs and benefits,[33] and that the different conditions demonstrate less favorable treatment and/or a failure of the U.S. measures to fulfill their objectives.

21. Mexico's Other Appellant Submission also ignores that for tuna products labeled dolphin safe with any label other than the official U.S. Department of Commerce label, the U.S. measures condition the use of such a label on the products not containing tuna caught in a set in which dolphins were killed or seriously injured.[34] It also ignores that the only known use of the official U.S. Department of Commerce label on the U.S. market is on tuna jerky, a product that is not widely sold in the United States.[35] Thus, nearly all tuna products on the U.S. market are subject to the condition that tuna products labeled dolphin safe not contain tuna caught in a set in which dolphins are killed or seriously injured (although only those that contain tuna caught in an ocean where there is a regular and significant association between tuna and dolphins or regular and significant dolphin mortality or serious injury – such as is the case in the ETP – would be subject to observer certification).

II. The Panel Correctly Interpreted and Applied TBT Article 2.1

22. Article 2.1 of the TBT Agreement provides that:

> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

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[31]E.g., U.S. Second Written Submission, para. 46.

[32]E.g., U.S. Second Written Submission, para. 46.

[33]E.g. Mexico Other Appellant Submission, paras. 9, 20.

[34]U.S. Second Written Submission, paras. 40, 144; Panel Report, paras. 7.535-7.536, 7.422.

[35]U.S. Second Written Submission, para. 145.

23. In evaluating Mexico's claims under TBT Article 2.1, the Panel began by interpreting the text, in context and in light of the object and purpose of the TBT Agreement, consistent with the interpretative approach reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties and previous panel and Appellate Body reports.[36] The Panel first assessed the meaning of the term "like products," and based on the facts before it concluded that Mexico had established that Mexican tuna products are like tuna products of U.S. origin and tuna products originating in any other country.[37] In conducting its like product analysis, the Panel stated, correctly, that "[t]he basis for our analysis is a comparison between Mexican tuna products and tuna products of U.S. origin and tuna products originating in any other country, not between dolphin-safe and not dolphin-safe tuna."[38] Mexico does not challenge this or any other aspect of the Panel's like product findings.

24. The Panel then proceeded to interpret the phrase "treatment no less favourable," again using customary rules of treaty interpretation reflected in the Vienna Convention and referring to previous panel and Appellate Body reports. Citing to dictionary definitions of the word "favourable," the Panel observed that the plain meaning of the term suggests that "imports of any Member must not be dealt with, in respect of technical regulations, in a manner less advantageous, than the like products of national or any other foreign origin."[39] At the outset, it acknowledged the importance of reading the term both in its immediate context and in the context of other agreements in which the same term appears. It noted that the term appears in more than one provision of the covered agreements and that prior interpretations of the term as used in these agreements may provide useful guidance.[40] At the same time, the Panel also noted that the particular context in which the term appears in Article 2.1 must be taken into account.[41] Referring to the Appellate Body's findings in *EC-Bananas III*, and *EC-Asbestos*, the Panel observed that "equality of treatment does not necessarily imply identity of treatment for all products, but rather an absence of inequality of treatment to the detriment of imports from any Member."[42] As the Panel noted, this understanding of less favorable treatment is entirely consistent with TBT Article 2.1, which addresses measures that by their nature distinguish between products.[43]

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[36]Vienna Convention on the Law of Treaties, Art. 31.

[37]Panel Report, para. 7.249.

[38]Panel Report, para. 7.250.

[39]Panel Report, para. 7.273.

[40]Panel Report, para. 7.270.

[41]Panel Report, para. 7.271.

[42]Panel Report, para. 7.275.

[43]Panel Report, para. 7.276

25. With this framework in mind, the Panel proceeded to evaluate whether Mexico had established that the U.S. measure provide less favorable treatment to Mexican tuna products than to U.S. or other imported tuna products. It first addressed the threshold question of whether the measure confers an "advantage" to products that meet the conditions set out in them. It noted that the measure does not require that tuna products be labeled dolphin safe or condition access to the U.S. market on qualifying for the label, but that, insofar as the measure controls access to the label and the label itself has value in the U.S. market, the measure accords an "advantage" to products that meet the conditions therein.[44]

26. The next question posed by the Panel was whether the measure provided an advantage to tuna products of U.S. origin and tuna products originating in any other country, as compared to Mexican tuna products. Citing the Appellate Body's reasoning in *EC-Asbestos*, the Panel reasoned that the starting point for its analysis should be "the entire groups of both products identified as like products," not merely a comparison of the treatment accorded to imported products that have no access to the label and domestic products that do, or vice versa.[45] Again, Mexico does not challenge this finding.

27. To evaluate this question, the Panel examined a number of elements.[46] To begin, the Panel considered the structure and design of the measure itself to discern how the *origin* of the products at issue relates to the advantage conferred by the measures.[47] First, the Panel found that the evidence demonstrated that the measure distinguishes between fish based on capture method rather than origin, and that the condition of not setting on dolphins as a condition to access the label would apply equally with respect to any fleet operating anywhere in the world.[48] The Panel therefore found that "to the extent that the requirement of not setting on dolphins is based on a fishing method that may be used by vessels of any nationality operating where this method can be practiced, tuna of any nationality, including U.S. and Mexican, as well as others, could

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[44]Panel Report, paras. 7.287-7.291.

[45]Panel Report, para. 7.295.

[46]These elements included: (1) the regulatory distinction at issue (not setting on dolphins as a condition for access to the label); (2) the fishing practices of U.S. and Mexican tuna fleets as well as their impact on access to the label for Mexican tuna products and tuna products originating in the U.S. and any other country; and (3) the situation of Mexican tuna products on the U.S. market. Panel Report, paras. 7.304-7.311; 7.312-7.350; 7.351-7.368.

[47]Panel Report, paras. 7.304-7.311.

[48]Panel Report, paras. 7.307-7.311. It should be noted that access to the label is not conditioned on all of a Member's fishing vessels forgoing the practice of setting on dolphins. Rather, access to the label is conditioned on the product not containing tuna caught by setting on dolphins. Thus, some vessels of a Member could continue to set on dolphins to catch tuna while at the same time other vessels could catch tuna using methods that would allow tuna to be used in tuna products labeled dolphin-safe in the United States. Panel Report, para. 7.374. Indeed, as Mexico conceded, a portion of the Mexican fleet catches tuna eligible to be included in dolphin-safe tuna products. Panel Report, paras. 7.313-314.

potentially meet (or not meet) the requirements for dolphin-safe labeling."[49] Second, the Panel found that the eligibility of a *tuna product* for the label did not necessarily depend on whether fish was caught by a fleet of the same nationality as the product itself. That is, Mexican tuna products need not be made of tuna caught by Mexican fleets. Given these facts, the Panel concluded that the U.S. measure did not appear to disadvantage Mexican tuna products as compared to U.S. and other imported tuna products by conditioning access to the label on not setting on dolphins.[50]

28. The Panel then considered whether, despite the fact that the measure itself does not provide less favorable treatment to Mexican tuna products, it might in application result in a disadvantage for those products due to the fishing practices of Mexican-flagged vessels as compared to vessels under other Members' flags.[51] In evaluating this question, the Panel began by noting that most, but not all, Mexican tuna is caught in a manner that would preclude products made from that tuna from being eligible for the label, and that most U.S. tuna is caught in a manner that would potentially qualify products made from it for the label.[52] Rather than end its analysis there – as Mexico now asserts the Panel should have done[53] – the Panel proceeded to consider additional facts that inform whether Mexico had provided adequate evidence to demonstrate the U.S. measure in fact accords Mexican tuna products "less favorable treatment" or whether, as the Panel ultimately concluded was the case, the U.S. measure imposes origin-neutral conditions and any different impact on Mexican tuna products as compared to tuna products originating in the United States or other countries are attributable to factors other than origin or factors other than the measure itself.[54] Key among these facts were the following:

(1) The decision by Mexico's fleet to continue setting on dolphins was the result of a choice, not — as Mexico claimed — dictated by unique costs or ecological factors. The Panel found that while Mexican fleets chose to set on dolphins, other fleets adapted their practices to catch tuna either exclusively using techniques other than setting on dolphins (e.g., the U.S. fleet) or to use a combination of techniques and allow that portion of their catch not caught by setting on dolphins to be used in dolphin-safe tuna products sold in the United States (e.g., Ecuador).[55] The Panel carefully evaluated evidence proffered by Mexico to show that the cost to the Mexican fleet of adapting its fishing practices was prohibitive,

[49]Panel Report, para. 7.309.

[50]Panel Report, para. 7.310.

[51]Panel Report, paras. 7.312 *et seq*.

[52]Panel Report, para. 7.317.

[53]Mexico Other Appellant Submission, para. 139.

[54]Panel Report, paras. 7.3775-7.380.

[55]Panel Report, paras. 7.329-7.330; *see also id.,* paras. 7.317-7.318.

and concluded that the evidence was not persuasive.[56] The Panel found equally unpersuasive evidence offered by Mexico that purported to show ecological costs of using techniques other than setting on dolphins to catch tuna.[57]

(2) The mere fact that the Mexican fleet continues to set on dolphins does not mean that Mexican tuna *processors* — and in turn, tuna *products* — are disadvantaged by the measure at issue.[58] The Panel rejected Mexico's invitation to infer, based on the practices of its fleet when fishing for tuna, a disadvantage to Mexican tuna products. As the United States noted, the vast majority of the U.S. market is comprised of tuna products containing imported tuna, and non-Mexican tuna products (including U.S. tuna products) made from Mexican tuna caught by setting on dolphins would be equally ineligible for the label. Conversely, Mexican tuna products could be made using tuna that meets the conditions for the label, and indeed, until 2002 some Mexican tuna products did qualify and even today Mexican tuna products could contain tuna caught by the portion of the Mexican purse seine fleet that does not set on dolphins to catch tuna and be eligible to be labeled dolphin-safe.[59]

(3) The mere fact that Mexican tuna products comprise a small share of the U.S. market does not mean that *the measure at issue* modifies conditions of competition as between Mexican and non-Mexican tuna products to the detriment of Mexican tuna products.[60] The Panel again carefully evaluated the evidence submitted by the parties. It noted that, for various reasons, many U.S. tuna processors and retailers do not want to purchase tuna caught by setting on dolphins — regardless of the conditions set out for the U.S. label.[61] It further noted that 90 percent of the world's tuna companies do not sell tuna products containing tuna caught by setting on dolphins, and therefore the market share for Mexican tuna products in the United States may simply reflect the general distribution of products around the world made from tuna caught by setting on dolphins.[62]

29. Based on the evidence before it, the Panel concluded that "the impact of the U.S. dolphin safe provisions on different operators on the market and on tuna products of various origins depends on a number of factors that are not related to the nationality of the product, but to the fishing and purchasing practices, geographical location, relative integration of different segments

[56]Panel Report, paras. 7.340-7.343.

[57]Panel Report, para. 7.343.

[58]Panel Report, para. 7.350.

[59]Panel Report, para. 7.314.

[60]Panel Report, para. 7.361.

[61]Panel Report, paras. 7.362-7.367.

[62]Panel Report, para. 7.368.

of production, and economic and marketing choices."[63] Echoing the words of the Appellate Body in *Dominican Republic – Cigarettes*, the Panel stated, "That these measures may, through the operation of origin-neutral regulatory categories, have a detrimental impact on certain imports, does not, in our view, necessarily imply that the measures afford less favourable treatment to such imported products within the meaning of Article 2.1."[64] Thus, it concluded, Mexico failed to establish that the measure breaches Article 2.1.

A. The Panel Did Not Err in its Interpretation of "Treatment No Less Favorable"

30. Mexico's legal objections to the Panel's analysis of Article 2.1 center on its interpretation of "treatment no less favourable," and in particular the manner in which the Panel used relevant context and prior panel and Appellate Body reports to interpret that term. As discussed further below, Mexico's position rests both on a mischaracterization of the Panel's analysis, as well as a misunderstanding of prior panel and Appellate Body reports interpreting similar language in other WTO agreements.

1. The Panel's Interpretation is Consistent with the Terms of Article 2.1, in Context and in Light of the Object and Purpose of the TBT Agreement

31. The Panel's interpretation of "less favorable treatment" is fully consistent with the ordinary meaning of the term, in both the immediate context of Article 2.1 and in the context of similar provisions in other WTO agreements, as well as the object and purpose of the TBT Agreement.

32. Contrary to what Mexico suggests, an inquiry into whether a measure provides "less favorable treatment" requires a determination of whether a measure accords different treatment to imported products versus domestic products *and* whether it does so based on origin.[65] The

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[63]Panel Report, para. 7.378.

[64]Panel Report, para. 7.375.

[65]E.g., *Korea– Beef (AB)*, paras. 143-44 (finding that the measures at issue accorded different treatment to imported and like domestic products, before proceeding to consider whether the different treatment constituted less favorable treatment). *See also Brazil –Tyres (Panel)*, paras. 7.420-7.421 (finding origin-based discrimination from market prohibition applied to imported retreaded tires that "foresees no comparable limitation on the marketing of domestic retreaded tyres made from domestic used tyre carcasses"); *Mexico – Soft Drinks (Panel)*, paras. 8.120-8.122 (finding origin based distinction between imported and domestic sweeteners); *Canada – Autos (Panel)*, para. 7.179-7.182 (finding origin-based discrimination based on requirement to purchase a domestic product in order to obtain right to import at a lower rate of duty); *Canada – Wheat Exports (Panel)*, para. 6.164 ("By virtue merely of its origin, domestic grain is not subject to the authorization requirement of Section 57(c)."); *China – Auto Parts (AB)*, paras. 192-195 (finding origin-based distinctions in treatment of imported and domestic auto parts arising from the measures at issue); *India – Autos (Panel)*, para. 7.199-7.202 (finding origin-based distinction in indigenization

question of whether treatment of the two categories of products is *different* springs from the fact that, as a matter of logic, treatment that is identical cannot be less favorable. The notion that the different treatment must be based on origin (as opposed to origin-neutral criteria) is evident from Article 2.1 itself, as well as relevant context provided by GATT 1994 Article III and the TBT Agreement.

33. Article 2.1 refers to products "imported from the territory of any Member" receiving treatment no less favorable than that accorded to "like products *of national origin and to like products originating in any other country"* The language of Article 2.1 of the TBT Agreement is similar to Articles I:1 and III:4 of the GATT 1994 and each contain a non-discrimination obligation. Mexico acknowledges that Article III is relevant context for the interpretation of TBT Article 2.1.[66] In interpreting Article III:4 of the GATT 1994, the Appellate Body has made clear that it must be read in view of its immediate context including Article III:1 of the GATT 1994. GATT 1994 Article III:1 states that internal laws, regulations and requirements affecting the internal sale of a product "should not be applied to imported or domestic products so as to afford protection to domestic production". The Appellate Body has explained that Article III:1 sets out a general principle that "informs the rest of Article III and acts 'as a guide to understanding and interpreting the specific obligations contained' in the other paragraphs of Article III, including paragraph 4,"[67] and "[t]he broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures."[68] Given the similar nature of the obligations in Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement, the "broad and fundamental purpose" of Article 2.1 of the TBT Agreement may also be considered to be to avoid protectionism in the application of a specific type of regulatory measure, technical regulations.

34. In this regard, the fact that Article 2.1 comprises part of the TBT Agreement is also relevant context. The TBT Agreement concerns standards, technical regulations and conformity assessment procedures, measures which the TBT Agreement makes clear that Members have the right to impose to achieve legitimate objectives. Standards, technical regulations, and conformity assessment procedures by their definition draw distinctions among products, *inter alia* setting out

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requirement); *US – FSC (Article 21.5) (Panel)*, para. 8.154-8.157 (finding statutory requirement "expressly and explicitly origin-based"); *US - Gasoline (Panel)*, para. 6.10 (finding origin-based difference in treatment between domestic and imported gasoline). No different treatment was found in *Dominican Republic – Cigarettes (AB)*, *Japan – Film* and *EC – Biotech*.

[66]Mexico Other Appellant Submission, paras. 92-93. Mexico's attempt to disavow Article III:1 as relevant context for interpreting Article III:4, and in turn, Article 2.1, due to the absence of a specific reference to Article III:1 in Article III:4 and the absence of a parallel provision in the TBT Agreement is without basis and contrary to the Appellate Body's observations in *EC-Asbestos*, noted above. Mexico Other Appellant Submission, n.186. It is also difficult to reconcile with Mexico's position before the Panel that the term "less favorable treatment" should be given the same meaning in both Article III:4 and Article 2.1. Mexico answer to Panel question No. 58, para. 172.

[67]*EC – Asbestos (AB)*, para. 93 (quoting *Japan – Alcohol (AB)*, p. 18).

[68]*EC – Asbestos (AB), para. 97* (quoting *Japan – Alcohol (AB)*, p. 16).

product characteristics and packaging and labeling requirements and imposing testing and certification procedures. This context further supports an interpretation that the types of measures with which Article 2.1 is concerned are those that accord different treatment based on origin, not those that provide different treatment based on factors other than origin (e.g., whether a product possesses characteristics that may be harmful to humans or the environment or is produced in a manner that would make a particular label deceptive or misleading. Indeed, this is confirmed by language in the preamble to the TBT Agreement, which states that:

> [N]o country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, or of the environment, or the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.[69]

35. Regarding a panel's assessment of whether the treatment accorded to imported products is "less favorable", the WTO agreements do not specify a precise approach to this question. In previous cases addressing the concept in the context of GATT 1994 Article III, panels and the Appellate Body have typically assessed whether, if a measure provides different treatment to imported and like domestic products, it modifies the conditions of competition to the detriment of like imported products. Importantly, these cases reflect the fact that, even if a measure modifies conditions of competition, it does not provide "less favorable treatment" within the meaning of Article 2.1 if it does so for reasons other than *origin*. Thus, for example, the panel in *EC – Biotech* found that because Argentina had not "adduced argument and evidence sufficient to raise a presumption that the alleged less favorable treatment is explained by the foreign origin of the relevant biotech products," it had not established that the EC had accorded less favorable treatment to imported products than to like domestic products.[70] Likewise, in *Dominican Republic - Cigarettes*, the Appellate Body found that a bond requirement that imposed higher per unit costs on imported products as compared to like domestic products was not inconsistent with Article III:4 since the higher per unit cost was not based on origin, but rather on other factors (imports' versus domestic products' relative market share).[71] As will be discussed in Part II.B, this critical element of the analysis is absent from Mexico's theory of "less favorable treatment."

36. The Panel's approach was fully consistent with this framework. As a threshold matter, contrary to what Mexico suggests, the Panel fully considered the preamble to the TBT Agreement and the GATT 1994 as relevant context in informing its interpretation of "less

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[69]TBT Agreement, preamble.

[70]*EC – Biotech (Panel)*, paras. 7.2514-7.2515.

[71]*Dominican Republic – Cigarettes (AB)*, para. 96.

favorable treatment."[72] As have prior panels and the Appellate Body, the Panel's assessment focused on whether any different treatment was accorded to Mexican tuna products under the measure and whether the difference was attributable to origin. In approaching the first question, the Panel focused on Mexico's own theory – that the measure provides different treatment because in practice, it excludes (as Mexico put it, "prohibits") most Mexican tuna products from access to the label while most U.S. tuna products and those of other countries qualify for it.[73] Regarding the second, the Panel considered the range of evidence regarding the correlation between the fishing technique that is the basis for access to the label and the availability of the label to Mexican tuna products as compared to domestic or other like imported products.[74] As also described above, the Panel's analysis supported the conclusion that the measure does not provide "less favorable treatment" within the meaning of Article 2.1. Here, much of the Panel's analysis was focused on whether the *measure* modified conditions of competition "*to the detriment of imports*" – that is, (1) whether the market conditions identified by Mexico arose from the measure or other factors and (2) whether any difference in treatment was attributable to the origin of the product. After carefully considering the evidence proffered by Mexico, the Panel rejected Mexico's argument on both counts.

2. The Panel Did Not Substitute a "Denial of Access Test" for "Treatment No Less Favorable" Analysis

37. Mexico's critique of the Panel's analysis centers on its assertion that the Panel substituted a "denial of access to an advantage" test for a proper "treatment no less favorable" analysis, and specifically that it adopted an overly narrow interpretation of "denial" to mean "absolute prohibition or bar".[75] A closer review of the Panel's findings reveals, however, that this is not the case. Indeed, to the extent that the Panel refers to "denial of access" it does so to address what Mexico *itself* described as "the factual basis" for its TBT Article 2.1 claim – specifically, that Mexican tuna products are "prohibited" from using the dolphin safe label and as a result are "denied competitive opportunities" as compared to like products from the United States and other countries.[76]

38. Regarding the Panel's discussion of the existence of an "advantage" and whether the "advantage" was available to the imported like product, this does not indicate a failure to

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[72]Panel Report, para. 7.268 et seq.

[73]Panel Report, paras. 7.278-7.279.

[74]Panel Report, paras. 7.308-7.309.

[75]Mexico Other Appellant Submission, paras. 74-75; *see also*, paras. 143-144.

[76]Panel Report, para. 7.277 (quoting Mexico Second Written Submission, para. 150 (stating that "the factual basis of Mexico's discrimination claims is that the prohibition against the use of the dolphin safe label on most Mexican tuna products denies competitive opportunities to those products compared to like products from the United States and other countries.")).

consider conditions of competition in its analysis. Indeed, in several parts of its discussion, the Panel explicitly refers to conditions of competition.[77] As the Panel stated, the basic principle of less favorable treatment reflected in Article 2.1 is the placing of "imports *at a disadvantage,* compared to like domestic products and imported products originating in any other country, with respect to the preparation, adoption or application of technical regulations"[78] It further stated:

> [T]he question to be considered in examining a claim of less favourable treatment is not simply whether the measure has some impact, or even some detrimental impact on imports, but, rather, whether the measures put the imported like products at issue at a disadvantage compared to like products of national origin and like products originating in any other country. In other words, what we must determine in this case is whether the measures have modified the relative position on the market of US and Mexican tuna products, to the detriment of Mexican tuna products.[79]

39. Nothing in the Panel's formulation suggests that it viewed less favorable treatment as arising only where there exists an "absolute prohibition or bar."[80] Indeed, the core issue addressed by the Panel was the same as that addressed by prior panels and the Appellate Body: the Panel considered whether the measure at issue accords different treatment to domestic tuna products as compared to Mexico's tuna products, and whether the different treatment was attributable to the products' origin. On both questions, the Panel concluded that Mexico had failed to meet its burden. Fundamentally, the Panel's analysis was driven by the facts before it and Mexico's own argument. [81]

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[77]E.g., Panel Report, para. 7.359 (finding that "the fact that Mexican imports represent only 1 per cent of tuna on the US market, in itself, only indicates that Mexico has a relatively limited penetration on the US tuna market" and that "[i]n the absence of further information as to what share of the US market Mexico might expect to secure in the absence of the measures at issue, we are not in a position to assess *whether Mexico's level of participation in the US tuna market reflects a modification of the conditions of competition to the detriment of Mexican tuna products* or whether it simply reflects Mexico's expected level of participation in the US market.") (emphasis added).

[78]Panel Report., para. 7.271; *see also*, para. 7.281.

[79]Panel Report, para. 7.358.

[80]Mexico Other Appellant Submission, para. 143 (claiming that "in the Panel's view, the denial of access had to be an absolute prohibition or bar").

[81]Even Mexico appears to acknowledge that it is reasonable for a panel to tailor its analysis to the particular facts at issue. Mexico Other Appellant Submission, para. 84 (noting that "[t]he different interpretations by the three Panels were, at least in part, a reflection of the different factual circumstances in the disputes. They may also have been a reflection of the attempts by the different panels to interpret Article 2.1 in a manner that enables it to capture the multitude of situations in which discrimination could arise in respect of technical regulations while at the same time, not prohibiting technical regulations that discriminate in a manner that is consistent with the object and purpose of the TBT Agreement as reflected, *inter alia*, in its preamble.").

40. Finally, Mexico's reference to the panel reports in *Canada – Wheat Exports* and *Canada - Autos* is inapposite. In both disputes the panels were considering measures which on their face distinguished between domestic and imported products – and therefore the question of whether different treatment was attributable to origin had already been resolved by the time the panel was presented with evidence regarding the purported availability of the advantage through other means.[82] Here, the ability of Mexican tuna products to qualify for the label through various means bears on the threshold question of whether different treatment is attributable to origin. As the Panel found, Mexico failed to establish that this was the case.

B. Mexico's interpretation of "treatment no less favorable" is flawed

41. Mexico's critique of the Panel's interpretation of "treatment no less favorable" derives from its own flawed understanding of the concept. First, under the guise of "context", Mexico asks that the Appellate Body read into the text of Article 2.1 an entire set of obligations that are not there. Second, based on its own misinterpretation of a GATT 1947 panel report, Mexico seeks to replace the conditions of competition analysis applied on numerous previous occasions by panels and the Appellate Body with an "equality of competitive opportunity" test, a test that according to Mexico requires that Members' measures preserve other Members' "natural comparative advantage" in order to be deemed nondiscriminatory.[83] Such an approach is contradicted by the text of the commitments at issue, as well as how panels and the Appellate Body have interpreted "less favorable treatment" in other contexts, and would render WTO-inconsistent a wide range of regulatory measures adopted to achieve legitimate objectives. Mexico's claim that this approach would prevent "circumvention" of the nondiscrimination obligation is merely indicative of its desire to expand the obligation in Article 2.1 well beyond its terms.[84]

1. Mexico's Interpretation Depends Upon an Improper Use of Context as an Interpretative Tool

42. Central to Mexico's critique of the Panel and to Mexico's own assertions regarding the meaning of Article 2.1 is its reliance on what it characterizes as "the context of Article 2.1 and the object and purpose of the TBT Agreement."[85] While as noted, the Panel addressed relevant

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[82] *Canada – Wheat Exports (Panel)*, para. 6.185 ("Section 57(c) of the Canada Grain Act, on its face, prohibits receipt of foreign grain unless authorized."); *Canada – Autos (Panel)*, para. 10.67 (Canadian value added requirements conditioning eligibility for duty-free importation of motor vehicles on specified percentage of Canadian value in production class).

[83] Mexico Other Appellant Submission, para. 96, 145-46.

[84] Mexico Other Appellant Submission, para. 100.

[85] Mexico Other Appellant Submission, para. 86.

context in its interpretation of Article 2.1, including the preamble to the TBT Agreement,[86] Mexico claims that the Panel's analysis did not accord with certain context, in particular the fifth recital of the preamble to the TBT Agreement, Article 12.3 of the TBT Agreement, and the preamble to the WTO Agreement.[87]

43. According to Mexico, the Panel erred by taking into account the fact that "the Mexican fleet could change its fishing methods and fishing areas and, if it chose not to, the Mexican canneries could source their tuna from suppliers who were outside the Mexican integrated fleets and who caught tuna in a manner that met the conditions of the U.S. dolphin-safe label."[88] This, Mexico argues, means that Article 2.1 is not violated if "the adversely affected industry can comply with the conditions of access to the advantage by giving up its natural comparative advantages."[89] Mexico claims that "an interpretation that requires a developing country to give up its natural comparative advantage" is inconsistent with relevant context, and in particular Article 12.3 of the TBT Agreement and the preamble to the WTO Agreement.[90]

44. As a threshold matter, Mexico does not explain the "natural comparative advantage" to which it refers, nor are there factual findings to support the conclusion that Mexico has a particular "natural comparative advantage" with respect to the product at issue in this dispute. Insofar as Mexico considers that its use of setting on dolphins to catch tuna in the ETP reflects some "natural comparative advantage" of geography or otherwise, uncontested factual findings suggest the opposite conclusion.[91] Insofar as Mexico considers the integration of its processors with the Mexican fleet to constitute a "natural comparative advantage," rather than simply a commercial feature of its industry, it is mistaken.

45. Moreover, nothing in Article 2.1 or the provisions that Mexico cites as context support the conclusion that there exists a "natural comparative advantage" proviso in Article 2.1, such that, in assessing whether a measure accords less favorable treatment, a panel is precluded from considering whether a product is disadvantaged owing to its origin or other factors, or whether the measure – and not other factors such as the particular commercial choices made by individual companies – is the source of any detrimental impact on the imported products. To the contrary, prior panel and Appellate Body reports demonstrate that these questions are entirely relevant to

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[86]Panel Report, para. 7.276.

[87]Mexico Other Appellant Submission, paras. 86, 109-110, 145-146.

[88]Mexico Other Appellant Submission, para. 143.

[89]Mexico Other Appellant Submission, para. 145.

[90]Mexico Other Appellant Submission, para. 145.

[91]Indeed, as the Panel found, and Mexico did not contest, several nations' fleets fish for tuna in the ETP and set on dolphins to do so. Panel Report, paras. 7.307-7.308; *see also* paras. 7-320-7.329. Mexico does not contest these findings. Moreover, as the United States pointed out, nations in addition to Mexico share geographical proximity to the ETP. Panel Report, para. 7.339.

an assessment of whether a measure modifies the conditions of competition to the detriment of an imported like product. As noted above, in evaluating whether a measure breaches a nondiscrimination obligation, prior panels and the Appellate Body have routinely considered it necessary to assess whether a difference in treatment is attributable to origin.[92] Likewise, the Appellate Body has stated that differences in treatment that are not attributable to the measure itself do not constitute less favorable treatment.[93]

46. The Panel's analysis of the options available to Mexican tuna processors to enable tuna products containing its tuna to obtain the label bears on both of these questions. The Panel rejected Mexico's theory that the relative cost of adapting its fleet to the labeling conditions merited the conclusion that Mexican tuna products were being accorded less favorable treatment, noting that "such costs would be felt also, though perhaps to varying degrees...by vessels of other fleets wishing to catch tuna eligible for inclusion in a dolphin-safe tuna product for sale on the US market."[94] That is, the Panel was not persuaded that a measure modifies conditions of competition to the detriment of imported products merely because some groups may bear higher adaptation costs than others. As the Panel observed, virtually all regulatory measures involve some adaptation costs and affect different market actors differently; the fact that a measure does so does not necessarily permit the conclusion that it differentiates based on origin. Likewise, as the Appellate Body stated in *Dominican Republic - Cigarettes*, "The existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product."[95] The Panel's evaluation of this issue was fully in line with this reasoning.

47. The Panel's discussion of whether Mexican tuna processors could change their sourcing patterns to qualify for the label similarly reflects an effort on the Panel's part to evaluate whether the measure caused the different treatment and whether the difference in treatment was attributable to origin or some other factor. As the Panel observed, tuna products are not necessarily made from tuna of the same origin, and therefore the mere fact that the measure in question prohibits the use of a dolphin-safe label on tuna products produced from tuna using particular fishing techniques favored by Mexico does not answer the question of whether the measure results in less favorable treatment for *Mexican* tuna products.[96]

48. Finally, in another misuse of context, Mexico claims that owing to the sixth recital in the preamble to the TBT Agreement, the Panel should have interpreted Article 2.1 to require an

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[92] *See* footnote 65, above.

[93] *E.g.*, *Dominican Republic – Cigarettes (AB)*, para. 96.

[94] Panel Report, para. 7.344.

[95] *Dominican Republic – Cigarettes (AB)*, para. 96.

[96] Panel Report, para. 7.345.

evaluation of whether the measure is "necessary, is applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or is applied in a manner which would constitute a disguised restriction on trade."[97] Mexico then proceeds to conduct an analysis, found nowhere in the text of Article 2.1, to demonstrate that the measure does not in fact meet the test Mexico has invented.[98] This diversion can only be explained as an attempt by Mexico to create the illusion of limits on its overly broad reading of "less favorable treatment".

49. Fundamentally, Mexico seeks an interpretation of Article 2.1 that would ignore the basic questions of whether differences in treatment are attributable to origin or some other factor, and whether differences in the conditions of competition for a Member's products are attributable to the measure or other ancillary causes. Mexico's theory would impugn any measure that can, even in the most attenuated fashion, be connected to different treatment between products of Members, regardless of whether the different treatment is based on origin, market conditions, particular choices made by that Member's producers, or simple chance. According to Mexico, any Member maintaining such a measure falling within TBT Article 2.1 would need to "justify" it using an analysis equivalent to that under GATT 1994 Article XX, and would need to do so before it was even established that the Member breached an obligation. As noted, Mexico's theory is found nowhere in the text of Article 2.1 and is contradicted by numerous panel and Appellate Body reports interpreting "less favorable treatment".

2. Mexico's Theory of "Equality of Competitive Opportunities" Does Not Accord with Conditions of Competition Analysis

50. Throughout its submission, Mexico equates a conditions of competition analysis with an analysis it describes as "equality of competitive opportunities."[99] While the basis for Mexico's use of this term is unclear,[100] coupled with its erroneous use of context as described above, the term appears to reflect Mexico's view that the purpose of the nondiscrimination obligation in TBT Article 2.1 is to ensure not only that a measure does not modify conditions of competition

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[97]Mexico Other Appellant Submission, para. 111. Incongruously, after a lengthy critique of the Panel for failing to conduct this analysis, Mexico asserts that "there is no basis on the facts of this dispute to narrow the interpretation of the non-discrimination obligations in Article 2.1 to take into account the sixth recital." Mexico Other Appellant Submission, para. 137.

[98]Mexico Other Appellant Submission, paras. 114-137.

[99]*E.g.*, Mexico Other Appellant Submission, para. 96-97.

[100]Mexico states that its test derives from the GATT 1947 report in *US – Section 337 Tariff Act*, where the panel referred to "effective equality of opportunities" for imported products, and claims that this "same line of interpretation" has been followed by later panels and the Appellate Body. Yet the only source Mexico cites for the latter proposition is the panel report in *US – Clove Cigarettes*. (Mexico Other Appellant Submission, para. 93 and fn.178). A reference to "competitive opportunities" also appears in a single sentence in *Argentina – Hides and Leather (Panel)*, para. 11.20. The GATT Panel Report in *Italian Agricultural Machinery*, where Mexico elsewhere claims the test derives (Mexico Other Appellant Submission, para. 96) does not use the term.

to the detriment of imports, but that measures ensure "equality of competitive opportunities" for all products. Mexico's formulation however does not accurately capture the conditions of competition analysis applied by panels and the Appellate Body in previous reports.

51. First, significantly, in adopting this formulation, Mexico omits reference to the second part of the conditions of competition analysis, which involves consideration of whether the impact on conditions of competition is due to origin — in particular, the requirement that modifications to conditions of competition act "to the detriment of imports." Mexico also converts the term "conditions" to "opportunities" — perhaps suggesting its view that any and all commercial opportunities must be equally available to any Member's producers, regardless of whether market conditions or other factors give one or another producer a competitive advantage. Needless to say, this does not comport with how prior panel and Appellate Body reports have applied a conditions of competition analysis, nor with the terms of Article 2.1.

3. Mexico's interpretation would create an impossible hurdle to regulation

52. From a practical standpoint, the implications of Mexico's interpretation for Members' ability to regulate are serious. Based on its flawed interpretation of Article 2.1, Mexico claims that the Panel's analysis "could have been limited to finding that access to the dolphin-safe label was an advantage, that access to the label was controlled by the U.S. dolphin-safe labelling provisions, and that most Mexican tuna products did not have access to the label while...all or most tuna products from the United States and other countries did have access."[101] As noted above, this would depart from a proper interpretation of the text of Article 2.1 as well as the approach followed in prior panel and Appellate Body reports.

53. Furthermore, it would pose a serious obstacle to legitimate regulatory action. It is impossible for a Member to know at the time it is developing a measure the precise costs the measure will impose on each producer in every other Member, or, more broadly, the unique circumstances of every Member's industry. Even if a Member was able to know with precision how each Member's industry would be affected by a measure, it would be nearly impossible to calibrate a measure such that it does not have a greater impact on one or another Member's products relative to its own or other Members. Yet, under Mexico's theory, any significant differentiation that results automatically gives rise to a breach.[102] Members would thus be unable

[101]Mexico Other Appellant Submission, para. 143.

[102]In its response to Panel Question 152, the United States explores an example of a measure that results in most imports experiencing a detrimental effect, while most domestic like products are unaffected. Under Mexico's theory, such a measure would automatically breach Article 2.1 of the TBT Agreement, and in fact, would breach even if only some imports experience a detrimental effect as a result of the measure in comparison to some domestic products that experience no or a lesser detrimental effect. However, as the example in the U.S. response to Panel Question 152 makes clear, that approach would prohibit such legitimate regulatory measures as those that prohibit toys from containing more than trace amounts of toxic chemicals in any circumstance where the cost or burden of

to anticipate and avoid breaching their nondiscrimination obligations, even if the measure is not designed to, and does not, discriminate based on origin, unless they were able to "justify" the measure under Mexico's quasi-Article XX analysis. Such an interpretation is at odds with the TBT Agreement's approach to Members' legitimate objectives. As discussed in Part I, technical regulations serve a variety of important purposes. The TBT Agreement does not limit the legitimate objectives that a Member may pursue through technical regulations. Mexico's theory, by contrast, would prevent Members from adopting technical regulations – which by definition distinguish between products – except to fulfill the limited objectives specified in the sixth recital of the TBT Agreement preamble.

54. Finally, such an interpretation of the obligations in question is also contrary to the object and purpose of the TBT Agreement. For example, the third recital of the preamble to the TBT Agreement recognizes the importance of international standards and conformity assessment systems to facilitating trade – yet even a regulation based on an international standard may result in different costs to various producers in different Members, depending on how that Member's particular industry is organized. If the national treatment requirement is breached whenever a measure results in different treatment, regardless of whether it is based on origin, Members would be prevented even from adopting technical regulations based on international standards.

C. The Panel Did Not Err in Its Assessment or Application of the Facts

55. Article 11 of the DSU instructs each panel to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."[103] In examining a panel's obligation to make an "objective assessment of the matter," the Appellate Body has explained that Article 11 requires panels to take account of the evidence put before them and prohibits them from wilfully disregarding or distorting such evidence or making affirmative findings that lack a basis in the evidence before them.[104]

1. The Panel Properly Evaluated Evidence of the Mexican Tuna Industry's Ability to Comply with the Conditions for the U.S. Label

56. Mexico argues that the Panel failed to make an objective assessment of the matter before it and acted inconsistently with Article 11 of the DSU by failing to consider and take into account "evidence put forward by Mexico that it was impossible for the Mexican tuna industry to change

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producing toys without that chemical might be higher for imported products as compared to like domestic products. *See* U.S. Response to Panel Question 152, paras. 108-111.

[103]DSU, Article 11.

[104]Appellate Body Report, *EC – Hormones*, para. 133; Appellate Body Report, *US – Wheat Gluten*, paras. 161-162; Appellate Body Report, *US – Carbon Steel,* para. 142.

its fishing practices to adapt to the U.S. measure."[105] As elaborated below, contrary to Mexico's assertion, the Panel did consider and take into account evidence regarding the Mexican tuna industry's ability to adapt to the U.S. measure, including whether it was impossible for Mexican tuna producers to adopt fishing practices that would allow their products to be eligible to be labeled dolphin-safe in the United States. Accordingly, there is no basis for Mexico's claim.

57. In addition, the Panel did not, as Mexico suggests, find Mexican producers' ability to adapt to the U.S. measure irrelevant to whether the U.S. measure accords less favorable treatment to Mexican tuna products. In fact, the Panel stated that "[w]e do not exclude that cost of adaptation to technical regulation may be pertinent to an examination of whether less favourable treatment is being afforded with respect to a technical regulation"[106] and specifically analyzed Mexico's arguments in this regard.[107] However, as Mexico itself states,[108] the Panel was not convinced that Mexican producers' ability to adapt demonstrated that the U.S. measure denies an advantage to Mexican tuna products that it accords like domestic products or products of other origins, including because Mexico had not established that any adaptation costs Mexican producers might face would not also be felt — to varying degrees based *inter alia* on geographical location and existing practices — by other vessels wishing to catch tuna for inclusion in tuna products eligible to be labeled dolphin-safe on the U.S. market.[109] In other words, the Panel considered Mexican producers' ability to adapt as an element in its analysis of whether the U.S. measure accorded less favorable treatment to Mexican tuna products; and finding that producers' adaptation costs would vary depending on such factors other than the origin of the product itself, concluded that Mexican producers' adaptation costs did not amount to evidence that the U.S. measure accords less favorable treatment to Mexican tuna products than to tuna products of other origins.[110]

(a) The Panel Considered and Took Into Account Evidence Regarding Mexican Producers' Adaptation Costs

58. Mexico's assertion that the Panel failed to consider evidence regarding Mexican producers' ability to modify their fishing practices to meet the conditions for dolphin-safe labeling under the U.S. measure is without merit. In fact, Mexico acknowledges that the Panel considered that Mexican vessels, to the extent that they would need to modify their fishing

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[105]Mexico Other Appellant Submission, para. 149.

[106]Panel Report, para. 7.342.

[107]Panel Report, paras. 7.335-7.346. "We do not exclude that cost of adaptation to technical regulation may be pertinent to an examination of whether less favourable treatment is being afforded with respect to a technical regulation."

[108]Mexico Other Appellant Submission, para. 152.

[109]Panel Report, para. 7.346.

[110]Panel Report, paras. 7.345-7.346.

techniques or relocate to other fisheries, would incur some financial and economic costs and that those costs could be greater for Mexican producers than other producers. In particular, the Panel found:

> We recognize that, to the extent that the Mexican fleet would need to modify its fishing techniques, or relocate to other fisheries, in order to comply with the requirements of the US dolphin-safe provisions, this may entail some economic and financial costs, taking into account the fact that setting on dolphins is a particularly effective means of fishing for tuna in the ETP. We also acknowledge that, to the extent that, due to its geographical proximity to an area within the ETP where setting on dolphins can easily be practiced, costs associated with travelling from one area of the ETP to the other to catch tuna by methods other than setting on dolphins and possibly targeting different types of tuna could be greater for Mexican vessels than for those of other fleets whose coasts are not similarly close to those areas. To that extent, adapting to the US dolphin-safe standard could in practice be more onerous for the Mexican fleet than for others who either did not exploit the association with dolphins in the first place or for whom relocating to another fishing area within the ETP or elsewhere implies less additional distance.[111]

59. The Panel also summarized Mexico's arguments regarding the various costs its producers would incur and their difficulty in adjusting to these costs, as well as the U.S. arguments that Mexico had overstated the cost and difficulty that would be involved.[112] The Panel's summary included Mexico's arguments that to catch tuna using methods other than setting on dolphins its vessels would have to (1) travel farther from its coastline, (2) cut production, (3) target different species of tuna, and (4) catch less mature tuna, resulting in financial costs for Mexican producers.[113]

60. The Panel also noted Mexico's arguments regarding ecological costs associated with other fishing techniques and found that in meeting the conditions for labeling tuna dolphin-safe the measure does not require or expect tuna fishing vessels to adopt unsustainable fishing practices.[114]

61. Mexico nonetheless contends that the Panel failed to consider and take into account

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[111]Panel Report, para. 7.344.

[112]Panel Report paras. 7.335-7.340.

[113]Panel Report, paras. 7.336-7.340. The Panel also stated in its concluding paragraphs of its Article 2.1 analysis that "the measure at issue, in applying the same origin-neutral requirement to all tuna products, do not inherently discriminate on the basis of the origin of the products, and [] they also do not make it impossible for Mexican tuna products to comply with this requirement." Panel Report, para. 3.778.

[114]Panel Report, para. 7.337, 7.343.

evidence put forward by Mexico that it was not only costly for Mexican producers to meet the conditions for labeling tuna dolphin-safe under the U.S. measure, but impossible for them to do so, citing Exhibit MEX-86(a), (b), and (c) as supporting this proposition.[115] Exhibit MEX- 86, however, does not stand for the proposition that it is impossible for Mexican tuna processors to meet the conditions for labeling tuna products dolphin safe.[116] Instead, the three affidavits comprising Exhibit MEX-86 cover the same points regarding the costs associated with fishing for tuna using techniques other than setting on dolphins that the Panel summarized in paragraphs 7.336-7.340 of the Panel Report, and that Mexico raised in its response to Panel Question 38 to which the Panel cites.[117] The fact that the affidavits in Exhibit MEX-86 include the opinion — based on the same points reviewed in paragraph 7.336-7.340 of the Panel Report and Mexico's response to Panel Question 38 — that [[

]] does not amount to evidence that it is impossible for Mexican producers to meet the conditions for labeling tuna dolphin-safe.[118] To the contrary, the Panel examined the evidence put forward by Mexico regarding adaptation costs and simply did not reach the conclusion that Mexico would have liked it to reach, namely that it would be impossible for Mexican producers to meet the conditions for labeling tuna dolphin-safe. The fact that the Panel does not reach a conclusion that Mexico believes it should does not amount to a failure of the Panel to discharge its Article 11 obligation.

62. Moreover, Article 11 does not require a Panel to refer to every piece of information or argument put forward by the parties to conclude that the Panel has made an objective assessment of the facts.[119] Rather, a panel fails to make an objective assessment of the facts if it wilfully

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[115]Mexico Other Appellant Submission, para. 151.

[116]The Affidavit also appears to assume that the choice the producer faces is abandoning setting on dolphins entirely, or meeting the conditions that would allow its tuna to be included in tuna products eligible to be labeled dolphin safe in the United States. However, as noted below, the U.S. measure does not require this because the U.S. measure conditions the labeling of tuna products dolphin-safe on the products not containing tuna caught by setting on dolphins; thus, a nation's vessels could continue to set on dolphins to catch tuna while also using other techniques to catch tuna and that portion of its catch that is caught in accordance with the conditions set out in the U.S. measure (e.g. is not caught by setting on dolphins) may be used in tuna products labeled dolphin-safe on the U.S. market.

[117]*See* Panel Report, paras. 7.336-7.338 and nn. 525-529; Mexico Answer to Panel Question 38, paras. 84-88.

[118]Mexico Other Appellant Submission, para. 150; Exhibit MEX-86(b) (BCI). Exhibit MEX-86(a) (BCI) and (c) (BCI) also include similar opinions based on these points. [[

]] Exhibit MEX-86(a) (BCI). [[

]] MEX-86(c) (BCI).

[119]*See Australia – Apples (AB)*, paras. 270-271 (finding that a panel, as the trier of fact, has the discretion to choose which evidence it relies upon to make a finding, and cannot realistically be expected to refer to all statements by experts, and should have the discretion to determine which statements it is 'useful' to refer to explicitly). Further,

disregards or distorts the evidence before it or makes affirmative findings that lack a basis in the evidence before it. There is no basis to find the Panel's evaluation of the evidence Mexico put forward about its producers' ability to adapt amounts to such wilful disregard or distortion or consists of findings that lack a basis in the evidence before the Panel. To the contrary, the Panel examined and took into account the information regarding Mexican producers' ability to adapt and did not find it indicative that the U.S. measure accorded less favorable treatment to Mexican tuna products.

(b) Evidence Before the Panel Supports the Conclusion That It Is Possible for Mexican Producers to Meet the Conditions for Labeling Tuna Dolphin-Safe

63. Mexico's argument also fails, as it ignores other findings by the Panel that not only is it *possible* for Mexican producers to adapt to catch tuna in a manner that would allow tuna products containing their tuna to be eligible for dolphin-safe labeling under the U.S. measure, but Mexican producers *already do* catch tuna in a manner that would allow tuna products containing their tuna to be eligible for dolphin-safe labeling under the U.S. measure. As the Panel noted, Mexico currently catches tuna caught using methods other than setting on dolphins.[120] In fact a portion of Mexico's purse seine tuna fleet comprises vessels that do not set on dolphins to catch tuna and Mexico acknowledged during the first panel meeting that 20 percent of Mexico's purse seine tuna catch is caught by techniques other than setting on dolphins.[121] In addition, as noted in the Panel Report, Mexican producers also catch tuna using non-purse seine vessels that do not set on dolphins.[122]

64. Moreover, the United States put forward evidence that until 2002 tuna caught by Mexican vessels with 363 metric tons carrying capacity or less was contained in Mexican tuna products that were labeled as dolphin safe in the United States.[123] And, the Panel cited evidence that "at least some Mexican companies also abandoned setting on dolphins and sought to meet the 'no

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the Panel does explicitly cite Exhibit MEX-86(b) (BCI) elsewhere in its report, suggesting that the Panel did in fact read and consider this exhibit. Panel Report, para. 7.534.

[120]*See, e.g.,* Panel Report, para. 7.314, 7.317 (noting that a limited share of Mexico's tuna catch is eligible to be included in dolphin-safe tuna products – because it is not caught by setting on dolphins – and that *most* Mexican tuna is caught by setting on dolphins).

[121]Panel Report, paras. 7.313-7.314; *see also* U.S. First Written Submission, paras. 68-69, 108, 113; U.S. Second Written Submission, para. 24-26.

[122]Panel Report, 7.312; *see also* U.S. Response to Question 89, para. 5 (second table shows that Mexico has non-purse seine vessels that fish for tuna in the ETP using gillnets, longline, and pole and line methods).

[123]*See* U.S. First Written Submission, para. 91; U.S. Second Written Submission, para. 26; Photo of "Ocean's Best", Exhibit US-72 (showing a can of tuna labeled dolphin safe under the U.S. dolphin labeling provision and marked as a "Product of Mexico").

setting on dolphins' requirement.'"[124] Further, the Panel cited evidence that other countries' fleets — the United States and Ecuador in particular — faced "the choice of either continuing to fish in the ETP by setting on dolphins, renouncing the benefits of the US dolphin-safe label on the US market, or discontinuing the practice in favour of another fishery or another fishing method in the ETP , and thus having access to the market for dolphin-safe tuna in the United States"[125] and that those countries' fleets chose the latter option.[126] Thus, Mexico's fleet does not face a not unique choice, nor — at least based on the experience of other producers — an impossible one if it wants to operate a tuna industry that produces products that can carry the "dolphin safe" label in the United States. Moreover, Mexico's approach would appear to mean that less favorable treatment with respect to a standard or technical regulation might be shown merely by identifying the one producer that has not conformed to that standard or technical regulation (while all others have) and pointing out that the producer would face adaptation costs that others do not currently face (since other producers already incurred those costs).

65. Mexico's arguments that it would be impossible for its tuna industry to adapt to meet the conditions for labeling tuna-dolphin safe also ignore that the U.S. measure does not require a nation's entire fishing fleet to completely abandon the practice of setting on dolphins to catch tuna in order for tuna caught by its fleet to be contained in tuna products eligible for dolphin-safe labeling under the U.S. measure.[127] To the contrary, vessels of a Member could continue to set on dolphins to catch tuna while other vessels of that Member's fleet could catch tuna using methods that would allow tuna caught with those methods to be used in tuna products labeled dolphin-safe in the United States.[128] Thus, some Mexican-flagged vessels could continue to set on dolphins while other Mexican-flagged vessels employ other methods to catch tuna, and the portion of Mexico's catch that meets the conditions for dolphin-safe labeling could be included in tuna products eligible to be labeled dolphin safe.

66. Finally, Mexico's arguments also ignore the Panel's finding that Mexican producers of tuna products could choose to use tuna harvested by vessels flagged to other nations whose fleets do not set on dolphins to catch tuna.[129] Thus, Mexican producers of tuna products could adapt to meet the conditions for use of dolphin-safe labeling under the U.S. measure without undergoing

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[124]Panel Report, para. 7.326.

[125]Panel Report, paras. 7.320.

[126]Panel Report, paras.7.321-7.334.

[127]Panel Report, para. 7.372 (noting that "the US dolphin-safe labelling provisions do not require the importing *Member* to comply with any particular fishing method (these measures do not state, for example, that no tuna may be imported if it originates in a country where tuna is caught by setting on dolphins) and that rather "it is the products themselves that need to comply with the requirements fo the labelling scheme, *if* they wish to benefit from the label and make dolphin-safe claims on the US market.").

[128]Panel Report, para. 7.372.

[129]Panel Report, paras. 7.310, 7.347-7.349.

the costs Mexico cites with respect to modifying fishing techniques or location.

(c) Conclusion

67. In sum, Mexico has not established that the Panel failed to make an objective assessment of the matter with respect to the ability of its tuna producers to adapt to meet the conditions that would allow such tuna to be contained in tuna products eligible for labeling tuna dolphin-safe under the U.S. measure. The Panel neither failed to consider evidence before it regarding adaptation costs nor willfully distorted that evidence. Further, evidence before the Panel supports the conclusion that it was not impossible for Mexico's tuna producers to adapt to meet the conditions that would allow tuna products containing their tuna to be eligible for labeling tuna dolphin-safe under the U.S. measure. Accordingly, there is no basis for Mexico's claim that the Panel failed to comply with its obligations under Article 11 of the DSU in this regard.

2. The Panel Was Correct in Its Conclusions Regarding Evidence of Consumers' and Retailers' Preferences for Dolphin-Safe Tuna

68. Mexico argues that the Panel failed to properly consider evidence regarding retailers' preferences for dolphin-safe tuna and omitted from its analysis relevant factual findings, evidence and argument regarding the AIDCP label's "value in the U.S. market." In so doing, Mexico claims that the Panel failed to make an objective assessment of the matter in breach of Article 11 of the DSU. Mexico's claim is without merit and should be rejected.

69. As an initial matter, Mexico appears to misunderstand the Panel's findings. The Panel's findings regarding the preferences of processors, retailers and consumers for tuna not caught by setting on dolphins address an argument Mexico raised before the Panel that the U.S. measure denies Mexican tuna products access to major distribution channels and modifies the conditions of competition to the detriment of Mexican tuna products. The Panel considered this argument in the course of examining whether the U.S. measure puts "the imported like products at issue at a disadvantage compared to like products of national origin and like products originating in any other country."[130] In examining this argument, the Panel disagreed with Mexico that the relative share of Mexican imports on the U.S. market demonstrated that the U.S. measure had an adverse impact on Mexican tuna products;[131] and found instead that it appears there "is only a marginal relationship between the US measure and the practices of operators on the market".[132] In other

[130]Panel Report, para. 7.358.

[131]Panel Report, paras. 7.355 (Mexico's argument), 7.359-7.360 (Panel's finding); *see also* paras. 7.361-7.367.

[132]Panel Report, para. 7.366 (retailers); *see also* Panel Report, para. 7.364 (processors), 7.367 (consumers). The Panel also found that it is more difficult to sell tuna that is caught by setting on dolphins in the United States but this does not imply that the U.S. measure puts Mexican tuna products at a disadvantage on the U.S. market as compared to domestic tuna products and tuna products of other origins since this constraint would apply equally to

words, it is not the U.S. measure that is affecting Mexican tuna products' market share but the preference in the U.S. market for tuna not caught by setting on dolphins. To reach this conclusion, the Panel examined the evidence before it related to processors', retailers' and consumers' preferences and found that processors[133] as well as retailers[134] and consumers[135] appeared to have a preference for tuna not caught by setting on dolphins and that the evidence did not support the conclusion that retailers and consumers would buy tuna caught by setting on dolphins if it could be labeled dolphin-safe (e.g. with the AIDCP label).

(a) The Panel Properly Evaluated Evidence Regarding Retailer Preferences

70. The Panel did not fail to evaluate properly evidence of retailer preferences. To the contrary, the Panel evaluated the evidence before it regarding retailer preferences and concluded that this evidence did not support the conclusion that retailers would purchase tuna products that contained tuna caught by setting on dolphins if they could be labeled dolphin-safe. Specifically, the Panel considered the affidavits that Mexico submitted purporting to indicate that retailers would purchase tuna products that contained tuna caught by setting on dolphins if they could be labeled dolphin-safe and thus would accept the AIDCP label as an alternative assurance that tuna products are dolphin-safe.[136] The Panel, however, disagreed that the affidavits supported that conclusion. Instead, the Panel agreed with the United States that in referring to "eligibility for a 'dolphin-safe' label" the affidavits may be "understood to mean that the retailers at issue would be prepared [to] offer [Mexican tuna] products for sale if they met the conditions for dolphin-safe labeling *under the existing U.S. measure*,"[137] which include that tuna products labeled dolphin-safe not contain tuna caught by setting on dolphins. The Panel in addition cited evidence that retailers are concerned with consumer acceptance of tuna products, not whether the product can legally be labeled dolphin safe or not.[138] The Panel further recalled that retailers are aware that

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all tuna products. Panel Report, para. 7.360.

[133]Panel Report, paras. 7.361-7.364.

[134]Panel Report, paras. 7.365-7.366.

[135]Panel Report, para. 7.367; *see also* para. 7.368.

[136]Panel Report, para. 7.365.

[137]Panel Report, para. 7.365 (italics added); U.S. Second Written Submission, para. 165. The United States also submitted evidence that retailers will sell tuna products that are not labeled dolphin-safe but nonetheless meet the conditions to be labeled dolphin safe, such as Walmart's Great Value Tuna. Panel Report, para. 7.352; U.S. Second Written Submission, para. 165; U.S. First Written Submission, para. 94; Photo of Great Value Tuna, Exhibit US-73; U.S. Response to Panel Question 95, para. 19 (noting that Great Value Tuna products have been verified as containing dolphin safe tuna).

[138]Panel Report, para. 7.365. This evidence directly counters Mexico assertion that retailers "do not have a legal need to know precisely what the label means" but are concerned with having "tuna products that can be lawfully labelled as dolphin safe." Mexico Other Appellant Submission, para. 162. Evidence regarding consumer

they risk facing actions such as boycotts if they carry tuna products not eligible for dolphin-safe labeling (i.e., containing tuna caught by setting on dolphins).[139] The Panel observed that this evidence suggests that "retailers are sensitive to the dolphin-safe issue in a manner comparable to that of tuna processors referred .., i.e., that they do not wish to carry tuna products containing tuna caught in association with dolphins that may lead to pressure from NGOs and negative perceptions from consumers."[140]

71. Thus, contrary to Mexico's assertion, the Panel did not rely on the perceptions of canneries to reach its conclusions regarding retailers' preferences for tuna products that contain tuna not caught by setting on dolphins. Rather, the Panel specifically analyzed the evidence Mexico put forward regarding retailer preferences and concluded that that evidence reflected a preference for tuna not caught in association with dolphins, which was similar to the preferences of canneries. Moreover, the evidence shows that canneries' preferences are shaped by the preferences of consumers for tuna not caught in association with dolphins.[141] It is therefore illogical to suggest as Mexico does that retailers — the direct suppler of tuna products for consumers — would not also be concerned about consumer preferences.

72. Given that the Panel examined and considered the evidence before it regarding retailer preferences, Mexico's complaint that the Panel failed to do so, or improperly attributed preferences of canneries to retailers, is without merit and therefore fails as a basis to assert the Panel failed to make an objective assessment of the matter under Article 11 of the DSU.

(b) The Panel Did Not Fail Properly to Evaluate the "Value" of the AIDCP Label on the U.S. Market

73. In addition to claiming that the Panel improperly evaluated retailers' preferences, Mexico also claims that the Panel "omitted from its analysis relevant factual findings, evidence and argument" regarding the "value" or "advantage" of the AIDCP dolphin-safe label.[142]

74. The issue before the Panel, however, was not the value or advantage that the AIDCP label provides on the U.S. market. Instead, as explained above, the issue before the Panel was

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preferences further refutes this as well. Panel Report, para. 7.288 (citing *inter alia* the Amicus Submission from the Humane Society International and American University); U.S. Second Written Submission, para. 128; U.S. Response to Panel Question 40, paras. 98-101.

[139]Panel Report, para. 7.366 (citing Mexico First Written Submission, para. 112); *see also* Panel Report, para. 4.29, 7.87, 7.166. The Panel elaborated on the boycotts, reflecting consumer concern with the practice of setting on dolphins, that preceded adoption of the U.S. measure in paragraph 7.182 of its report.

[140]Panel Report, para. 7.366.

[141]Panel Report, para. 7.364; *see also* U.S. First Written Submission, para. 92-93; U.S. Response to Panel Question 40, para. 98; Written Submission of Amicus Curie to the Panel, paras. 19, 62-63.

[142]Mexico Other Appellant Submission, paras. 163-166.

whether the U.S. measure – which does not allow tuna products to be labeled dolphin-safe if they contain tuna caught by setting on dolphins – denies an advantage to Mexican tuna products that they afford domestic tuna products or tuna products originating in other countries.[143] In addressing that question, the Panel examined various evidence and argument submitted by Mexico, including arguments that the U.S. measure is responsible for Mexican tuna products' absence from major distribution channels and that retailers and consumers would accept tuna products that contained tuna caught by setting on dolphins and labeled with the AIDCP label.[144] The Panel found that the relative share of Mexican tuna products on the U.S. market does not in itself constitute evidence that the U.S. measure modifies the conditions of competition to the detriment of Mexican tuna products[145] and further that there "is only a marginal relationship between the US measure and the practices of operators on the market" including retailers and consumers.[146] In reaching the latter conclusion, the Panel rejected Mexico's assertions that the evidence before the Panel supported the conclusion that retailers and consumers would accept tuna products containing tuna caught by setting on dolphins if they were labeled dolphin-safe under the AIDCP label,[147] particularly given retailers' and consumers' preference for tuna caught not in association with dolphins.

75. The "findings and evidence" Mexico cites in paragraph 164 of its Other Appellant Submission are neither inconsistent with these findings, nor support Mexico's contention that the "AIDCP label" has value in the U.S. market (i.e., that U.S. market operators would accept tuna products that contain tuna caught by setting on dolphins if they were labeled with the AIDCP label).

76. First, contrary to Mexico's assertion in paragraph 164(b),[148] the mere existence of the U.S. measure does not support the conclusion that the AIDCP label has value on the U.S. market. The U.S. measure does not prohibit use of the AIDCP dolphin-safe label on tuna products that contain tuna caught by setting on dolphins because the AIDCP label "has value" but because allowing its use on such products would be misleading. As reviewed by the Panel, the U.S. measure has as its objective 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

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[143]Panel Report, para. 7.358.

[144]Panel Report, paras. 7.365-7.367.

[145]Panel Report, para. 7.359.

[146]Panel Report, para. 7.366; *see also* Panel Report, para. 7.364 (processors), 7.367 (consumers). The Panel also found that whether it is more difficult to sell tuna that is caught by setting on dolphins in the United States but this does not imply that the U.S. measure puts Mexican tuna products at a disadvantage on the U.S. market as compared to domestic tuna products and tuna products of other origins since this constraint would apply equally to all tuna products. Panel Report, para. 7.360.

[147]Panel Report, paras. 7.365-7.367.

[148]Mexico Other Appellant Submission, para. 164(b).

contributing to the protection of dolphins by ensuring the U.S. market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins.[149] Under the AIDCP label, tuna products may be labeled dolphin-safe even if they contain tuna caught by setting on dolphins — a practice that is harmful to dolphins.[150] The U.S. measure does not permit tuna products that contain tuna caught by setting on dolphins to bear the AIDCP dolphin-safe label. The same can be said about the Earth Island Institute (EII) challenge to the finding by the U.S. Department of Commerce that would have allowed tuna products to be labeled dolphin safe (with the AIDCP label or otherwise) if they contained tuna caught by setting on dolphins (cited by Mexico in paragraph 164(c) of its submission). There is no evidence that EII challenged the U.S. Department of Commerce finding because it considered the AIDCP label to "have value." Rather, EII challenged the U.S. Department of Commere finding because it disagreed that the evidence supported the conclusion that the practice of setting on dolphins was not having a significant adverse impact on dolphins.[151]

77. Second, the "findings and evidence" Mexico cites in paragraph 164(d) and (e) likewise do not support the conclusion that the AIDCP label has value on the U.S. market. The testimony Mexico cites in paragraph 164(d) does not address the "value" of the AIDCP label, but only addresses the Assistant Secretary's view that tuna fishers would only adhere to the AIDCP's dolphin conservation procedures if U.S. law were changed to allow tuna products that contain tuna caught by setting on dolphins to be labeled dolphin-safe.[152] As U.S. law was not changed in that way, yet fishers of nations party to the AIDCP nonetheless are adhering to the AIDCP's dolphin conservation procedures,[153] it is unclear what value this testimony serves, much less that it supports the proposition that the AIDCP label has value on the U.S. market. Similarly, the fact that [[

]], is not evidence of the AIDCP label's value on the U.S. market.[154] If anything, it supports the opposite conclusion, that regardless of whether the product is labeled dolphin safe, consumers and retailers have a strong preference for tuna products that do not contain tuna caught by setting on dolphins.

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[149]Panel Report, paras. 7.425.

[150]E.g., Panel Report, paras. 7.493, 7.504.

[151]Panel Report, paras. 2.18-2.19 (noting that EII filed a legal action alleging that the Secretary of Commerce had abused its powers in reaching the conclusions reflected in the final findings that the practice of setting on dolphins "not having a significant adverse effect on any depleted dolphin stock in the ETP.").

[152]Mexico Other Appellant Submission, para. 164(d).

[153]Panel Report, para. 7.506.

[154]Mexico Other Appellant Submission, para. 164(e) (citing Exhibits MEX-58(BCI) and MEX-100(BCI)). Exhibits MEX-58 and MEX-100 address [[

]]. Exhibit MEX-58 (BCI), pp. 1-2 (item number 3); Exhibit MEX-100 (BCI).

78. Third, Mexico's argument misreads paragraph 7.568 of the Panel Report. Contrary to Mexico's suggestion, it does not stand for the proposition that the Panel considered that U.S. market operators would accept tuna products that contain tuna caught by setting on dolphins if they were labeled with the AIDCP label. Rather in paragraph 7.568, the Panel states that "to the extent that a proposed alternative measure would provide access to the [dolphin-safe] label, and thus to this advantage, to a greater range of tuna products, including imported tuna products, it would be less-trade restrictive than the existing U.S. measure, in that it would allow greater competitive opportunities on the US market to those products."[155] In this regard, Mexico appears to confuse the question of whether the U.S. measure by providing access to dolphin-safe labeling accords an advantage,[156] with the question of whether the U.S. measure by denying access to dolphin-safe labeling for tuna caught by setting on dolphins, in fact denies access to an advantage to Mexican tuna products.[157] There is nothing inconsistent with the Panel finding, as it did, that the U.S. measure accords an advantage, but does not fail to accord that advantage to Mexican tuna products. Further, we understand the Panel in paragraph 7.568 to be stating that an alternative measure that provides access to an advantage to a wider range of products would in turn allow greater competitive opportunities for such products — i.e., allow more products to access an advantage and seek to benefit from that advantage on the market. That, however, is not the same as concluding that products accessing that advantage would necessarily be accepted by market operators or enjoy other benefits attributable to the choice of private actors.

79. Mexico also argues that the Panel failed to consider that there could be latent demand for tuna products that contain tuna caught by setting on dolphins and labeled with the AIDCP label.[158] Mexico cites no evidence in this regard, but cites to prior Appellate Body reports noting that certain challenged tax measures could have suppressed demand for the relevant products and diminished the extent to which potentially substitutable products competed. Mexico's argument is without merit. First, as reviewed above, the evidence before the Panel indicates U.S. market operators' strong preference for tuna products that do not contain tuna that is caught in association with dolphins and does not support Mexico's contention that market operators would accept tuna products that contain tuna caught by setting on dolphins and labeled with the AIDCP label. This would appear to counter any suggestion that there might be latent demand for such products.

80. Second, the cited portions of the Appellate Body reports concerned whether the relevant imported and domestic products were "like" or "directly competitive or substitutable" within the meaning of Article III:2 of the GATT 1994. In *Philippine – Distilled Spirits,* the Appellate Body noted that the measures at issue imposed significantly higher tax rates on imported products

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[155]Panel Report, para. 7.568.

[156]The Panel examined this question in paragraphs 7.285-7.291 of its Report.

[157]The Panel examined this question in paragraphs 7.292-7.387 of its Report.

[158]Mexico Other Appellant Submission, paras. 166-167.

relative to domestic products and that those higher tax rates could affect demand for imported products.[159] The Appellate Body therefore agreed that current demand for imported products might understate the extent to which the products at issue were"like" or "directly competitive or substitutable."[160] In *Korea – Alcohol,* the Appellate Body was observing that earlier protectionist tax and other measures could have affected consumer demand for imported products,[161] as the panel in *Japan – Alcohol* similarly did.[162]

81. The situation in this dispute is unlike the situation in *Philippines – Distilled Spirits.* The U.S. measure does not affect consumers' ability to purchase Mexican tuna products. Moreover, as the Panel found, what is affecting consumer and retailer demand for Mexican tuna products is whether the tuna is dolphin safe, not the origin of the product.[163] Thus, unlike in *Philippines – Distilled Spirits*, there is no basis for the Panel to have considered that there might be any "latent" demand for Mexican tuna products that contain tuna caught by setting on dolphins.

82. Furthermore, unlike the cited reports, the relevant question before the Panel was not whether Mexican tuna products compete with U.S. tuna products and tuna products originating in other countries. In fact, the Panel already found that they did, as reflected in its finding that Mexican tuna products are "like" U.S. tuna products and tuna products originating in other countries. Instead, the question was whether the relative share of Mexican tuna products on the U.S. market was evidence that the U.S. measure modifies the conditions of competition to the detriment of Mexican tuna products. The Panel concluded that it was not. In reaching this conclusion, the Panel did not limit its evaluation to the current situation where tuna products may not be labeled dolphin safe if they contain tuna caught by setting on dolphins, but considered Mexico's argument that retailers and consumers would purchase tuna products that contain tuna caught by setting on dolphins if they could be labeled with the AIDCP label.[164] The Panel however did not agree with Mexico that such a change would lead to demand for Mexican tuna

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[159] *Philippine – Distilled Spirits (AB)*, paras. 221, 226.

[160] *Philippine – Distilled Spirits (AB)*, para. 228.

[161] *Korea – Alcohol (AB)*, paras. 120-123.

[162] *Japan – Alcohol (Panel),* para. 6.28. Mexico also cites *EC – Sardines* where it notes that regulatory measures could create consumer expectations. *EC – Sardines (Panel)*, para. 7.127. Mexico, however, does not explain how the panel's observation in this regard relates to the facts of this dispute. To the extent the U.S. measure creates consumer expectations, it would be that tuna products labeled dolphin safe do not contain tuna caught by setting on dolphins. This is not evidence, however, that the U.S. measure suppresses latent demand for tuna product that contain tuna caught by setting on dolphins.

[163] Panel Report, para. 7.366; *see also* Panel Report, para. 7.364 (processors), 7.367 (consumers). The Panel also found that whether it is more difficult to sell tuna that is caught by setting on dolphins in the United States but this does not imply that the U.S. measure puts Mexican tuna products at a disadvantage on the U.S. market as compared to domestic tuna products and tuna products of other origins since this constraint would apply equally to all tuna products. Panel Report, para. 7.360.

[164] Panel Report, paras. 7.365-7.368.

products that contain tuna caught by setting on dolphins, noting that there "is only a marginal relationship between the US measure and the practices of operators on the market."[165]

83. In sum, the Panel did not fail to consider evidence regarding the "value" of the AIDCP label. The "findings and evidence" Mexico contends that the Panel should have considered do not support Mexico's contentions regarding the value of the AIDCP label. Nor do they conflict with the Panel's finding that other evidence submitted by Mexico did not support the conclusion that U.S. market operators would accept tuna products that contained tuna caught by setting on dolphins if they could be labeled dolphin-safe with the AIDCP label. Instead, that evidence supported the conclusion that U.S. market operators – processors, retailers and consumers – had a strong preference for tuna products that do not contain tuna caught by setting on dolphins and that it was not the U.S. measure but market operators that were responsible for the absence of Mexican tuna products – which contain tuna caught by setting on dolphins – in major distribution channels. Accordingly, there is no basis for Mexico's claim that the Panel failed to make an objective assessment of the matter regarding the "value" of the AIDCP label, and its claims in this regard should be rejected.

3. The Panel Correctly Read the Findings of the Appellate Body in *Dominican Republic – Cigarettes* and Applied Them With Respect to the Facts in this Dispute

84. Premised on its erroneous view that any difference between the share of Mexican tuna products currently eligible for the U.S. dolphin safe label and the share of other products eligible automatically results in a breach of TBT Article 2.1, Mexico claims that the Panel improperly assessed the facts with regard to the origin-neutrality of the measure. Mexico asserts that the Panel's error arises from a flawed reading of the Appellate Body report in *Dominican Republic – Import and Sale of Cigarettes*. However, it is Mexico, not the Panel, which has misconstrued that report.

85. In *Dominican Republic – Cigarettes*, the Appellate Body examined a claim that a bond requirement that on its face applied equally to imported and like domestic products in fact accorded different and less favorable treatment to imported products. In that dispute the complaining party asserted that although the total amount of the bond (RD$5 million) was the same for imported as it was for like domestic products, the per unit cost of the bond requirement was higher on imports because imports comprised a smaller share of the market. The Appellate Body rejected this claim because the reason for the higher per unit cost was not based on origin, but rather other factors, namely imports' versus like domestic products' relative market share.[166]

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[165]Panel Report, paras. 7.364, 7.366.

[166]*Dominican Republic – Cigarettes (AB),* para. 96; *see also* para. 87 (setting out bond amount of RD$5 million).

86. Mexico claims that the Appellate Body's reasoning was confined to the facts before it, which it asserts are "readily distinguishable" from those in the instant case.[167] According to Mexico, whereas in *Dominican Republic – Cigarette*s "it would not matter from which country the 'importer' or more generically the re-seller purchased the cigarettes, because the alleged adverse effect related solely to the volume of cigarettes carried by the importer/re-seller," in this case "it would matter from which country the importer/re-seller purchased the tuna products because the fishing methods and cannery practices of that country would dictate whether the importer/reseller would have access to the principal distribution channels for the tuna products."[168] Yet this is precisely the argument that, based on the facts before it, left the Panel unpersuaded — that is, Mexico did not provide sufficient evidence to demonstrate that the fishing methods used by a country's fleet correlated to the origin of that country's tuna products, such that the fishing methods of a given country "dictated" whether that country's tuna products would be precluded from having access to the label.[169]

87. Mexico proceeds to assert that the Panel's interpretation is somehow at odds with the notion that discrimination may be *de facto* as well as *de jure*.[170] This, too, is unpersuasive. The Panel, like all of the parties to the dispute, recognized that a measure that on its face does not differentiate based on origin may nonetheless discriminate on a *de facto* basis.[171] The core question is whether Mexico offered sufficient evidence to support the conclusion that the measure at issue is *de facto* discriminatory. To the extent that some products falling within the group of like products were to receive different treatment than other products falling within the group of like products, it would be reasonable to consider what portion of products receiving that different treatment were imported in evaluating whether the basis for the different treatment — in this case, fishing method — was in fact a proxy for origin.

88. However, the fact that some imported products may fall within the group of like products that are subject to different treatment that may be less favorable alone is not evidence that a measure accords less favorable treatment to imported products as compared to like domestic products, particularly where there is evidence that the basis for the different treatment is not in fact origin. If the basis for the different treatment is not origin, then the measure is according imported and like domestic products the same treatment and it cannot be said to accord less favorable treatment to imported products as compared to like domestic products.

89. This is consistent with the Appellate Body's finding in *EC – Asbestos* that to establish that a measure has accorded less favorable treatment under Article III:4, "a complaining Member

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[167]Mexico Other Appellant Submission, para. 172.

[168]Mexico Other Appellant Submission, para. 173.

[169]Panel Report, paras. 7.302-7.358.

[170]Mexico Other Appellant Submission, para. 174.

[171]Mexico Other Appellant Submission, para. 7.281-282.

must ... establish that the measure accords to the group of 'like' imported products 'less favourable treatment' than it accords to the group of 'like' domestic products" and that Members may draw distinctions between like products without that alone being considered to have accorded imported products less favorable treatment than like domestic products.[172] The Appellate Body's reference to the "group of 'like' *imported* products" and "group of 'like' *domestic* products" support the view that the types of distinctions with which the Article III:4 national treatment obligation is concerned are those that distinguish between products based on whether they are domestic or imported, or said another way, based on origin.[173] Consistent with the Appellate Body's report in *EC – Asbestos*, distinctions based on criteria other than origin are not distinctions that accord less favorable treatment to the group of imported products as compared to the group of like domestic products, and neither Article III:4 nor Article 2.1 prohibit such distinctions.

90. Mexico's passing references to *Belgium - Family Allowances* and *EC - Tariff Preferences* are inapposite. In neither *Belgium - Family Allowances* nor *EC - Tariff Preferences* did the panel conclude that a measure may be found to breach a non-discrimination obligation even if it does not differentiate based on origin. In *Belgian Family Allowances*, Belgium conditioned a product's eligibility for a particular tax exemption on whether or not the country from which the product originated maintained a system of family allowances that was consistent with the requirements of Belgian law. This Belgian requirement resulted in imported products from some countries being accorded the tax exemption while imports of like products from other countries were not for reasons wholly unrelated to the imported products themselves.[174] As the panel in *Indonesia – Autos* clarified, the case stands for the proposition that if conferral of an advantage within the meaning of Article I:1 of the GATT is made conditional on any criteria then those criteria must be related to the imported product itself.[175] Likewise, in *EC - Tariff Preferences*, the EC conditioned a product's eligibility for tariff preference on whether or not the country from which the product originated was experiencing a certain degree of drug problems; the panel found that the EC's action constituted a failure to "unconditionally" accord an advantage available to products from some countries to those of other countries.[176] The facts are different in this dispute. In contrast to the situation in *Belgian Family Allowances* and *EC – Tariff Preferences,* if a tuna product is ineligible to bear a dolphin safe label it is based on criteria directly related to the product itself, namely the fact that it contains tuna caught by setting on

[172] *EC – Asbestos (AB),* para. 100.

[173] *See, e.g.*, U.S. Response to Panel Question 148 (responding to the Panel's question as to the meaning of the Appellate Body's findings in *EC – Asbestos*).

[174] *Belgian– Family Allowances (GATT Panel)*, para. 3.

[175] *Indonesia – Autos (Panel)*, paras. 14.143-14.145.

[176] *EC – Tariff Preferences (Panel)*, para. 7.60.

dolphins or in a set in which dolphins were killed or seriously injured.[177]

91. Mexico's theory would preclude any inquiry into whether a difference in treatment is in fact attributable to the origin of the products in question. According to Mexico, even *facts* that "are not on their face related to origin" permit the conclusion that a measure discriminates on that basis[178] — ergo, the mere fact that some Mexican vessels happen to set on dolphins and the U.S. fleet does not permits the conclusion that the measure breaches Article 2.1. As noted above, this reasoning is contradicted by the text of Article 2.1 and how the concept of "less favorable treatment" has been applied in previous disputes relating to *de facto* discrimination claims, and would have profound implications for Members' ability to adopt legitimate regulations.

92. Finally, regarding Mexico's invocation of the Appellate Body's observations in *US - Shrimp* regarding the "coercive effect" of an import ban, which it equates to the claimed "pressure" on Mexico and the Mexican fleet that results from the U.S. dolphin safe labeling conditions,[179] and setting aside that the point is legally irrelevant for purposes of a nondiscrimination analysis, it may be recalled that the measure in question does not ban imports of Mexican tuna products, nor require Mexico's fleet to adopt different fishing methods in order for Mexican tuna products to obtain the dolphin-safe label. To suggest that it is "coercive" is comparable to suggesting that one Member's fuel efficiency label "coerces" other Members into requiring that their car manufacturers meet a particular fuel efficiency standard.

4. The Panel Correctly Read the Appellate Body Findings in *Korea – Beef* and Applied Them With Respect to the Facts in this Dispute

93. Mexico contends that the Panel misinterpreted and misapplied the Appellate Body's findings in *Korea – Beef*.[180] To the contrary, however, it is Mexico that is misinterpreting and misapplying those findings.

94. In *Korea – Beef,* the Appellate Body examined a measure that on its face accorded different treatment to imported and domestic products.[181] In examining whether this measure altered the conditions of competition to the detriment of imported products, the Appellate Body considered whether the measure itself or the choice of private actors was responsible for the

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[177]The Panel rejected Mexico's argument that the U.S. measure "pressures" Mexico to change its fishing practices. The Panel found that the U.S. measure does not require the importing Member to comply with any particular fishing method. The measure does not state, for example, that no tuna may be imported if it originates in a country where tuna is caught by setting on dolphins. Panel Report, para. 7.372.

[178]Mexico Other Appellant Submission, para. 176.

[179]Mexico Other Appellant Submission, para. 178-79.

[180]Mexico Other Appellant Submission, paras. 180-187.

[181]*Korea – Beef (AB)*, paras. 143-144.

reduction in access to normal retail channels for imported products. The Appellate Body found that by requiring retailers to choose between selling either imported or domestic beef, rather than continuing to allow them the option of selling both, the challenged measures themselves had the effect of reducing access to normal retail channels; it was not purely private actors that were choosing to sell either imported or domestic beef but the challenged measures that were requiring them to make a choice.[182]

95. In contrast, in this dispute, the U.S. measure does not require retailers to choose between selling imported and domestic tuna products nor between tuna products that are labeled dolphin-safe and those that are not or that contain tuna caught by setting on dolphins and those that do not. Retailers are free to carry one or the other or both. And, in fact, U.S. retailers carry both domestic and imported tuna products and both tuna products that are labeled dolphin-safe and those that are not.[183] Some retailers also carry tuna products that contain tuna caught by setting on dolphins[184] as well as tuna products that do not. Thus, unlike the challenged measures in *Korea – Beef*, the U.S. measure does not have the effect of reducing access to normal retail channels for tuna products by requiring retailers to make a choice between selling imported and domestic tuna products, or even between selling tuna products that are labeled dolphin-safe and those that are not or that contain tuna caught by setting on dolphins and those that do not. Any decision to sell one or the other or both is purely the choice of private actors.

96. The U.S. measure also does not otherwise limit the choice of retailers to market tuna products that contain tuna caught by setting on dolphins. As the Panel found, retailers are free to, and do, sell tuna products that are not dolphin safe,[185] and nothing in the U.S. measure limits the marketing of tuna products that are not dolphin safe or are not labeled dolphin safe. While the Panel found that there is a preference in the U.S. market for tuna products that are dolphin safe,[186] in line with the Appellate Body's finding in *Korea – Beef,* the actions of private actors (in this case, their preference for tuna products that are dolphin safe) cannot form the basis for

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[182] *Korea – Beef (AB)*, para. 146.

[183] As noted in the Panel Report and U.S. submissions to the Panel, some retailers such as Walmart sell both tuna products that are labeled dolphin-safe and those that are not; yet even those tuna products that it sells that are not labeled dolphin-safe nonetheless meet the conditions to be labeled dolphin-safe; Walmart has simply chosen not to label the product. Panel Report, paras. 7.353 (reviewing evidence that Walmart the world's largest food distributor sells both tuna products that are labeled dolphin safe and those that are not). Evidence before the Panel showed that Walmart sells both tuna products that are labeled dolphin-safe, Mexico Second Oral Statement, para. 28; Exhibit MEX-104; U.S. Response to Panel Question 107, para. 28, and tuna products that are not labeled dolphin-safe, *see* U.S. First Written Submission, paras. 94; U.S. Second Written Submission, para. 96 & n.137; Exhibits US-73 and US-81, U.S. Response to Panel Question 107, paras. 25-26, although the Walmart tuna products not labeled dolphin-safe have been verified by the National Marine Fisheries Service as in fact being dolphin-safe, *see* U.S. Response to Panel Question 102, para. 25.

[184] U.S. First Written Submission, para. 95.

[185] Panel Report, para. 7.352-7.353.

[186] *E.g.*, Panel Report, paras. 7.632-7.368.

concluding that the U.S. measure modifies the conditions under which imported and domestic products compete. The limited demand for non-dolphin safe tuna products is a result of preferences of market operators not the U.S. measure.

97. Mexico argues that by conditioning use of a dolphin-safe label on tuna products not containing tuna caught by setting on dolphins, the U.S. measure is "restricting the choice that can be made by U.S. consumers" to buy tuna products that are labeled dolphin-safe but that contain tuna caught by setting on dolphins.[187] Mexico views this as evidence that the U.S. measure is "responsible for the establishment of competitive conditions that are less favorable for imported products than for the like domestic product from the United States and other countries."[188] While Mexico is correct that the U.S. measure restricts the option of selling tuna products labeled dolphin-safe that contain tuna caught by setting on dolphins, this is not evidence that the U.S. measure establishes competitive conditions that are less favorable for imported products. By definition, any standard restricts the option of saying that a product meets that standard. Mexico's approach appears to imply that standards are of necessity WTO inconsistent since the limit the ability of some producers to market their products as meeting that standard. However, this is fundamentally at odds with the TBT Agreement. Furthermore, the U.S. measure impose conditions for using the label regardless of the origin of the tuna product, and as the Panel correctly found, none of the evidence Mexico submitted support the conclusion that, by prohibiting use of a dolphin safe label on tuna products that contain tuna caught by setting on dolphins, the U.S. measure in fact accord less favorable treatment to Mexican tuna products.[189]

98. In this regard, Mexico appears to confuse the question of whether a measure modifies the conditions of competition, and the question of whether a measure modifies the conditions of competition *to the detriment of imported products*.[190] While the U.S. measure did introduce a change affecting tuna products by establishing conditions under which such products could be labeled dolphin safe, those conditions apply equally to imported and domestic tuna products regardless of origin.[191] Thus, any change the U.S. measure introduced regarding the conditions under which tuna products compete is not one that modified the conditions of competition to the detriment of imported products or tuna products originating in some countries as compared to others. Under the U.S. measure, all tuna products compete under the same conditions: tuna products – regardless of origin – that contain tuna caught by setting on dolphins may not be labeled dolphin safe.

99. Mexico also confuses the question of whether the U.S. measure accords an advantage

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[187]Mexico Other Appellant Submission, paras. 184-185.

[188]Mexico Other Appellant Submission, para.185.

[189]*E.g.*, Panel Report, paras. 7.311, 7.319, 7.320, 7.324, 7.334. 7.346.

[190]Mexico Other Appellant Submission, paras. 185-186.

[191]Panel Report, paras. 7.324, 7.331, 7. 333, 7.345-7.346.

with the question of whether the U.S. measure denies access to that advantage to Mexican tuna products. In paragraph 7.287 of its report to which Mexico cites,[192] the Panel is addressing the former, specifically whether the U.S. measure accords an advantage in the form of access to dolphin-safe labeling for tuna products eligible for such labeling. The Panel concluded that it did. Mexico, however, wrongly equates that conclusion with its view that the U.S. measure fails to accord that advantage to Mexican tuna products and modifies the conditions of competition to the detriment of Mexican tuna products.[193] As the Panel correctly found, while the U.S. measure accords an advantage,[194] it does not deny access to that advantage to Mexican tuna products or disadvantage Mexican tuna products as compared to U.S. tuna products or tuna products originating in other countries.[195]

100. In contrast to Mexico's erroneous interpretation and application of the Appellate Body's findings in *Korea – Beef*, the Panel correctly read and applied the Appellate Body's findings in that dispute as well as in *Dominican Republic – Cigarettes* in analyzing the U.S. measure. In particular, the Panel correctly observed that the analysis of whether a technical regulation affords less favorable treatment concerns the treatment arising from the preparation, adoption and application of the measure, not the difference in the impact of the measure attributable to the behavior of private actors, for example impacts arising because some private actors chose to continue to set on dolphins to catch tuna while others chose to discontinue that practice for all or some of their catch to take advantage of dolphin-safe labeling in the U.S. market.[196] As the Appellate Body found in *Korea – Beef*, the question of whether a measure accords less favorable treatment concerns the treatment arising from the measure itself;[197] moreover, as the Appellate Body found in *Dominican Republic – Cigarettes* "the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favorable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product."[198] Applying this guidance, the Panel concluded:

> "That [the U.S. measures] may, through the operation of origin-neutral regulatory categories, have a detrimental impact on certain imports does not, in our view, necessarily imply that the measures afford less favourable treatment to such imported products within the meaning of Article 2.1. ... [I]n our view, the form of

[192]Mexico Other Appellant Submission, para. 187.

[193]Mexico Other Appellant Submission, para. 187.

[194]Panel Report, para. 7.291.

[195]*See e.g.,* Panel Report, paras. 7.311, 7.319, 7.345, 7.357.

[196]Panel Report, para. 7.334, 7.375-7.376; *see also* paras. 7.325-7.333.

[197]*Korea – Beef (AB)*, para. 149.

[198]*Dominican Republic – Cigarettes (AB)*, para. 96.

> the analysis is the treatment afforded by the measures themselves, rather than the consequences that arise as a result of the actions of private actors on the market. ... [O]n the basis of the elements presented to us in these proceedings, it appears to us that the impact of the US dolphin-safe provisions on different operators on the market and on tuna products of various origins depends on a number of factors that are not related to the nationality of the product, but to the fishing and purchasing practices, geographical location, relative integration of different segments of production, and economic and marketing choices. In this context, any particular adverse impact felt by Mexican tuna products on the US market is, in our view, primarily the result of "factors or circumstances unrelated to the foreign origin of the product", including the choices made by Mexico's own fishing fleet and canners.[199]

101. As discussed in Section II.C.3 above, the Panel's analysis was wholly consistent with that of the Appellate Body in *Dominican Republic - Cigarettes* and Mexico's critique of the Panel's interpretation is unpersuasive. Rather than rely on the superficial analysis proffered by Mexico to establish less favorable treatment, the Panel properly considered the questions of whether different treatment was attributable to origin, and whether the adverse impact Mexico complained of was attributable to the measure or other factors. In so doing, it committed no error.

D. Conclusion

102. For the reasons reviewed above, the Panel properly interpreted and applied Article 2.1 of the TBT Agreement to the facts of this dispute to conclude that the U.S. measure does not accord Mexican tuna products less favorable treatment than U.S. tuna products and tuna products originating in other countries. Accordingly, the Appellate Body should reject Mexico's appeal that the Panel erred in concluding that the U.S. measure is not inconsistent with Article 2.1 of the TBT Agreement.

III. The Panel Acted Within its Discretion in its Exercise of Judicial Economy

103. The aim of WTO dispute settlement "is to secure a positive solution to a dispute."[200] Accordingly, the Appellate Body has stated there is nothing that requires a panel to examine all legal claims made by the complaining party.[201] Rather "[a] panel need only address those claims

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[199]Panel Report, paras. 7.375-7.378 (citing *Korea – Beef (AB)* and *Dominican Republic – Cigarettes (AB)*).

[200]DSU, Art. 3.7; *see also* DSU, Art. 3.4 ("[r]ecommendations and rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under covered agreements.").

[201]*US – Wool Shirts (AB)*, p. 18.

which must be addressed in order to resolve the matter in issue in the dispute."[202] Therefore, a panel has discretion to determine which claims it must address in order to resolve the dispute between the parties.[203]

104. In Part A of its argument, Mexico argues that the Panel failed properly to exercise this discretion because the Panel's use of judicial economy failed to resolve the dispute.[204] In Part B of its argument, Mexico makes the same point, with the addition that this constitutes a violation of Article 11.[205] As explained below, each of these arguments is flawed.

105. In Part A, Mexico argues that the Panel erroneously exercised judicial economy because (1) Article 2.1 of the TBT Agreement is "more specific in coverage" than Articles I:1 and III:4 of the GATT 1994; (2) the Panel "subsumed" or "excluded" provisions of the GATT 1994 by not considering claims made under those provisions; and (3) the Panel failed to resolve the dispute.

106. With regards to Mexico's first argument[206], Mexico does not explain why considering a more specific provision first would be in error. The Appellate Body has stated that, in some cases, the more specific provision should be applied first.[207] Nor, during the panel proceedings, did Mexico argue Article 2.1 as a "more specific" provision than GATT Articles I:1 and III:4. To the contrary, Mexico argued and presented evidence on the basis that Article 2.1 should be interpreted and applied in the same manner as Articles I:1 and III:4 of the GATT 1994.[208] Even

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[202]*US – Wool Shirts (AB)*, p. 19; *see also*, fn. 30 ("[t]he 'matter at issue' is the 'matter referred to the DSB' pursuant to Article 7 of the DSU.").

[203]*See US – Poultry*, para. 7.306 ("[t]he Appellate Body has consistently ruled that panels are not required to address all the claims made by a complaining party but rather a panel has discretion to determine which claims it must address in order to resolve the dispute between the parties.").

[204]Mexico Other Appellant Submission, paras. 198-206.

[205]Mexico Other Appellant Submission, paras. 207-211.

[206]Mexico Other Appellant Submission, para. 201.

[207]*See EC – Bananas III (AB)*, para. 204 (finding that when applying similar provisions in different agreements (in that case, Article 13 of the Import Licensing Agreement and Article X:3(a) of the GATT1994), the more specific provision should be applied first).

[208]Panel Report, paras. 7.193-7.204; *see also,* Mexico First Written Submission, paras. 260-262:

> For the same reasons set out above for Mexico's claim under GATT Article III:4, the U.S. measures do not accord products imported from the territory of any Member (namely, Mexico) treatment no less favourable than that accorded to like products of national origin. For the same reasons set out above for Mexico's claim under GATT Article I:1, the U.S. measures do not accord products imported from the territory of any Member (namely, Mexico) treatment no less favourable than that accorded to like products originating in any other country. For these reasons, the U.S. measures are inconsistent with Article 2.1 of the TBT Agreement.

in its other appellant submission, Mexico has not stated why it believes a finding of non-discrimination made under Article 2.1 would be different if considered under Articles I:1 and III:4.[209]

107. Mexico also asserts that, by exercising judicial economy, the Panel read provisions of the TBT Agreement to "replace, subsume, or exclude" provisions of the GATT 1994.[210] It is not clear how a panel's decision not to examine a claim under a provision of the WTO Agreement results in the replacement, subsumption, or exclusion of that provision. Moreover, nothing in the Panel Report suggests that the Panel read Article 2.1 of the TBT Agreement as a replacement for the non-discrimination provisions in the GATT 1994. Rather, as the Panel noted, Mexico's arguments under Article 2.1 of the TBT Agreement derived directly from its arguments under the GATT 1994, and therefore the Panel concluded that it could address all of Mexico's non-discrimination claims and arguments through its examination of Article 2.1.[211]

108. Finally, Mexico argues that the Panel's finding that the U.S. measure is inconsistent with Article 2.2 of the TBT Agreement did not resolve the dispute.[212] Mexico cites the Appellate Body's findings in *Australia – Salmon* as "caution[ing] panels against false judicial economy."[213] That is correct, but incomplete. In that dispute, the Appellate Body did not just "caution" against "false judicial economy," but also stated what false judicial economy entails. A panel incorrectly

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See also Mexico response to Panel question No. 58, paras. 175, 178, 183-184:

- Like product: "the four criteria used to determine likeness under Article III:4 should be used to determine likeness under Article 2."
- National treatment: "In Mexico's view, the assessment for 'treatment no less favourable' in Article 2.1 of the TBT Agreement should be the same as under Article III:4 of the GATT 1994."
- MFN: "Consistent with the interpretation of the term 'treatment no less favourable' in Article III:4, discussed above ... the facts evidencing the less favourable treatment accorded to Mexican tuna that are described under its Article I:1 claim demonstrate a violation of the MFN obligation in Article 2.1 of the TBT Agreement.";

See also Mexico Second Written Submission, para. 191 (the only paragraph in the submission where Mexico specifically addressed Article 2.1):

> The United States' rebuttal of Mexico's arguments with respect to this claim mirror the United States' rebuttal arguments for Mexico's claims under Articles I:1 and III:4 of the GATT 1994. Mexico addresses all of the points raised in the United States' rebuttal arguments above.

[209]*See* Mexico Other Appellant Submission, paras. 212-230.

[210]Mexico Other Appellant Submission, para. 203.

[211]Panel Report, paras. 7.747-7.748.

[212]Mexico Other Appellant Submission, paras. 204-205.

[213]Mexico Other Appellant Submission, para 204.

exercises judicial economy if in doing so it does not "enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings."[214] The Appellate Body went on to find that, in that dispute, where compliance with one provision of an agreement would still allow the responding Member to act inconsistently with another provision of the agreement, the panel should not have exercised judicial economy.[215]

109. Mexico's statement that the Panel's finding that the U.S. measure is inconsistent with Article 2.2 does not provide a positive solution to the dispute appears to be based on the assumption that the Panel erred in finding that there was no discrimination, an assumption that lacks foundation. Moreover, the Panel's findings under Article 2.2 were not the sole basis for its exercise of judicial economy. Rather, as it explained, the Panel fully considered Mexico's discrimination claims through its consideration of Mexico's factual and legal arguments under Article 2.1 and found that the United States had not violated the national treatment and MFN obligations under Article 2.1.[216] It is not clear, and Mexico does not explain, how reconsidering those claims under Articles I:1 and III:4 using the same facts and arguments as were provided under Article 2.1 would lead to a different result and different DSB recommendations or rulings.[217]

110. In asserting that the Panel's findings under Article 2.2 failed to resolve the dispute, Mexico has misconstrued the Panel report. As the Panel noted, it addressed "all aspects of Mexico's claims, including non-discrimination aspects under Article 2.1, and other aspects under Article 2.2 and 2.4," such that it was not "necessary for it to consider separately and additionally Mexico's claims under Articles I:1 and III:4 of the GATT 1994."[218] That is the proper basis for

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[214]*Australia – Salmon (AB)*, para. 223.

[215]*Australia – Salmon (AB)*, para. 224.

[216]Panel Report, paras., 7.747-7.748.

[217]Mexico relies in part on the panel's statement in *US – Clove Cigarettes* that it would consider Article 2.1 first and if it did not make a finding of inconsistency, it would then examine Indonesia's claim under Article III:4. (Mexico Other Appellant Submission, para. 205). First, consideration of Article 2.1 followed by a consideration of the implications of that analysis for Mexico's claims under Articles I:1 and III:4 appears to be precisely what the Panel in this dispute did. (*See* Panel Report, para. 7.741). Second, Indonesia set out its non-discrimination claims differently than Mexico. It appears that Indonesia specifically argued its Article III:4 claim in the alternative to its Article 2.1 claim. (*See US – Clove Cigarettes*, paras. 7.85, 7.294). It is in that context that the quote from the panel on which Mexico relies should be read. Moreover, even in that context, the Panel would have still been within its discretion to exercise judicial economy with respect to the alternative claim if doing so would allow the DSB to make sufficiently precise recommendations and rulings so that the respondent could come into compliance. *See also EC –Biotech (Canada)*, para. 7.2505 (italics added) (wherein the panel found that, in light of its finding that the EC failed to apply control, inspection and approval procedures in a "*no less favourable manner* for imported products than for domestic like products" in violation of Article 8 of the SPS Agreement, it did not need to examine claims about the same measure under Article III:4 of the GATT 1994).

[218]Panel Report, para. 7.748.

the exercise of judicial economy. Mexico has not explained why this exercise of the Panel's discretion failed the test set out in *Australia – Salmon*.

111. In Part B, Mexico recasts its argument as an Article 11 claim.[219] As the Appellate Body has stated, "a claim under Article 11 of the DSU must stand by itself and be substantiated with specific arguments, rather than merely being put forth as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement."[220] Mexico has not explained why its claim under Article 11 "stands by itself," and Mexico relies on the same arguments as in Part A to support its Article 11 claim.

112. Article 11, among other obligations, requires panels to make such findings that "will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."[221] This obligation is related to Article 3.4 (the "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this understanding and under the covered agreements") and Article 3.7 of the DSU.[222] As the Appellate Body set forth in *US – Wool Shirts* and *Australia – Salmon*, Article 3.4 and 3.7 provides the parameters – both the basis and the constraint – on the exercise of judicial economy.[223] The Panel does have an obligation under Article 11 to assist the DSB in the performance of its duties under Article 3.4 so as to help achieve the aim of the dispute settlement mechanism as set out in Article 3.7. The invocation of Article 11 does not, however, change the essential showing that must be made before there is a finding of false judicial economy. That is, it must be shown that the panel's use of judicial economy would not allow the DSB to make recommendations and rulings that would help achieve a satisfactory resolution of the dispute. As discussed above, Mexico has not explained why the use of judicial economy by the Panel is a failure to assist the DSB in making recommendations and rulings that would help settle the dispute. It has not explained why reconsidering the same arguments and the same facts under provisions that Mexico argued should be interpreted similarly and satisfied by the same facts would produce a different result.[224]

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[219]Mexico Other Appellant Submission, para. 211.

[220]*US – Tyres (AB)*, para. 321.

[221]DSU, Art. 11.

[222]DSU, Art. 3.4. 3.7.

[223]*US – Wool Shirts (AB)*, p. 19; *Australia – Salmon (AB)*, para. 223.

[224]In this section, Mexico relies heavily on the Appellate Body report from *Philippines – Distilled Spirits*. The United States notes that judicial economy was not at issue in that dispute; the issue was whether the panel correctly understood a claim by the EU to have been made in the alternative. The Appellate Body found that the panel erred in finding that the EU's claim under the second sentence of Article III:2 of the GATT 1994 was an alternative claim to that made under the first sentence of Article III:2. (*Philippines – Distilled Spirits (AB)*, para. 191). The Appellate Body found that because the panel failed to correctly identify the nature of the EU's claim under the second sentence of Article III:2, and therefore failed to consider that claim once it determined that the condition for considering the "alternative" claim was not met, the panel failed to meet its Article 11 obligation.

113. In conclusion, the Panel considered all of Mexico's claims, including the claims it made under the non-discrimination provisions of Article 2.1 and Articles I:1 and III:4. During the panel proceedings, Mexico did not suggest that the non-discrimination provisions should be interpreted in different ways, and it consistently argued that the provisions were satisfied by the same facts. In that circumstance, the Panel acted within its discretion to exercise judicial economy with respect to Mexico's MFN and national treatment claims under Articles I:1 and III:4 after considering those claims under Article 2.1. Mexico has not demonstrated on appeal why this would not assist the DSB to make recommendations and rulings that would help resolve this dispute in a satisfactory manner.

IV. The Panel Was Correct in Finding that the AIDCP Definition is an Ineffective or Inappropriate Means for Fulfilling the U.S. Objectives

114. Article 2.4 of the TBT provides that:

> Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

115. According to the Panel, a complaining party must establish three elements in order to prove an inconsistency with Article 2.4 of the TBT Agreement: (1) that an alleged standard is a "relevant international standard" within the meaning of Article 2.4; (2) that the relevant international standard was not used "as a basis for" the challenged measure; and (3) that the relevant international standard would not be "ineffective or inappropriate" for the fulfillment of the legitimate objectives pursued by the measure.[225] The Panel found that the AIDCP dolphin-safe provisions contained in two AIDCP resolutions, the *AIDCP Resolution to Establish a System for Tracking and Verifying Tuna*[226] and the *AIDCP Resolution to Establish Procedures*

(*Philippines – Distilled Spirits (AB)*, para. 192). The Appellate Body did not find that judicial economy was exercised, nor did it discuss judicial economy. It is notable, however, that part of the reason the Appellate Body found the panel's failure to consider the EU's claim under the second sentence of Article III:2 violated Article 11 is because the claims under the two sentences applied to "distinct product groupings." (*Philippines – Distilled Spirits (AB)*, para. 189). That is not the case in this dispute where Mexico's claims under Article 2.1 and Articles I:1 and III:4 apply to the same products and were supported by the same legal and factual arguments.

[225]Panel Report, para. 7.627.

[226]Exhibit Mex-55.

for AIDCP Dolphin Safe Tuna Certification,[227] constituted a standard that was international and relevant, satisfying the first element.[228] The United States has appealed this finding.[229] The Panel also found that the second element was satisfied because the U.S. measure was not based on the AIDCP standard[230]; this finding has not been appealed.

116. The Panel found, however, that the third element of Article 2.4 had not been satisfied because it found that Mexico had not carried its burden of showing that the AIDCP standard would be effective and appropriate for achieving the U.S. objectives.[231] Accordingly, the Panel found that the United States had not violated Article 2.4. This finding is the basis for Mexico's appeal.

117. The Panel found that the legitimate U.S. objectives are "(1) 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 (2) 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."[232] Mexico has not challenged the Panel's finding that these are the U.S. objectives.[233] Thus, for purposes of Mexico's appeal under Article 2.4, the only finding at issue is that the AIDCP standard would be ineffective or inappropriate for fulfilling the U.S. objectives of 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 contributing to the protection of dolphins by ensuring that the U.S. market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins.

118. Mexico structures its appeal as part Article 11 claim,[234] part failure of the Panel to apply the correct "legal test" which Mexico considers to be set out in the Appellate Body report in *EC*

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[227]Exhibit Mex-56.

[228]Panel Report, para. 7.707.

[229]The United States disagrees that the AIDCP provisions are a relevant international standard because the AIDCP is not an international body or organization. Therefore, any definition or standard it might develop and adopt cannot be an international standard, within the meaning of Article 2.4. *See* U.S. Appellant Submission, para. 134 *et seq*.

[230]Panel Report, para. 7.716.

[231]Panel Report, para. 7.740.

[232]Panel Report, para. 7.726.

[233]*See* Mexico Other Appellant Submission, paras. 241-260. Mexico has challenged, on a conditional basis and in the context of its Article 2.2 claim, the finding that the second U.S. objective is legitimate. It has not challenged the Panel's finding that the first U.S. objective is legitimate. Mexico Other Appellant Submission, para. 261.

[234]Mexico Other Appellant Submission, paras. 241-250.

– *Sardines*.[235] In particular, Mexico argues the Panel erred in finding that the AIDCP standard was ineffective or inappropriate for meeting the U.S. objectives because: (1) the Panel failed to consider the potential effectiveness and appropriateness of the AIDCP standard outside the ETP and thus failed to make an objective assessment of the matter in accordance with Article 11 of the DSU;[236] (2) during its consideration of the definition of "dolphin safe" in the AIDCP standard as applied inside the ETP, the Panel found that the AIDCP definition would meet one aspect (though not all aspects) of the U.S. objectives concerning mortality and serious injury to dolphins; and (3) the Panel failed to compare the effectiveness and appropriateness of the AIDCP standard to that of the U.S. standard. Mexico characterizes the latter two arguments as instances of the Panel misapplying the "legal test" set out in *EC – Sardines*. However, Mexico includes no explanation of how the Panel misapplied this "test" in finding that the AIDCP standard would be ineffective or inappropriate to fulfil the objectives of the U.S. measures, but rather appears to contest the Panel's factual findings in this regard.

119. Before discussing the flaws in each of Mexico's arguments, the United States notes that even if all of Mexico's arguments were accepted, this would be insufficient to conclude that the Panel's finding that the AIDCP standard is ineffective and inappropriate for fulfilling the U.S. objectives is in error. That is, even if one agrees with Mexico in all respects (and for reasons explained below, each of Mexico's arguments is flawed), Mexico has left unchallenged the Panel's findings that support the conclusion that, *inside the ETP*, the AIDCP standard would be ineffective and inappropriate for fulfilling the U.S. objectives as they relate to ensuring consumers are not misled or deceived about whether tuna products contain tuna caught in a manner harmful to dolphins, in particular with respect to unobserved mortality, serious injury, and other adverse effects to dolphins. Thus, regardless of Mexico's objections, the Panel's ultimate conclusions should remain unaltered.

A. The Standard at Issue Cannot Operate Outside the ETP

120. Mexico begins by asserting as "factual background" that the AIDCP definition of "dolphin safe" is the standard at issue.[237] This, however, is not what the Panel found the standard at issue to be. Instead, the Panel found the AIDCP resolutions contained not only a definition but also provisions that "relate to the capture, unloading, storage, transfer and processing of tuna,"[238] and provisions pertaining to "symbols, packaging, marking and labeling requirements as they

[235]Mexico Other Appellant Submission, paras. 251-259.

[236]Mexico Other Appellant Submission, para. 250.

[237]*See, e.g.*, Mexico Other Appellant Submission, paras. 243, 256.

[238]Panel Report, para. 7.673.

apply to tuna and tuna products"[239] caught in the ETP.[240] Based on those findings (which Mexico does not challenge), the Panel found that the AIDCP resolutions provide for "common and repeated use, rules, guidelines or characteristics for tuna fishing and tuna products," and thus comprise a standard.[241] In other words, the basis for the Panel's finding that the AIDCP resolutions constitute a standard is that the resolutions establish "a system" for tracking, certifying, and labeling tuna caught in the ETP by vessels fishing under the AIDCP;[242] it did not find that a definition contained in one of the resolutions was, in itself, a standard. Thus, the Panel's findings with respect to the "AIDCP standard" are made with respect to not only the definition of dolphin safe in the AIDCP resolutions but more broadly to the rules they set out for tracking, certifying, and labeling tuna as dolphin-safe.[243]

121. Based on this erroneous characterization of the standard at issue, Mexico proceeds to assert that the AIDCP standard may simply be transposed to other fishing areas, and that therefore the Panel erred in "whether the definition provided by the AIDCP standard would be effective and appropriate to fulfil the U.S. objectives outside the ETP."[244] First, as a factual matter, the standard the Panel examined by its terms could not readily be used in other oceans. The "system" for tracking, certifying, and labeling tuna caught in the ETP depends on the tuna being caught in accordance with the AIDCP under which States agreed to require their fleets to carry independent observers on board to certify that no dolphins were killed or seriously injured in the set in which the tuna is caught.[245] Thus, stating that the AIDCP standard could apply outside the ETP ignores that there is no intergovernmental agreement applicable outside the ETP whereby nations have agreed to require independent observers on board 100 percent of their flagged vessels to verify whether dolphins are killed or seriously injured in a set.[246] A standard cannot be effective or appropriate to fulfill a Member's objectives if it requires a Member to base its domestic standard on regimes that do not actually exist.

122. Moreover, the U.S. measure requires that tuna products labeled with a dolphin-safe label other than the official U.S. Department of Commerce label not contain tuna caught in a set in

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[239]Panel Report, para. 7.675.

[240]Panel Report, para. 7.673 (finding that the tuna tracking resolution applies with respect to tuna "caught in the Agreement Area by vessels fishing under the AIDCP.") Here the "Agreement Area" refers to the ETP. *See* Panel Report, para. 2.35.

[241]Panel Reports, paras. 7.672-.677.

[242]Panel Report, para. 7.673.

[243]*See* Panel Report, para. 7.707.

[244]Mexico Other Appellant Submission, para. 241.

[245]Panel Report, para. 2.39.

[246]U.S. Second Written Submission, footnote 67.

which dolphins are killed or seriously injured.[247] Before the Panel, Mexico criticized this aspect of the U.S. measure, arguing that it was meaningless to include such a requirement if it was not backed by independent observers to verify whether it was met.[248] Yet, in its Other Appellant Submission, that appears to be exactly what Mexico is advancing in arguing that the definition in the AIDCP resolutions itself would be effective and appropriate to fulfil the objectives of the U.S. measures.[249] However, as discussed above, the Panel found that the AIDCP standard at issue was not simply the definition of "dolphin-safe" in the AIDCP resolutions but that definition together with the rules they set out for tracking, certifying and labeling tuna products as dolphin-safe.

B. The Scope of the Panel's Inquiry into the AIDCP Standard Was Not Inconsistent with DSU Article 11

123. Premised on this erroneous factual foundation, Mexico claims that the Panel failed to make an objective assessment of the matter in accordance with Article 11 of the DSU by assessing whether the AIDCP standard would be ineffective or inappropriate for accomplishing the U.S. objectives in the ETP, while not considering whether that standard might be effective or appropriate outside the ETP.[250] Mexico's claim should be rejected.

124. As noted above, a Panel fails to make an objective assessment of the matter under Article 11 of the DSU if it wilfully disregards or distorts the evidence before it or makes affirmative findings that lack a basis in the evidence before them.[251] There is no evidence that the Panel did either in this case.

125. Early in its analysis, the Panel explained the scope of its consideration of the effectiveness and appropriateness of the AIDCP standard for fulfilling the U.S. objectives.[252] It noted that the U.S. objectives extend beyond the ETP, while the AIDCP standard addresses only fishing conditions in the ETP and "alone would not have the capacity to address US concerns in relation to the manner in which tuna is caught beyond the ETP."[253] As the Panel appeared to understand, the AIDCP standard (contained in the AIDCP resolutions) is built upon the international dolphin conservation program set out in the AIDCP (i.e., the intergovernmental

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[247]Panel Report, para. 7.535-7.536.

[248]*See, e.g.*, Mexico Second Written Submission, para. 45.

[249]Mexico Other Appellant Submission, para. 243.

[250]Mexico Other Appellant Submission, paras. 242, 250.

[251]Appellate Body Report, *EC - Hormones*, para. 133; Appellate Body Report, *US - Wheat Gluten*, paras. 161-162; Appellate Body Report, *US - Carbon Steel,* para. 142.

[252]Panel Report, para. 7.727.

[253]Panel Report, para. 7.727.

agreement distinct from the AIDCP resolutions) and in particular that agreement's requirement that parties to the AIDCP require their flag vessels to carry independent observers on 100 percent of fishing trips to verify whether dolphins are killed or seriously injured.[254] While the Panel observed that this type of mechanism may provide guidance in addressing dolphin-safe issues outside of the ETP, it could not be assumed it necessarily would.[255] One obvious reason that it would not is the lack of agreement in any other fishery in the world to require 100 percent observer coverage to verify whether dolphins are killed or seriously injured in a set. Mexico itself acknowledges that these mechanisms have not been implemented in any fishery other than the ETP.[256]

126. The Panel's approach to analyzing whether the AIDCP standard would be effective and appropriate to fulfil the objectives of the U.S. measures was entirely appropriate in light of this factual framework. Indeed, rather than continuing to inquire as to the effectiveness and appropriateness of the AIDCP standard outside the ETP (which it observed was alone not capable of addressing U.S. concerns outside the ETP), the Panel inquired further into whether the AIDCP standard would be effective and appropriate for fulfilling the objectives of the U.S. measure in the ocean for which it was designed, where it is applied, and where it should be at its most effective.[257] Moreover, if the Panel concluded – as it did – that the AIDCP standard was ineffective or inappropriate for achieving the U.S. objectives within the ETP, there would be no need to consider the hypothetical application of the AIDCP standard outside of the ETP: the standard would already have been found to be ineffective or inappropriate for achieving the U.S. objectives. In other words, the Panel's finding that the AIDCP standard is ineffective or inappropriate at achieving the U.S. objectives within the ETP[258] was sufficient basis to conclude that the AIDCP standard is ineffective and inappropriate overall, and thus there was no need for the Panel to further inquire about the effectiveness and appropriateness of the AIDCP standard beyond the ETP. There is nothing in the Panel's approach or its evaluation of the evidence before it that would support Mexico's claim that the Panel failed to adhere to its Article 11 obligations in this regard.

127. Furthermore, regarding Mexico's arguments that the Panel failed to explain why requiring independent observers on board all large purse seine vessels outside the ETP to verify that no dolphins were killed or seriously injured would not address U.S. concerns,[259] Mexico completely ignores that the "relevant international standard" at issue is the AIDCP standard and that the Panel was tasked with evaluating whether this standard would be effective and appropriate to

[254]Panel Report, para. 7.611.

[255]Panel Report, para. 7.727.

[256]Mexico Other Appellant Submission para. 243.

[257]Panel Report, para. 7.727.

[258]Panel Report, paras. 7.731, 7.738, 7.740.

[259]Mexico Other Appellant Submission, paras. 244-245.

fulfil the objectives of the U.S. measures. The AIDCP standard does not include a requirement that vessels outside the ETP carry on-board observers to verify whether dolphins are killed or seriously injured in a set. Thus, there would be no reason for the Panel to examine whether such a requirement would be effective and appropriate to fulfil the objectives of the U.S. measures and the Panel did not fail in its Article 11 duty in failing to do so.

128. Moreover, it should be emphasized that it is not the U.S. measures that require purse seine vessels in the ETP to carry observers; it is the AIDCP that requires this.[260] The U.S. measures simply reflect that this requirement exists and makes possible the provision of certifications, required under the U.S. measures for access to dolphin-safe labeling, that no dolphins are killed or seriously injured in a set based on independent observer statements.[261]

C. Mexico's Arguments About the Appropriateness and Effectiveness of the AIDCP Standard for Fulfilling the U.S. Objective Do Not Account for All of the U.S. Objectives

129. For purposes of Article 2.4, a relevant international standard must fulfill *all* of the legitimate objectives pursued at the levels the Member considers appropriate. As the Appellate Body stated in *EC – Sardines*, a relevant international standard "would be *effective* if it had the capacity to accomplish all three of these objectives [of the EC measure], and it would be *appropriate* if it were suitable for the fulfilment of all three of these objectives."[262] In this regard, it is Mexico not the Panel that misapplied the Appellate Body's guidance in *EC – Sardines.*

130. As noted, Mexico correctly acknowledges the objectives of the U.S. measure.[263] It disregards, however, that these objectives pertain to both observed mortality and serious injury to dolphins, and to what the Panel called "unobserved mortality and serious injury to dolphins" and "other adverse effects."[264] As an initial matter, Mexico has not appealed the Panel's findings that

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[260]Panel Report, para. 2.39.

[261]U.S. Second Written Submission, para. 46.

[262]*EC – Sardines (AB)*, para. 288 (italics original, underline added).

[263]Mexico Other Appellant Submission, para. 240.

[264]*See, e.g.*, Panel Report, paras. 7.484, 7.486 ("the adverse effects on dolphins targeted by the US dolphin-safe provisions, as described by the United States, relate to observed and unobserved mortalities and serious injuries to individual dolphins in the course of tuna fishing operations."). *See also*, fn. 675 (describing "observed mortalities and injuries" as "dolphin killings or serious injuries that are reported during (or immediately after the conclusion of) dolphin-setting operations," and "unobserved deaths or injuries" as "to the extent that setting on dolphins also result in dolphin deaths or injuries that are *not* observed or taken into account as *observed* killings or serious injuries, the other adverse effects identified by the United States may be described as *unobserved* deaths or injuries of dolphins." (italics original, underline added)).

"unobserved mortality and serious injury" and "other adverse effects" occur.[265] As such, the occurrence of unobserved mortality and serious injury and other adverse effects as a result of setting on dolphins to catch tuna is not in dispute.

131. Mexico's argument that the definition of "dolphin safe" in the AIDCP standard would fulfill one aspect of the U.S. objectives is thus beside the point. Mexico's reference to the Panel's statement regarding informing consumers about dolphin mortality or injury "*during the sets* in which the tuna was caught" refers to only one aspect of the U.S. objectives, that pertaining to observed mortality and serious injury.[266] As such, Mexico's assertion that the definition of "dolphin safe" in the AIDCP standard "would fulfil the U.S. objective" is incorrect.[267] The information provided through application of the definition in the AIDCP standard would not fulfill the U.S. objective of informing consumers about the adverse effects from setting on dolphins that occur *before* the set (while dolphins are being chased) and *after* the set (when complications such as organ failure and increased predation result from exhaustion).[268] Thus, Mexico's assertion that the definition of "dolphin safe" in the AIDCP standard would be effective and appropriate for fulfilling the U.S. objectives is based on only one aspect of the U.S. objectives – observed mortality and serious injury – and fails to account for the full scope of the objectives.[269]

132. Mexico has not challenged the Panel's finding that the definition of "dolphin safe" in the AIDCP standard would not fulfill this aspect of the U.S. objectives. As such, Mexico appears to accept the Panel's ultimate conclusion that the AIDCP would be an ineffective and inappropriate means for the fulfillment of the objective of the U.S. measure with respect to unobserved

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[265]*See, e.g.,* Panel Report, para. 7.730; *see also* para. 7.738:

> [T]aken alone, [the AIDCP standard] fails to address unobserved adverse effects derived from repeated chasing, encircling and deploying purse seine nets on dolphins, such as separation of mothers and their dependent calves, killing of lactating females resulting in higher indirect mortality of dependent calves and reduced reproductive success due to acute stress caused by the use of helicopters and speedboats during the chase.

[266]Mexico Other Appellant Submission, para. 253 (italics added).

[267]Mexico Other Appellant Submission, para. 253; *see also* para. 244.

[268]*See, e.g.*, Panel Report, para. 7.504 ("such [adverse] effects would arise as a result of the chase in itself, and would thus exist even if measures are taken in order to avoid the taking and killing of dolphins in the nets, as is the case under the AIDCP.").

[269] As a particularly striking example of Mexico's focus on only one aspect of the U.S. objectives, when Mexico quotes paragraph 7.729 of the Panel Report, Mexico emphasizes that the use of the AIDCP label would not mislead or deceive consumers about whether dolphins were killed during sets, but then ignores the very next sentence of the report: "to the extent that there might be other adverse effects deriving from that fishing method, the AIDCP standard alone would not address them ... [and] would not also, in itself, convey any information in this respect." (Mexico Other Appellant Submission, para. 252; Panel Report, para. 7.729).

mortality and serious injury to dolphins.

D. Mexico's Arguments About Comparing the AIDCP Standard to the U.S. Standard are Based on an Incorrect Reading of Article 2.4

133. In order for there to be an obligation to use an international standard as a basis for a technical regulation under Article 2.4, the international standard in question must be an effective and appropriate means for achieving a Member's legitimate objectives at the level the Member considers appropriate. Thus, the focus of the inquiry is whether use of a technical regulation based on the relevant international standard at issue fulfills the Member's legitimate objectives, rather than the extent to which the challenged technical regulation fulfills those objectives. Accordingly, Mexico's arguments about the relative effectiveness of the U.S. measure as compared to the AIDCP standard[270] are inapposite. As used in Article 2.4, effectiveness and appropriateness are not relative concepts; they are instead elements of Article 2.4 that must be achieved by a technical regulation based on the international standard. Thus, to substantiate its claim, Mexico needed to establish that the "relevant international standard" it identified – *i.e.* the AIDCP standard – would be an effective and appropriate means to fulfil the objectives of the U.S. measure. As reviewed above, and as the Panel found, Mexico did not establish that the AIDCP standard would be effective or appropriate with respect to the objectives of the U.S. measure related to unobserved dolphin mortalities and serious injuries resulting from the practice of setting on dolphins to catch tuna. Thus, the Panel properly concluded that the AIDCP standard would not be an effective and appropriate means of fulfilling the objectives of the U.S. measure.[271]

E. Conclusion

134. In its other appellant submission, Mexico acknowledges the U.S. objectives, but fails to show how the AIDCP standard is an effective and appropriate means for fulfilling those objectives. Instead, Mexico has set forth incomplete arguments – such as that the definition in the AIDCP standard might be effective outside the ETP, while not challenging the Panel's finding that it would be ineffective inside the ETP; that the standard meets part of the U.S. objectives, while not challenging the Panel's finding that it would not meet all of the U.S. objectives; that the standard is more effective than the U.S. standard, while not challenging the Panel's finding that the AIDCP standard itself would not be an effective and appropriate means. Moreover, regardless of whether the AIDCP standard has or would have the effects Mexico describes (and as noted above, the facts do not support a finding that it would be), the AIDCP standard cannot be applied outside the ETP and therefore cannot be an effective or appropriate means for fulfilling the U.S. objectives outside the ETP. Accordingly, the Panel's finding that the AIDCP standard would not fulfill the legitimate objectives of the U.S. measure, at the levels

[270]Mexico Appellant Submission, para. 256.

[271]Panel Report, paras. 7.731, 7.740.

the United States considers appropriate, must stand.

V. Mexico's Conditional Appeal of the Panel's Findings Regarding Article 2.2 Should Be Rejected

A. The Panel Correctly Interpreted and Applied to the Second Objective of the U.S. Measure the Term "Legitimate Objective" in Article 2.2 of the TBT Agreement

135. Mexico conditionally appeals the Panel's finding that the second objective of the U.S. measure is legitimate within the meaning of Article 2.2 of the TBT Agreement.[272] Notably, Mexico does not appeal the Panel's finding that the objectives of the U.S. measure is:

(1) ensuring that consumers are not mislead or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins; and

(2) contributing to dolphin protection by ensuring that the U.S. market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins.

Mexico appears to accept that the Panel's factual findings in this regard were correct and does not alleged that the Panel's findings reflect a failure to make an objective assessment of the matter under Article 11 of the DSU.[273] Instead, Mexico focuses its appeal solely on whether the second of these objectives is legitimate within the meaning of Article 2.2 of the TBT Agreement, arguing that the Panel erred both in its interpretation of the term "legitimate objective"[274] and its application to the second objective of the U.S. measure.[275]

136. Regarding the interpretation of the term "legitimate objective," Mexico's argument is based on a faulty premise. Contrary to Mexico's assertion, the Panel did not formulate a "legal test" for whether a measure is legitimate based on whether the objectives of the measure "go against the object and purpose of the TBT Agreement."[276] Rather, the Panel reviewed several factors relevant to whether the second objective of the U.S. measure is "legitimate." First, the Panel observed that Article 2.2 provides a non-exhaustive list of legitimate objectives that

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[272]Mexico Other Appellant Submission, paras. 261, 264.

[273]Mexico's Notice of Appeal also does not raise an Article 11 claim with respect to the Panel's findings regarding the objective's of the U.S. measure. Mexico Notification of Other Appeal, WT/DS381/11, 27 January 2012.

[274] Mexico Other Appellant Submission, paras. 264-278.

[275] Mexico Other Appellant Submission, paras. 272-278.

[276]Mexico Other Appellant Submission, para. 266.

includes the "protection of ... animal or plant life or health, or the environment." The Panel found that the protection of dolphins may be understood as intended to protect animal life or health or the environment" and therefore to fall within one of the legitimate objectives expressly listed in Article 2.2 of the TBT Agreement.[277] The Panel further noted that the objective of the U.S. measure of protecting dolphins related to a genuine concern that dolphins may be harmed in tuna fishing activities[278] and that "nothing prevents Members from using the incentives created by consumer preferences to encourage or discourage particular behaviors that may have an impact on the protection of animal life or health."[279] The Panel then concluded that "we find the objective of contributing to the protection of dolphins by ensuring that the US market is not used to encourage fishing methods that adversely affect dolphins to be legitimate."[280] The Panel also considered and rejected suggestions by Mexico that the U.S. measure was not in fact concerned with protecting dolphins because it did not also protect other marine species, noting that Members may determine for themselves which legitimate policies to pursue.[281] The Panel observed that the objective of protecting dolphins by discouraging certain fishing practices "do[es] not go against the object and purpose of the TBT Agreement, even in light of the existence of potentially conflicting objectives that could also be recognized as legitimate."[282] The Panel's findings are entirely in keeping with the text of Article 2.2 and the TBT Agreement and there is no basis for Mexico's claims that the Panel either failed to interpret properly the term "legitimate" or misapplied the facts of this dispute to that interpretation.

137. Mexico argues that "a coercive and trade restrictive" objective is not "legitimate" within the meaning of Article 2.2 of the TBT Agreement. Yet, Mexico fails to explain what that observation has to do with the Panel's interpretation of the term "legitimate objective" or its application of that interpretation to the facts of this dispute. As noted above, the Panel already concluded that the objectives of the U.S. measure are ensuring that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins and contributing to dolphin protection by ensuring that the U.S. market is not used to

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[277]Panel Report, para. 7.437.

[278]Panel Report, para. 7.438.

[279]Panel Report, para. 7.440.

[280]Panel Report, para. 7.440.

[281]Panel Report, para. 7.441-7.442. The Panel also noted the U.S. point that the U.S. measure is part of a comprehensive policy to protect dolphins and that Mexico did not argue that the U.S. measure is the only instrument the United States has in place to protect marine life. The Panel also cited the Appellate Body's finding in *Brazil – Tyres* that"certain complex public health or environmental problems may be tackled only when a comprehensive policy comprising a multiplicity of interacting measures." Thus, Mexico's suggestion that an objective of the U.S. measure cannot be protecting dolphins since it has other measures in place that have that as their objectives dolphin protection (e.g., an embargo on tuna from countries whose fleets are failing to apply AIDCP procedures to conserve dolphins) is without merit. Mexico Other Appellant Submission, para. 273. A Member may pursue multiple measures with the same or similar objectives as part of a comprehensive policy to protect dolphins.

[282]Panel Report, para. 7.433.

encourage fishing fleets to catch tuna in a manner harmful to dolphins. It did not find that the objectives of the U.S. measure includes coercion or trade restrictiveness,[283] and Mexico does not appeal these factual findings.[284]

138. There is also no basis for Mexico to equate any objective aimed at discouraging or encouraging certain practices harmful to animal life or health, for example, through labeling schemes that inform consumers about products that are produced using such practices, with an objective that is coercive and trade-restrictive and therefore illegitimate. Under Mexico's theory, this would render illegitimate the objective of any labeling scheme that seeks to inform consumers about products that reflect their preferences with a view to encouraging consumers to purchase those products, for example, labeling schemes regarding energy- or water efficiency or percentage of recycled content. These types of schemes are widely recognized as legitimate ways to pursue environmental objectives and objectives to protect life or health. Moreover, they are not measures that "coerce" or "restrict" behavior. To the contrary, they allow consumers to choose those product that suit their preferences and allow producers to decide whether to conform their products to those preferences or not. For producers choosing not to conform to those preferences, the schemes do not required them to modify their products or otherwise prohibit them from marketing them.

139. Mexico also appears to confuse the objective of a measure with how that measure is achieved.[285] A measure may pursue legitimate objectives such as protecting animal life or health or the environment but do so through means that restrict the marketing of certain products, for example, measures that prohibit products from containing asbestos fibers to protect human life or heath. Also, as the Panel correctly points out "the terms of Article 2.2 suggest that some restrictions on international trade may arise from the preparation, adoption and application of technical regulations that pursue legitimate objectives."[286] In other words, a measure's objective is not illegitimate merely because the measure restricts trade.

140. In this regard, it is Mexico not the Panel that erroneously relies on the Appellate Body's

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[283]Indeed, the Panel found that the U.S. measure "does not require the importing Member to comply with any particular fishing method (these measures do not state, for example, that no tuna may be imported if the it originates in a country where tuna is caught by setting on dolphins)." Panel Report, para. 7.372. The Panel also found that seeking to protect dolphins by ensuring the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins does not "itself constitute[] evidence of a discriminatory effect of the measure." Panel Report, para. 7.733.

[284]As the Appellate Body has stated, claims that a Panel has failed to meet its Article 11 obligations with respect to particular findings must be raised in the Notice of Appeal. *US – Corrosion-Resistant Steel Sunset Review (AB),* para. 71; *US – Countervailing Measures on Certain EC Products* (AB), para. 74*; Japan – Apples (AB)*, para. 127; *US – Steel Safeguards (AB)*, para. 498.

[285]E.g., Mexico Other Appellant Submission, para. 27.

[286]Panel Report, para. 7.454.

findings in *US – Shrimp* and *US - Gasoline*.[287] While Mexico is correct that the measures in those disputes were found to constitute "arbitrary and unjustifiable discrimination" and a "disguised restriction on trade," that was not because the objectives of the U.S. measures were illegitimate. In fact, in both those disputes the Appellate Body found that the measures pursued a policy objective expressly identified in Article XX as legitimate: conserving exhaustible natural resources.[288] The Appellate Body did not examine whether the measures constituted "arbitrary and unjustifiable discrimination" or a "disguised restriction on trade" in evaluating whether the objectives of those measures were legitimate, and there is no basis for Mexico to argue that the Panel in this dispute ought to have done so in examining whether the U.S. measure's objectives are legitimate within the meaning of Article 2.2 of the TBT Agreement.

141. For the reasons stated above, the Appellate Body should reject Mexico's conditional appeal that the Panel erred in finding the second objective of the U.S. measure legitimate within the meaning of Article 2.2 of the TBT Agreement.

B. The Panel's Legal Approach to Examining Whether the U.S. Measure Were More Trade-Restrictive Than Necessary Was Proper

142. Mexico's conditionally appeals the Panel's legal approach to examining whether a measure more trade-restrictive than necessary under Article 2.2 of the TBT Agreement. Mexico contends that the correct legal approach is to first determine whether the technical regulation fulfils a legitimate objective and second, if it fulfills such an objective, determine whether it is more trade-trade restrictive than necessary to fulfill such objective, taking into account the risks of non-fulfillment would create.[289] Mexico argues that a measure that does not *fully* met its objective is *per se* a breach of Article 2.2 of the TBT Agreement, and that the Panel erred by not reaching that conclusion after having found that the U.S. measure only partially fulfills its objectives.[290] Mexico's arguments are without merit and should be rejected.

143. First, the Panel's legal approach is consistent with text of Article 2.2 of the TBT Agreement. Article 2.2 states that "technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking into account the risks of non-fulfilment." Thus, as the Panel correctly observed two requirements must be met under Article 2.2 – the technical regulation must pursue a legitimate objective and it must not be more trade-restrictive than necessary to meet that objective.[291] The Panel then correctly proceeded first to examine whether the U.S. measure pursues a legitimate objective and second to examine whether it is more trade-

[287]Mexico Other Appellant Submission, paras. 275-278.

[288]*US – Gasoline (AB)*, p. 23; *US – Shrimp (AB)*, para. 142, 146-147.

[289]Other Appellant Submission, paras. 280, 283.

[290]Other Appellant Submission, para. 281.

[291]Panel Report, para. 7.387.

restrictive than necessary.[292]

144. Second, Mexico's arguments are based on a misreading of Article 2.2. Article 2.2 does not include an obligation that technical regulations fulfill their objectives at a particular level, let alone a "100%" level. In deciding what level of an objective a Member seeks to achieve, the Member may well weigh a number of factors, such as technical feasibility, costs, enforcement resources, etc. Rather, Article 2.2 requires technical regulations not to restrict trade more than necessary to achieve legitimate objectives, and Members remain free to determine at what level they seek to achieve an objective, which is affirmed by the preamble . Members may adopt measures to pursue legitimate objectives (e.g. to protect human health) but also that a Member may not seek to protect health to the utmost extent (e.g. some humans may still be harmed). The fact that a Member is not seeking to fulfill an objective to the utmost extent time does not render the measure *per se* more trade-restrictive than necessary. If it did, Members could only adopt technical regulations that achieved their objectives to the extreme in every instance. This is not what the text of Article 2.2 provides nor is it consistent with the preamble to the TBT Agreement which provides that "no country should be prevented from taking measures ... for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices *at the levels it considers appropriate*..." (emphasis added). Yet, under Mexico's theory, Article 2.2 would prevent exactly that: Members could only adopt technical regulations to achieve legitimate objectives if the level the Member considers appropriate is to the utmost extent or to the extreme. For example, under Mexico's theory, a technical regulation that requires lighters to include child-resistant technology to protect children would *per se* violate Article 2.2 of the TBT Agreement if some children continue to be harmed by lighters (e.g. because some children manage to operate the lighter despite the child-safety technology used). Furthermore, Mexico's approach would essentially have a panel step into the shoes of the regulator, determining whether a particular technical regulation was the best possible means to achieve an objective, regardless of the factors that a Member would normally take into account and balance in determining the level it considers appropriate.

145. This is not to suggest that the contribution a measure makes to fulfilling its objective is irrelevant to the evaluation of whether a measure is more trade-restrictive than necessary under Article 2.2 of the TBT Agreement. Indeed, a measure's contribution to achieving its objective is relevant to the evaluation of whether there is a reasonably available, significantly less trade-restrictive alternative measure that would fulfill the Member's legitimate objective at the level the Member considers appropriate. The United States disagrees with the Panel's conclusion that the alternative measures proposed by Mexico – allowing for dolphin safe labeling both under the U.S. measures and the AIDCP standard – is a reasonably available, alternative measure that is significantly less trade restrictive that would fulfill the objectives of the U.S. measures at the level the United States considers appropriate, but the United States does not disagree that an evaluation of the extent to which a measure contributes to achieving its objective may be relevant

[292]Panel Report, para. 7.453.

to determine whether a measure is more trade-restrictive than necessary under Article 2.2.

146. Third, Mexico's arguments ignore that the Panel did examine the contribution the U.S. measure makes to fulfilling its objectives and found that the U.S. measure partially achieves its objectives.[293] Again, the United States disagrees with the Panel's finding in this regard, but assuming *arguendo* that the Panel's finding is correct, it would not be accurate to characterize a measure that "partially" achieves its objective as a measure that is not capable of fulfilling its objective or fails to fulfil its objective.[294] Thus, even under Mexico's flawed legal theory, the Panel would have correctly proceeded to examine the alternative measure put forward by Mexico after making its finding that the U.S. measure "partially" achieves its objectives.

147. Thus, for the reasons noted above, the Appellate Body should reject Mexico's conditional appeal that the Panel erred in its interpretation and analysis of certain aspect of Article 2.2 of the TBT Agreement.

VI. Conclusion

148. For the foregoing reasons, the Appellate Body should reject Mexico's appeal in its entirety.

[293]Panel Report, para. 7.563, 7.599.

[294]In this regard, the Panel's findings are different than the panel's findings in *US – COOL* where the panel found that the challenged measures did not fulfill their objectives. Specifically, the Panel found that "the COOL measure does not fulfil the identified objective within the meaning of Article 2.2 because it fails to convey meaningful origin information to consumers." *US – COOL* (Panel), para. 7.719-7.720. In other words, the Panel in *US – COOL* did not find that the measures partially achieved their objective, but that the measures *failed* to achieve their objective.