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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

REPORT OF THE PANEL

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Argentina – Textiles and Apparel	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, p. 1003
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, p. 4299
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985
Canada – Autos	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, p. 3043
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
China – Rare Earths	Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014
China – Rare Earths	Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R / WT/DS432/R / WT/DS433/R / and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
Colombia – Ports of Entry	Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
EC – Bananas III (Ecuador)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador*, WT/DS27/R/ECU, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:III, p. 1085
EC – Bananas III (Guatemala and Honduras)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Guatemala and Honduras*, WT/DS27/R/GTM, WT/DS27/R/HND, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 695
EC – Bananas III (Mexico)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Mexico*, WT/DS27/R/MEX, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 803
EC – Bananas III (US)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States*, WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 943
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965

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EC – Export Subsidies on Sugar	Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, p. 6365
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Seal Products	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014
EC – Tariff Preferences	Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 20 April 2004, as modified by Appellate Body Report WT/DS246/AB/R, DSR 2004:III, p. 1009
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9
Indonesia – Autos	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 Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, p. 2201
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Korea – Various Measures on Beef	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, DSR 2001:I, p. 5
Philippines – Distilled Spirits	Appellate Body Reports, *Philippines – Taxes on Distilled Spirits*, WT/DS396/AB/R / WT/DS403/AB/R, adopted 20 January 2012, DSR 2012:VIII, p. 4163
Thailand – Cigarettes (Philippines)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
US – Clove Cigarettes	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, DSR 2012: XI, p. 5751
US – COOL	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449
US – COOL (Article 21.5 – Canada and Mexico)	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384/RW / WT/DS386/RW / and Add.1, circulated to WTO Members 20 October 2014 [appeal in progress]
US – Countervailing Measures on Certain EC Products	Panel Report, United States – Countervailing Measures Concerning Certain Products from the European Communities, WT/DS212/R, adopted 8 January 2003, as modified by Appellate Body Report WT/DS212/AB/R, DSR 2003:I, p. 73
US – FSC (Article 21.5 – EC)	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, DSR 2002:I, p. 55
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (Corr.1, DSR 2006:XII, p. 5475)
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Hot-Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, p. 4769
US – Tuna II (Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837

Short Title	Full Case Title and Citation
US – Tuna II (Mexico)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012:IV, p. 2013
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6481
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Softwood Lumber IV (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, p. 11357
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
US – Upland Cotton (Article 21.5 – Brazil)	Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809
US – Wool Shirts and Blouses	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, DSR 1997:I, p. 323
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009, DSR 2009:VII, p. 2911

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AIDCP	Agreement on International Dolphin Conservation Program
DPCIA	Dolphin Protection Consumer Information Act of 1990
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EPO	Eastern Pacific Ocean
ETP	Eastern Tropical Pacific Ocean
FAD	Fish Aggregating Device
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Commission for the Conservation of Atlantic Tunas
IOTC	Indian Ocean Tuna Commission
IDCP	International Dolphin Conversation Program
GATT 1994	General Agreement on Tariffs and Trade 1994
MMPA	Marine Mammal Protection Act
NOAA	National Oceanic Atmospheric Administration
NMFS	National Marine Fisheries Service
RFMOs	Regional Fishery Management Organizations
RPT	Reasonable Period of Time
TBT Agreement	Agreement on Technical Barriers to Trade
TTF	Tuna tracking form
TTVP	Tuna Tracking and Verification Program
USC	United States Code
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1 INTRODUCTION

1.1 General

1.1. On 14 November 2013, Mexico requested the establishment of a panel pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) concerning the United States' alleged failure to implement the recommendations and rulings of the Dispute Settlement Body (DSB) in the dispute *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*.[1] At its meeting on 22 January 2014, the DSB referred, if possible, to the original Panel in accordance with Article 21.5 of the DSU to examine the matter referred to the DSB by Mexico in document WT/DS381/20.[2]

1.2. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Mexico in document WT/DS381/20 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.3. On 27 January 2014, the Panel was composed as follows:

Chairperson:	Mr Mario Matus
Members:	Ms Elizabeth Chelliah Mr Franz Perrez

1.4. Australia, Canada, China, European Union, Guatemala, Japan, the Republic of Korea, New Zealand, Norway, and Thailand reserved their third-party rights.

1.5. The Panel met with the parties from 19 to 21 August 2014. A session with the third parties took place on 20 August 2014.

1.6. On 27 October 2014, the Panel issued the descriptive part of its Report to the parties. The parties provided comments to the descriptive part of the Panel Report on 10 November 2014. The Panel issued its Interim Report to the parties on 28 November 2014. On 12 December 2014, the parties separately requested the revision of specific aspects of the Interim Report; on 19 December 2014, the parties made comments on other party's request. The Panel issued its Final Report to the parties on 30 January 2015.

1.2 Request for enhanced third-party rights

1.7. On 5 August 2014, in its third-party submission[3], the European Union requested the following rights for itself and the other third parties in these proceedings:

> [T]o be present throughout the hearing; to comment, at the invitation of the Panel, on matters arising during the hearing; to receive copies of any questions to the Parties, their responses and comments; and to be present at any subsequent meeting of the compliance Panel with the Parties. The European Union reiterated its request in its oral statement at the third-party session of the substantive meeting of the Panel with the parties.[4]

1.8. After considering the European Union's request and consulting the parties, who both objected to the request, the Panel informed the European Union orally at the third-party session that it had decided to decline its request. The Panel concluded that, in the absence of the parties' agreement to this request, it need not deviate from the third-party rights established in paragraphs 2 and 3 of

[1] WT/DS381/20.
[2] WT/DSB/M/341.
[3] European Union's third-party submission, paras. 3-9.
[4] European Union's oral statement, para. 1.

Article 10 of the DSU, paragraph 6 of Appendix 3 to the DSU, and panel practice regarding third-party rights.

1.3 Background of the dispute

1.9. This dispute concerns the implementation by the United States of the DSB recommendations and rulings in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*.

1.10. On 13 June 2012, the DSB adopted the Appellate Body Report on *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (WT/DS381/AB/R) and the Panel Report (WT/DS381/R), as modified by the Appellate Body Report.[5]

1.11. The DSB ruled *inter alia* that the US "dolphin-safe" labelling provisions were inconsistent with Article 2.1 of the TBT Agreement and recommended that the United States bring its measure into conformity with its obligations under that Agreement.[6] The dolphin-safe labelling provisions comprised the US Code, Title 16, Section 1385 (the "Dolphin Protection Consumer Information Act"); the implementing regulations at US Code of Federal Regulations, Title 50, Section 216.91 and Section 216.92; and a ruling by a US federal appeals court in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007) (the Hogarth ruling).[7]

1.12. On 2 August 2012, Mexico and the United States informed the DSB that additional time was required to discuss a mutually agreed reasonable period of time (RPT) for the United States to implement the recommendations and rulings of the DSB.[8] On 17 September 2012, Mexico and the United States informed the DSB that they had agreed that the RPT was 13 months from 13 June 2012, the date of adoption of the DSB's recommendations and rulings. The RPT expired on 13 July 2013.[9]

1.13. On 9 July 2013, the United States published in its Federal Register a legal instrument entitled "Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products", which the United States refers to as the "2013 Final Rule". According to the United States, the 2013 Final Rule constitutes the measure taken to comply with the DSB recommendations and rulings pursuant to Article 21.5 of the DSU. Furthermore, the United States refers to all three measures – the statute, the implementing regulations (as amended by the 2013 Final Rule), and the *Hogarth* decision, collectively – as the "amended dolphin safe labeling measure" or the "amended measure".[10]

1.14. Mexico considers that the United States has not brought its dolphin-safe labelling provisions into compliance with the DSB's recommendations and rulings. Furthermore, Mexico argues that the amended tuna measure is not consistent with the United States' obligations under the covered agreements.[11]

1.15. On 2 August 2013, Mexico and the United States informed the DSB of Agreed Procedures under Article 21 and 22 of the DSU. Pursuant to paragraph 2 of the said Procedures, Mexico was not required to hold consultations with the United States prior to requesting the establishment of an Article 21.5 panel.[12]

[5] Minutes of DSB Meeting held on 13 June 2012, WT/DSB/M/317, para. 37.
[6] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 407(b) and 408.
[7] Appellate Body Report, *US – Tuna II (Mexico)*, para. 172.
[8] Communication from Mexico and the United States concerning Article 21.3(c) of the DSU, WT/DS381/16.
[9] Agreement under Article 21.3(b) of the DSU, WT/DS381/17.
[10] United States' first written submission, para. 10.
[11] Mexico's request for establishment of a panel, WT/DS381/20, p. 2.
[12] WT/DS381/19.

2 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

2.1. Mexico considers that in this dispute, the "measure taken to comply with the recommendations and rulings" of the DSB, to which Mexico refers collectively as the "Amended Tuna Measure", comprises:[13]

a. Section 1385 ("Dolphin Protection Consumer Information Act"), as contained in Subchapter II ("Conservation and Protection of Marine Mammals") of Chapter 31 ("Marine Mammal Protection"), in Title 16 of the US Code;

b. US Code of Federal Regulations, Title 50, Part 216, Subpart H ("Dolphin Safe Tuna Labeling"), as amended by the 2013 Final Rule;

c. The court ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007); and

d. Any implementing guidance, directives, policy announcements or any other document issued in relation to instruments a. through c. above, including any modifications or amendments in relation to those instruments.

2.2. Mexico has identified a number of claims in its panel request and requests the Panel to find that:[14]

a. The amended tuna measure is inconsistent with Article 2.1 of the TBT Agreement because it continues to accord Mexican tuna products treatment less favourable than that accorded to like tuna products of the United States and to like tuna products originating in any other country;

b. The amended tuna measure is inconsistent with Article I:1 of the GATT 1994 because it continues to confer on tuna products originating in other countries an advantage which is not accorded immediately and unconditionally to like tuna products originating in Mexico;

c. The amended tuna measure is inconsistent with Article III:4 of the GATT 1994 because it continues to accord Mexican tuna products treatment less favourable than that accorded to like tuna products of United States' origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use;

d. The amended tuna measure nullifies or impairs benefits that accrue to Mexico under the GATT 1994 within the meaning of GATT Article XXIII:1(b).

2.3. Mexico requests the Panel to find that the United States had failed to comply with the recommendations and rulings adopted by the DSB on the basis that the amended tuna measure remains inconsistent with Article 2.1 of the TBT Agreement, and Articles I:1 and III:4 of the GATT 1994.[15]

2.4. The United States requests that the Panel reject Mexico's claims in their entirety.

3 OVERVIEW OF THE MEASURE AT ISSUE

3.1. In the original proceedings, Mexico challenged three measures: 1) the Dolphin Protection Consumer Information Act (DPCIA); 2) the statute's implementing regulations; and 3) the Ninth Circuit Court of Appeals decision in *Earth Island Institute v. Hogarth* ("*Hogarth*").[16] The original panel and the Appellate Body found that these measures provide for the conditions under which

[13] See WT/DS381/20, and Mexico's first written submission, para. 11.
[14] See WT/DS381/20.
[15] Mexico's first written submission, para. 331.
[16] Panel Report, *US – Tuna II (Mexico)*, para. 2.1; Appellate Body Report, *US – Tuna II (Mexico)*, para. 172.

tuna products may receive a "dolphin-safe" label, and referred to them collectively as the "measure at issue" or the "US dolphin-safe labelling provisions."[17]

3.2. Taken together, the DPCIA, the implementing regulations, and the Hogarth ruling set out the requirements for when tuna products sold in the United States may be labelled as "dolphin-safe". More specifically, they condition eligibility for a "dolphin-safe" label upon certain documentary evidence that varies depending on the area where the tuna contained in the tuna product is harvested and the type of vessel and fishing method by which it is harvested. In particular, tuna caught by "setting on" dolphins is currently not eligible for a "dolphin-safe" label in the United States, regardless of whether this fishing method is used inside or outside the Eastern Tropical Pacific Ocean (the "ETP"). The DPCIA and the implementing regulations also prohibit any reference to dolphins, porpoises, or marine mammals on the label of a tuna product if the tuna contained in the product does not comply with the labelling conditions spelled out in the DPCIA. However, they do not make the use of a "dolphin-safe" label obligatory for the importation or sale of tuna products in the United States.[18]

3.3. The relevant provisions of the original measure are described below.[19] The 2013 Final Rule, which the United States claims to be the measure taken to comply, is also described in the following paragraphs.

3.1 The Dolphin Protection Consumer Information Act and its Original Implementing Regulations

3.4. The DPCIA is codified in Title 16, Section 1385 of the United States Code (USC). Regulations promulgated in accordance with the DPCIA are codified in Title 50, Section 216 of the Code of Federal Regulations. The core of the US "dolphin-safe" labelling scheme is contained in subsection 1385(d)(1)-(3) of the DPCIA. Paragraph (d) of Section 1385 of the DPCIA provisions regulates the use of the term "dolphin-safe" when it appears on tuna products.[20]

Fishing method

3.5. Under the DPCIA, tuna caught by large scale driftnet fishing on the high seas, and tuna products containing tuna harvested anywhere in the world by setting on dolphins are not eligible to be labelled dolphin-safe.[21]

Certification by captain and observer

3.6. Subparagraph (h)(1) of the DPCIA establishes the following:

> (h) Certification by captain and observer
>
> (1) Unless otherwise required by paragraph (2), the certification by the captain under subsection (d)(2)(B)(i) of this section and the certification provided by the observer as specified in subsection (d)(2)(B)(ii) of this section shall be that no dolphins were killed or seriously injured during the sets in which the tuna were caught.
>
> (2) The certification by the captain under subsection (d)(2)(B)(i) of this section and the certification provided by the observer as specified under subsection (d)(2)(B)(ii) of this section shall be that no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphins, and that no dolphins were killed or seriously injured during the sets in which the tuna were caught, if the tuna were caught on a trip commencing—

[17] Appellate Body Report, *US – Tuna II (Mexico)*, para. 172 (citing Panel Report, *US – Tuna II (Mexico)*, para. 7.24).
[18] Appellate Body Report, *US – Tuna II (Mexico)*, para. 172.
[19] The description of the unchanged aspects of the measure is taken from the panel's report in the original proceedings.
[20] Panel Report, *US – Tuna II (Mexico)*, para. 2.3.
[21] Panel Report, *US – Tuna II (Mexico)*, para. 2.3.

(A) before the effective date of the initial finding by the Secretary under subsection (g)(1) of this section;

(B) after the effective date of such initial finding and before the effective date of the finding of the Secretary under subsection (g)(2) of this section, where the initial finding is that the intentional deployment on or encirclement of dolphins is having a significant adverse impact on any depleted dolphin stock; or

(C) after the effective date of the finding under subsection (g)(2) of this section, where such finding is that the intentional deployment on or encirclement of dolphins is having a significant adverse impact on any such depleted stock.[22]

3.7. The DPCIA provisions refer to *four* criteria to establish *five* basic categories of circumstances in which tuna may be caught. These criteria are: location (*inside* or *outside* the ETP); fishing gear (*with* or *without* the use of purse seine nets); type of interaction between tuna and dolphin schools (*there is* or *there is no* regular or significant association between tuna and dolphin schools) and the level of dolphin mortalities or injuries (*there is* or *there is no* regular and significant mortality or serious injury). The five categories that result from the combined application of these criteria are described in subparagraphs (A) to (D) of subsection 1385(d)(1) of the DPCIA.[23]

3.8. These subparagraphs refer to tuna caught:

A) On the high seas by a vessel engaged in driftnet fishing;

B) Outside the ETP by a vessel using purse seine nets:

(i) in a fishery in which the US Secretary of Commerce has determined that there is a regular and significant tuna-dolphin association similar to the association between dolphins and tuna in the ETP;

(ii) in any other fishery (other than a fishery described in subparagraph (D)).

C) In the ETP by a vessel using purse seine nets; and

D) In a fishery other than the ones described in the previous categories that is identified by the US Secretary of Commerce as having a regular and significant mortality or serious injury of dolphins.[24]

3.9. Tuna products containing tuna caught under the scenario described in subparagraph (A) of subsection 1385(d)(1), i.e. tuna caught on the high seas using driftnet fishing, may under no circumstances be labelled as "dolphin-safe" or display any analogous claim. Subsections 1385(d)(1)(2) and (h) of the DPCIA establish specific conditions for the use of the term "dolphin-safe" or any analogous claims on tuna products for each of the categories described in subparagraphs (B) through (D) of subsection 1385(d)(1). The documentary evidence required under the DPCIA for the categories (B) through (D) is described below.[25]

3.10. With respect to tuna products containing tuna caught outside the ETP by a vessel using purse seine nets in a fishery in which the US Secretary of Commerce has determined that a regular and significant dolphin-tuna association exists (subparagraph (B)(i)), the use of the term "dolphin-safe" or any analogous term is conditional upon a written statement executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary of Commerce, certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna were caught and no dolphins were killed or seriously injured in the sets in which the tuna were caught.[26]

[22] Panel Report, *US – Tuna II (Mexico)*, para. 2.4.
[23] Panel Report, *US – Tuna II (Mexico)*, para. 2.7.
[24] Panel Report, *US – Tuna II (Mexico)*, para. 2.8.
[25] Panel Report, *US – Tuna II (Mexico)*, para. 2.9.
[26] Panel Report, *US – Tuna II (Mexico)*, para. 2.10.

3.11. For tuna caught outside the ETP by a vessel using purse seine nets in any fishery, other than a fishery described in subparagraph (D) of subsection 1385(d)(1) of the DPCIA provisions, (subparagraph (B)(ii)), a written statement executed by the captain of the vessel is required, certifying that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna was harvested.[27]

3.12. For tuna harvested *in the ETP* by a large purse seine[28] vessel (subparagraph (C)), the conditions are:

- a written statement executed by the *captain* certifying that *no dolphins were killed or seriously injured* during the sets in which the tuna were caught; and, unless there is a previous determination by the Secretary of Commerce that the fishing technique of setting on dolphins is not having a significant adverse impact on any depleted dolphin stock in the ETP, also certifying that *no purse seine net was intentionally deployed on or used to encircle dolphins*;

- a written statement executed by either the Secretary of Commerce or the Secretary's designee, or a representative of the Inter-American Tropical Tuna Commission (IATTC), or an authorized representative of a participating nation whose national program meets the requirements of the IDCP stating that there was an observer approved by the IDCP on board the vessel during the entire trip and that such observer provided the same certifications as the vessel captain;

- the written endorsement by each exporter, importer, and processor of the tuna; and

- the above mentioned written statements and endorsements comply with regulations promulgated by the Secretary which provide for the verification of tuna products as dolphin-safe.

Small purse seine vessels in the ETP are not subjected to these requirements. Therefore, considering only the DPCIA and not the other aspects of the US measure, tuna caught in the ETP by this type of vessel may be labelled "dolphin-safe" without the need to submit any documentary evidence.[29]

3.13. For tuna caught in a fishery *other* than those described in subsection 1385(d)(1)(A)-(C) (that is, tuna caught without purse seine nets or large driftnets in the high seas) that is identified by the US Secretary of Commerce as having a *regular and significant mortality* or *serious injury* of dolphins (subparagraph (D)), the use of the term "dolphin-safe" or any analogous terms is subject to a written statement executed by the *captain* of the vessel and an *observer* participating in a national or international program acceptable to the Secretary of Commerce that *no dolphins were killed or seriously injured* in the sets or other gear deployments in which the tuna were caught, provided that the Secretary of Commerce determines that such an observer statement is necessary.[30]

3.14. For tuna caught without purse seine nets in fisheries where there has *not* been a finding of *regular and significant mortality* or *serious injury* of dolphins, the DPCIA provisions do not require any written statement or certification.

3.15. As described above, subparagraph (h)(1) of the DPCIA provisions establishes that, unless otherwise required by paragraph (2), tuna harvested in the ETP by a vessel using purse seine nets may be labelled "dolphin-safe" if the captain of the vessel and an approved observer certify that no dolphins were killed or seriously injured during the sets in which the tuna were caught.[31]

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[27] Panel Report, *US – Tuna II (Mexico)*, para. 2.11.

[28] Consistent with the AIDCP, US law, and the reports in the original proceeding, the Panel uses the term "large purse seine vessel" to refer to purse seine vessels in the ETP with a carrying capacity greater than 363 metric tons and the term "small purse seine vessel" to refer to purse seine vessels in the ETP with a carrying capacity of 363 metric tons or less.

[29] Panel Report, *US – Tuna II (Mexico)*, para. 2.12.

[30] Panel Report, *US – Tuna II (Mexico)*, para. 2.13.

[31] Panel Report, *US – Tuna II (Mexico)*, para. 2.15.

3.16. However, subparagraph (h)(2) establishes that tuna harvested in the ETP by a large vessel using purse seine nets may be labelled "dolphin-safe" if the captain of the vessel and an approved observer certify that (i) no purse-seine net were intentionally deployed on or used to encircle dolphins during the trip in which the tuna was caught, and (ii) no dolphins were killed or seriously injured during the sets in which the tuna were caught. Subparagraph (h)(2) of the DPCIA provisions conditions the applicability of subparagraph (h)(1) to the existence of a finding by the US Secretary of Commerce that the intentional deployment on or encirclement of dolphins with purse seine nets is *not* having a significant adverse impact on any depleted dolphin stock in the ETP. Subparagraph (g) requires the Secretary of Commerce to conduct this task in two stages resulting in an initial and a final finding on the impact of setting on dolphins in the ETP.[32]

3.17. In the event of a negative finding, a certification that "no dolphins were killed or seriously injured during the sets in which the tuna were caught" is sufficient in order to make the tuna products eligible for a "dolphin-safe" label. In the event of a positive finding, an additional certification that "no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphins" is required.[33]

3.18. The US Secretary of Commerce made a final finding that "the intentional deployment on or encirclement of dolphins with purse seine nets [was] not having a significant adverse effect on any depleted dolphin stock in the ETP."[34] However, this finding was overturned through US court rulings, on the basis that the Secretary failed to conduct statutorily mandated studies and that the best available scientific evidence did not support the Secretary's finding.[35]

3.19. Hence, given that the Secretary's ruling has been overturned with the result that there is no finding that intentional deployment on or encirclement of dolphins with purse seine nets is *not* having a significant adverse impact on any depleted dolphin stock in the ETP, tuna harvested in the ETP by a large purse seine vessel may be labelled dolphin-safe only if the captain certifies that *no dolphins were killed or seriously injured* during the sets in which the tuna were caught and that *no purse seine net was intentionally deployed on or used to encircle dolphins* during the same fishing trip. This certification must be accompanied by a written statement executed by the Secretary of Commerce (or designee), a representative of the Inter-American Tropical Tuna Commission or an authorized representative of a participating nation whose national program meets the requirements of the IDCP that an observer approved by the IDCP was on board the vessel during the entire trip and that such observer provided the same certifications as the captain, and the endorsement by the exporters, importers and processors required in subparagraphs (d)(2)(B)-(C) of Section 1385 of the DPCIA provisions.[36]

3.20. As explained above, subparagraphs (d)(1)(B) and (D) of the DPCIA provisions establish different categories of tuna harvested *outside* the ETP large purse seine fishery. These categories are:[37]

- Tuna caught using purse seine nets in a fishery in which the US Secretary of Commerce has determined that a *regular and significant tuna-dolphin association* exists similar to the association in the ETP (§1385 (d)(1)(B)(i));

- Tuna caught using purse seine nets in a fishery in which the US Secretary of Commerce has not determined that a *regular and significant association* between tuna and dolphins exists (§1385 (d)(1)(B)(ii)); and

- Tuna caught in a fishery *other* than the ones described in subparagraphs (d)(1)(A)-(C) that is identified by the US Secretary of Commerce as having a *regular and significant mortality* or *serious injury* of dolphins (§1385 (d)(1)(C)).

[32] Panel Report, *US – Tuna II (Mexico)*, para. 2.16.
[33] Appellate Body Report, *US – Tuna II (Mexico)*, para. 175.
[34] Panel Report, *US – Tuna II (Mexico)*, para. 2.18.
[35] Panel Report, *US – Tuna II (Mexico)*, para. 2.19; See also *Earth Island Institute v. Evans*, affirmed by *Earth Island Institute v. Hogarth*.
[36] Panel Report, *US – Tuna II (Mexico)*, para. 2.20.
[37] Panel Report, *US – Tuna II (Mexico)*, para. 2.21.

3.21. As also mentioned above, the DPCIA provisions establish a specific set of conditions that must be fulfilled by each of these categories of tuna in order to use the term "dolphin-safe" or to make similar claims. In two of these instances (i.e. tuna caught in a fishery in which the US Secretary of Commerce has *determined* that a regular and significant tuna-dolphin association exists, *and* in the case of tuna caught in a fishery other than the ones described in subparagraphs (d)(1)(A)-(C) that is *identified* by the US Secretary of Commerce as having a regular and significant mortality or serious injury of dolphins), the applicability of the relevant requirements is conditioned on the existence of a determination by the Secretary of Commerce that in the fishery in question there is regular and significant tuna-dolphin association similar to the association in the ETP, or regular and significant mortality or serious injury of dolphins.[38]

3.22. The United States indicated that no fishery outside the ETP has been determined to have a regular and significant association between tuna and dolphins similar to the association in the ETP. Moreover, the United States has also explained that it has not made a determination that any non-purse seine tuna fishery has regular and significant dolphin mortality.[39]

3.23. Therefore, although it remains a possibility under the DPCIA provisions, that the Secretary of Commerce may determine that there is regular and significant dolphin-tuna association, or regular and significant mortality or serious injury of dolphins in fisheries outside the ETP, such determinations have not been made to date. Hence the "dolphin-safe" requirements for tuna caught under the circumstances described in subparagraphs (d)(1)(B)(i) and (d)(1)(D) of Section 1385 are not currently applied with respect to any fishery.[40]

3.24. Consequently, the scenarios described in subparagraphs (d)(1) of Section 1385 that are currently applicable are those described in:

a. subparagraph (d)(1)(A), which refers to tuna caught on the high seas by driftnet fishing;

b. subparagraph (d)(1)(C), which refers to tuna caught in the ETP by a large vessel using purse seine nets; and

c. subparagraph (d)(1)(B)(ii), which refers to tuna caught by a purse seine vessel outside the ETP in a fishery that has not been the subject of a determination by the Secretary of Commerce of regular and significant dolphin-tuna association. The "dolphin-safe" certification required for this type of tuna must be provided by the *captain* of the vessel and, according to subparagraph (d)(1)(B)(ii), must state only that *no purse seine net was intentionally deployed on or used to encircle dolphins* during the particular voyage on which the tuna was harvested.[41]

3.25. As subparagraph (d)(1)(D) of Section 1385 is not currently applicable, the DPCIA provisions do not require any written statement or certification for tuna caught without purse seine nets in any fishery.

Tracking and Verification Program (TTVP)

3.26. The United States National Marine Fisheries Service (NMFS) has established the Tuna Tracking and Verification Program (TTVP) for tracking and verifying the "dolphin-safe" or "non-dolphin-safe" condition of tuna. The provisions establishing this program are mainly contained in Title 50, Sections 216.24 and 216.91-216.93 of the US Code of Federal Regulations. Through the use of the TTVP, the United States government collects information from domestic tuna processors, US tuna vessels, and importers of tuna products, to verify whether tuna products labelled dolphin-safe meet the statutory conditions.[42]

[38] Panel Report, *US – Tuna II (Mexico)*, para. 2.22.
[39] Panel Report, *US – Tuna II (Mexico)*, para. 2.23.
[40] Panel Report, *US – Tuna II (Mexico)*, para. 2.24.
[41] Panel Report, *US – Tuna II (Mexico)*, para. 2.25.
[42] Panel Report, *US – Tuna II (Mexico)*, para. 2.31.

Form 370

3.27. Every import of tuna and tuna products to the United States, regardless of whether the "dolphin-safe" label is intended to be used, must be accompanied by a Fisheries Certificate of Origin (National Oceanic and Atmospheric Administration (NOAA) Form 370). One copy of this form must be submitted to Customs and Border Protection at the time of importation, and a second one to the TTVP.[43]

Tuna Tracking Form (TTF)

3.28. For tuna caught by US vessels, section 216.93 establishes a "tracking and verification program" for large US purse seine vessels fishing in the ETP, which is designed to be consistent with the AIDCP. The regulation requires that the observer on the vessel record every set made during a fishing voyage on a Tuna Tracking Form (TTF) bearing a unique identification number. One TTF is used to record dolphin-safe sets (i.e. where no dolphins were killed or seriously injured) and a second TTF is used to record non-dolphin-safe sets (i.e. where there was a dolphin mortality or serious injury). The information entered on the TTFs for each set includes the date, well number, weights by species composition, estimated tons loaded, and additional notes, if any. The observer and the vessel engineer initial the entry following each set, and the vessel captain and the observer review and sign both TTFs at the end of the fishing trip certifying that the information on the forms is accurate. The requirement for TTFs does not apply to US vessels operating outside the ETP, nor to US vessels operating in the ETP that are not large purse seine vessels. The TTF forms must be certified by the independent observers required on large purse seine vessels in the ETP.[44] TTF(s) are a component of the Agreement on the International Dolphin Conservation Program (AIDCP). During any fishing trip in the ETP, large purse seine vessels are required to record on TTF(s) every purse seine set made and any dolphin mortalities or serious injuries. As required by the AIDCP, section 216.93(a) requires that separate TTFs be used to record tuna harvested in dolphin-safe and non-dolphin-safe sets. Subsection (c)(1)(i) provides that a set is "non-dolphin-safe" if a dolphin died or was seriously injured during the set.[45]

3.29. For tuna products containing tuna caught in the ETP by non-US vessels, there are separate regulations. Section 216.92(b)(1) applies to imported tuna products made with yellowfin tuna harvested in the ETP, and requires the tuna to be caught by a vessel belonging to a nation that has obtained an affirmative finding under § 216.24(f)(8), which is a determination by the US government that a nation is in compliance with the AIDCP. For other tuna products not containing yellowfin tuna, Section 216.92(b)(2)(i) requires that the tuna have been caught by a vessel belonging to a nation that is a party to the AIDCP and is adhering to its requirements. Thus, the same requirements for compliance with the AIDCP apply to imported tuna products containing both yellowfin and non-yellowfin tuna. The AIDCP requires member nations to implement the same TTF system for fishing by large purse seine vessels in the ETP as is implemented for US vessels under section 216.93.[46] The Form 370 required for imported tuna products containing tuna caught in the ETP must list the numbers for the associated TTF(s).[47]

3.30. The TTF requirement applies only to tuna caught by large purse seine vessels in the ETP.

Physical segregation

3.31. Under the original measure, there were no requirements for segregating dolphin-safe from non-dolphin-safe tuna for any tuna other than that caught by large purse seine vessels in the ETP. For tuna caught by large purse seine vessels in the ETP only, tuna caught in sets designated as dolphin-safe by the vessel observer must be stored separately from tuna caught in non-dolphin-safe sets from the time of capture through unloading at port. Specifically, if tuna was caught in a set during which a dolphin was killed or seriously injured, that tuna must be stored in a "well" on the vessel separate from dolphin-safe tuna. If any dolphin-safe tuna is mixed in the same well with the non-dolphin-safe tuna, all of the tuna in that well must be treated as non-dolphin-safe. Furthermore, tuna offloaded to trucks, storage facilities, or carrier vessels must be loaded or

[43] Panel Report, *US – Tuna II (Mexico)*, para. 2.32.
[44] Mexico's first written submission, paras. 82-83.
[45] See United States' first written submission, footnote 63.
[46] Mexico's first written submission, paras. 85-88.
[47] United States' first written submission, para. 42.

stored in such a way as to maintain the identification of the dolphin-safe or non-dolphin-safe tuna as it left the vessel.[48] The TTF documentation required for tuna caught by large purse seine vessels in the ETP is used for this purpose.[49]

3.2 The 2013 Final Rule

3.32. On 9 July 2013, the United States published in its Federal Register a Final Rule entitled "Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products" (2013 Final Rule). The 2013 Final Rule made changes to the previous regulations at Sections 216.91 and 216.93.[50] However, neither the DPCIA, nor the *Hogarth* ruling, has been amended since the original panel circulated its report.[51]

3.33. The amended dolphin-safe labelling measure places three types of conditions on use of the dolphin-safe label for tuna products: 1) conditions relating to fishing methods, 2) conditions relating to certifications, and 3) conditions relating to record-keeping (tracking and verification).[52]

3.34. The relevant changes to the original implementing regulations are explained below.

Fishing method

3.35. Under the amended measure, as under the original measure, tuna harvested using large-scale driftnets on the high seas is not eligible for the dolphin-safe label.[53]

3.36. Under the amended measure, as under the original measure, tuna products containing tuna harvested anywhere in the world by setting on dolphins are not eligible to be labelled dolphin-safe. This prohibition is implemented through 50 C.F.R. section 216.91(a)(1), which applies to large purse seine vessels in the ETP, and section 216.91(a)(2), which applies to purse seine vessels outside the ETP. Both provisions stipulate that tuna caught by a covered vessel is not eligible for the dolphin-safe label unless it is accompanied by a captain's certification that no purse seine nets were intentionally deployed on or used to encircle dolphins during the particular trip on which the tuna was harvested and that no dolphins were killed or seriously injured during the sets in which the tuna were caught"[54]

3.37. Tuna products harvested by fishing methods other than large-scale high seas driftnet fishing or setting on dolphins are eligible to be labelled dolphin-safe only if no dolphins were killed or seriously injured in the gear deployments in which the tuna were caught. To ensure this condition is met, tuna products labelled dolphin-safe are subject to the certification and record-keeping conditions discussed below.[55]

Certifications

Captain certification

3.38. Under the amended measure, the use of the dolphin-safe label on any tuna product is conditioned on the product being accompanied by certain certifications by the captain of the harvesting vessel and, in some circumstances, an observer from an approved national or international observer program.[56]

3.39. The certification requirements under the original DPCIA statute for all tuna harvested in the ETP by a large purse seine vessel remain unchanged. For US-flagged vessels, sections 216.92(a)(1) and 216.93(a) implement this condition by requiring that captain-certified TTFs, which show whether a dolphin was killed or seriously injured in the set in which the tuna

[48] Mexico's first written submission, paras. 60-61.
[49] Mexico's first written submission, paras. 90-92.
[50] Mexico's first written submission, para. 10.
[51] United States' first written submission, para. 11.
[52] United States' first written submission, para. 20.
[53] United States' first written submission, para. 22.
[54] United States' first written submission, para. 30.
[55] United States' first written submission, para. 32.
[56] United States' first written submission, para. 33.

were caught, accompany all tuna caught by large purse seine vessels in the ETP. For foreign-flagged vessels, section 216.24(f)(2) requires that all tuna imports be accompanied by a NOAA Form 370, which indicates dolphin-safe status and contains the certifications described in section 216.91(a) as necessary.[57] The certification must include validation that the dolphin-safe status was certified by an independent observer meeting the requirements of the AIDCP.[58]

3.40. In addition to the certification that no dolphins were killed or seriously injured, tuna products containing tuna harvested by a purse seine vessel may be labelled dolphin-safe only if accompanied by a certification by the vessel captain that no purse seine net was intentionally deployed on or used to encircle dolphins during the trip on which the tuna were caught. Under the amended measure, this condition applies to tuna products containing tuna harvested by large purse seine vessels in the ETP, and by purse seine vessels outside the ETP.[59]

3.41. Under the amended measure, a captain's certification that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna was caught is also needed for tuna products containing tuna harvested in any other fishery to be labelled dolphin-safe. Section 216.91(a)(2) implements this condition for tuna caught by a purse seine vessel outside the ETP on trips beginning on or after 13 July 2013. Section 216.91(a)(4) establishes the same condition for tuna harvested in all other fisheries (i.e. all fisheries other than the large purse-seine fishery in the ETP and purse seine fisheries outside the ETP). (The original tuna measure did not require any certification for tuna products containing tuna caught (i) not using purse seine nets or (ii) by small purse seine vessels in the ETP.)[60]

Observer on-board and observer certification

3.42. Tuna products containing tuna caught by large purse seine vessels in the ETP may be labelled dolphin-safe only if accompanied by valid documentation signed by a representative of the appropriate IDCP–member nation certifying that: (i) there was an IDCP-approved observer on board the vessel during the entire trip; and (ii) no purse seine net was intentionally deployed on or to encircle dolphins during the fishing trip and no dolphins were killed or seriously injured in the sets in which the tuna were caught. In addition, the documentation must list the numbers for the associated Tuna Tracking Forms which contain the required captain and observer certifications.[61]

3.43. For tuna caught by large US purse seine vessels in the ETP, sections 216.91(a)(1) and 216.93(a) implement this condition by requiring that the IDCP observer on board certify the TTF accompanying the tuna caught by that vessel.[62] A TTF that is used to record dolphin-safe sets attests that no dolphins were killed or seriously injured in the set in which the tuna was caught.[63]

3.44. For tuna caught by large non-US purse seine vessels in the ETP, sections 216.92(b) and 216.24(f)(4) implement this provision by requiring that the NOAA Form 370 accompanying the tuna products contain the necessary observer certifications. For tuna products to be labelled dolphin-safe, the accompanying Form 370 must be signed by a representative of an IDCP-member nation, and the representative must certify that (i) there was an IDCP observer on the vessel during the entire trip, (ii) no purse seine net was intentionally deployed on or to encircle dolphins, and (iii) no dolphins were killed or seriously injured in the sets in which the tuna were caught. The Form 370 must also list the numbers for the associated TTF(s), which contains the required captain and observer's certifications.[64]

3.45. For tuna caught other than by large purse seine vessels in the ETP, the amended measure does not require an observer certification requirement unless the NMFS Assistant Administrator

[57] United States' first written submission, para. 35.
[58] 16 USC § 1385(d)(2)(B) (Exhibit MEX-8).
[59] United States' first written submission, para. 37.
[60] United States' first written submission, para. 36.
[61] United States' first written submission, para. 40.
[62] See 50 C.F.R. §§ 216.92(a)(1) (Exh. US-2). For US vessels, NOAA's TTVP is the representative of the IDCP-member nation (i.e. the United States) and US certification is made by reviewing TTFs.
[63] United States' first written submission, para. 41; (Under Section 216.93(a), one TTF is used to record dolphin-safe sets and a second TTF is used to record non-dolphin-safe sets).
[64] United States' first written submission, para. 42.

has made certain findings. More specifically, under the amended measure, observer certification is required under the following circumstances:[65]

> (i) In a non-ETP purse seine fishery in which the Assistant Administrator has determined that a regular and significant association occurs between dolphins and tuna (similar to the association between dolphins and tuna in the ETP) (50 C.F.R. §§ 216.91(a)(2)(i));
>
> (ii) In a non-ETP purse seine fishery where the Assistant Administrator has determined that observers participating in a national or international observer program are qualified and authorized to certify that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna were caught, and that no dolphins were killed or seriously injured in the sets in which the tuna were caught" (50 C.F.R. §§ 216.91 (a)(2)(iii)(B));
>
> (iii) In any other fishery where the Assistant Administrator has determined that observers participating in a national or international observer program are qualified and authorized to certify that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught" (50 C.F.R. §§ 216.91(a)(4)(ii)); and
>
> (iv) In any other fishery that is identified by the Assistant Administrator as having a regular and significant mortality or serious injury of dolphins" (50 C.F.R. §§ 216.91(a)(4)(iii)).

3.46. Under the current measure, for tuna caught outside the ETP, the amended tuna measure does not impose any observer certification requirements, other than with respect to seven US domestic fisheries for which the Assistant Administrator has determined that US observers are qualified and authorized to certify that no that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught. The certification is required only when the observer is on board the vessel for other reasons, and tuna caught when there is not an observer on board may still be labelled dolphin-safe with a captain's statement.[66]

Tracking and Verification

Documentation requirements

Tuna Tracking Form (TTF)

3.47. As in the original measure, under the amended measure tuna harvested in the ETP by large purse seine vessels may be labelled dolphin-safe only if the documentation requirements of sections 216.92 and 216.93 are met. For tuna caught by US-flagged vessels, the dolphin-safe label may be used if the tuna is accompanied by a TTF certified by the vessel captain and the IDCP-approved observer and delivered to a US tuna processor that is in compliance with the tuna tracking and verification requirements of section 216.93.[67]

3.48. The same tracking and verification requirements, e.g. that the tuna in question should be accompanied by a TTF certified by the vessel captain and the IDCP-approved observer, apply to imported tuna products harvested in the ETP by large purse seine vessels. Such tuna products may be labelled dolphin-safe only if the tuna was harvested by a vessel flagged to an AIDCP party (or a country that is provisionally applying the AIDCP) that is adhering to all the requirements of the IDCP Tuna Tracking and Verification Plan. This requirement is implemented by the Form 370, which requires that tuna harvested in the ETP by large purse seine vessels be accompanied by documentation from the appropriate IDCP-member country certifying that there was an IDCP observer on the vessel at all times and listing the numbers for the associated TTF(s).[68]

[65] United States' first written submission, para. 43.
[66] United States' second written submission, para. 128.
[67] United States' first written submission, para. 45.
[68] United States' first written submission, para. 46.

Form 370

3.49. Every imported tuna product, regardless of where the tuna was caught and whether the dolphin-safe label is used, must be accompanied by a NOAA Form 370, which designates the gear type with which the tuna was caught and, if the product is to be labelled dolphin-safe, contains the necessary certifications. At the time of importation, one copy of this form is required to be submitted to Customs and Border Protection and another is required to be submitted, within 10 days of the importation, to the Tuna Tracking and Verification Program (TTVP).[69]

Physical segregation

3.50. The amended measure requires that, to be contained in tuna product labelled dolphin-safe, tuna must be segregated from non-dolphin-safe tuna from the time it was caught through unloading and processing. Section 216.93(c)(1) implements this requirement for tuna caught by large purse seine vessels in the ETP, requiring that dolphin-safe tuna be loaded into designated wells and offloaded to trucks, storage facilities, or carrier vessels in such a way as to safeguard the distinction between dolphin-safe and non-dolphin-safe tuna. Independent observers monitor the loading and unloading of wells, and individual lots of tuna are assigned TTF tracking numbers that can be traced through each step of production of the tuna products.[70]

3.51. Sections 216.93(c)(2) and (3) apply the same requirement to tuna caught by purse seine vessels outside the ETP and to tuna caught in other fisheries. Any mixing in the affected wells or storage areas should result in the tuna being designated non-dolphin-safe.[71]

Tracking cannery operations and processor operations other than cannery operations, subject to US jurisdiction

3.52. Whenever a US cannery receives a shipment of domestic or imported tuna for processing, a NMFS representative may be present to monitor delivery and verify the dolphin-safe designations. Further, US tuna processors are required to submit monthly reports to the TTVP for all tuna received at their processing facilities. These reports indicate, for all tuna received, whether the tuna is eligible to be labelled dolphin-safe under section 216.91, species, condition of the tuna products, weight, ocean area of capture, catcher vessel, gear type, trip dates, carrier name, unloading dates, location of unloading and, if the tuna products are labelled dolphin-safe, the required certifications for each shipment of tuna. All US exporters, trans-shippers, importers, processors, and distributors of tuna or tuna products must maintain records related to the tuna for at least two years, including Form 370s and associated certifications, and all additional required reports.[72]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 17 of the Working Procedures adopted by the Panel (see Annexes B-1, B-2, B-3, B-4, B-5 and B-6).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, Canada, the European Union, Japan, the Republic of Korea, New Zealand, and Norway are reflected in their respective executive summaries, provided in accordance with paragraph 18 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, C-5, C-6, C-7, C-8, C-9 and C-10). The Republic of Korea did not submit written arguments to the Panel. Japan did not make an oral statement. China, Guatemala and Thailand did not submit written or oral arguments to the Panel.

[69] United States' first written submission, para. 49.
[70] Mexico's first written submission, para. 92.
[71] United States' first written submission, para. 50.
[72] United States' first written submission, para. 52.

6 INTERIM REVIEW

6.1 General issues

6.1. All paragraph references in this section are to the paragraph numbers in the final report. This section of the Report constitutes an integral part of the Panel's findings.

6.2. In response to the parties' requests, the Panel made typographical and stylistic corrections in the following paragraphs: 7.11, 7.16, 7.34, 7.35, 7.62, 7.71, 7.80, 7.98, 7.120, 7.124, 7.126, 7.136, 7.143, 7.147, 7.160, 7.161, 7.167, 7.172, 7.177, 7.187, 7.185, 7.192, 7.198, 7.199, 7.206, 7.208, 7.231, 7.233, 7.248, 7.249, 7.251, 7.252, 7.253, 7.256, 7.262, 7.283, 7.294, 7.297, 7.298, 7.300, 7.302, 7.303, 7.304, 7.306, 7.310, 7.312, 7.346, 7.349, 7.352, 7.355, 7.365, 7.363, 7.367, 7.368, 7.370, 7.377, 7.378, 7.401, 7.433, 7.439, 7.444, 7.450, 7.453, 7.454, 7.458, 7.466, 7.477, 7.483, 7.486, 7.508, 7.517, 7.519. 7.528, 7.533, 7.539, 7.554, 7.577, 7.579, 7.585, 7.587, 7.591, 7.593, and 7.599.

6.3. In response to comments from both parties, the Panel has made minor revisions to the descriptive part of its Report at paragraphs 1.1, 1.10, 3.1, 3.13, 3.14, 3.28, 3.29, 3.30, 3.31, 3.32, 3.36, 3.40, and 3.47.

6.4. In light of the requests made by the parties during the interim review stage, and in order to reflect the parties' arguments and exhibits more precisely, the Panel made adjustments to the following paragraphs: 7.104, 7.111, 7.112, 7.116, 7.154, 7.156, 7.193, 7.291, 7.309, 7.324, 7.328, 7.339, 7.349, 7.360, 7.374, 7.467, 7.589, and 7.592.

6.5. Both parties requested that the Panel clarify and, in some cases, revise its reasoning and findings in a number of paragraphs. In response to these requests, the Panel has adjusted its Report at paragraphs: 7.66, 7.105, 7.148, 7.150, 7.366, and 7.601.

6.2 Specific issues

6.2.1 Evidence concerning observable and unobservable harms caused by different fishing methods

6.6. Both parties requested the Panel to explain in more detail its views of certain evidence pertaining to the different eligibility criteria. The Panel did not consider it necessary to review evidence submitted by the parties in the original dispute. The Panel did, however, review the new evidence, and found that it simply confirmed the findings made in the original proceedings on this issue. For this reason, the Panel did not discuss this new evidence in great detail in its interim report. Nevertheless, in light of the parties' requests, we have decided to describe the new evidence in some more detail, and to provide more detailed explanations of the Panel's understanding and views of the various documents. The Panel notes that this new evidence confirms the factual findings made by the original panel and upheld by the Appellate Body. Accordingly, we have revised the report at paragraphs 7.111, 7.112, 7.116, 7.122, 7.123, and 7.129 to 7.135.

6.2.2 Description of the Appellate Body's finding on observed and unobserved harms caused by setting on dolphins as compared with other tuna fishing methods

6.7. The United States requested that the Panel review its description of the Appellate Body's findings in paragraphs 7.120, 7.122, 7.579, and 7.585 of its Report. Mexico did not agree with the United States' request, and asked the Panel to reject it.

6.8. The paragraph as originally drafted accurately reflects our understanding of the original panel and Appellate Body reports. The Appellate Body expressly confirmed that "setting on dolphins causes observed and unobserved adverse effects on dolphins".[73] Neither party denies that setting on dolphins causes observed and unobserved harm to dolphins. However, the original panel and the Appellate Body were also clear in holding that "the risks to dolphins from other fishing techniques are [not] insignificant, and [may] under some circumstances rise to the same level as

[73] Appellate Body Report, *US – Tuna II (Mexico)*, para. 287.

the risks from setting on dolphins".[74] In our view, what makes setting on dolphins particularly harmful is the fact that it causes certain unobserved effects *beyond* mortality and injury "as a result of the chase itself".[75] These harms would continue to exist "even if measures are taken in order to avoid the taking and killing of dolphins on the nets".[76] It is precisely because these unobserved harms cannot be mitigated by measures to avoid killing and injuring dolphins that the original panel and the Appellate Body found that the United States is entitled to treat setting on dolphins differently from other fishing methods.

6.9. To ensure clarity, we have revised our drafting of paragraphs 7.120, 7.122, 7.123, 7.579 and 7.585.

6.2.3 Mexico's evolving argument on the different observer requirements under Article 2.1 of the TBT Agreement

6.10. The United States requested the Panel to revise its description of Mexico's argument in paragraphs 7.154 and 7.161 of the Report. Mexico requested the Panel to reject this request, and stated that the United States' proposed redraft would "mischaracterize Mexico's arguments".[77]

6.11. In our view, the original text accurately summarizes Mexico's argument. Mexico explicitly argued that the different certification requirements "impose two distinct … standards for the accuracy of information regarding the dolphin-safe status tuna: one standard for tuna caught inside the ETP, and a separate and much lower standard for tuna outside the ETP".[78] In the Panel's view, this sentence clearly means that, in Mexico's view, the amended tuna measure imposes a lighter (or, in Mexico's words, a "much lower") burden on tuna caught outside of the ETP large purse seine fishery on tuna caught within that fishery. For the sake of clarity, the Panel has added a footnote in paragraph 7.154 explicitly linking the Panel's summary to Mexico's submission.

6.12. In addition, the Panel notes that its description of Mexico's argument takes into account the way in which Mexico's arguments developed over the course of these proceedings, and in particular its (Mexico's) development of arguments concerning the different cost burdens imposed by the amended tuna measure. As both parties will recall, one of the main issues discussed by the Panel and the parties at the meeting concerned the various costs imposed by the amended tuna measure. A number of the Panel's written questions to the parties also concerned the different cost burdens imposed by the measure at issue, and both parties responded to these questions. As the Panel explains in paragraph 7.162 the amended tuna measure appears to impose different cost burdens on different countries, and this is an important element of the differential burdens imposed by the measure. In light of these considerations, we believe that our understanding and representation of Mexico's argument is accurate and should stand.

6.2.4 Evidence concerning log-books

6.13. The United States requested the Panel to review certain factual findings in paragraphs 7.219 and 7.601. In particular, the United States requested that the Panel explicitly note that some logbooks do require or allow captains to record mammal bycatch. The Panel reviewed this evidence, and has revised its Report at paragraphs 7.219-7.226.

6.2.5 Tracking and verification systems

6.14. The United States requested the Panel to revise its findings in a number of paragraphs concerning the tracking and verification system that applies to tuna caught other than in the ETP large purse seine fishery. Specifically, the United States requested that the Panel find: (a) that can codes enable tracking back not only to the vessel by which the tuna in the can was caught, but also to the captain's statement associated with the tuna contained in the can; (b) that captains' certifications are associated with batches of tuna at their "first point of unloading"; and (c) that in some cases tuna products made from tuna caught other than in the ETP large purse

[74] Appellate Body Report, *US – Tuna II (Mexico)*, para. 289.
[75] Panel Report, *US – Tuna II (Mexico)*, para. 7.504.
[76] Panel Report, *US – Tuna II (Mexico)*, para. 7.504.
[77] Mexico's Comments on the United States' Comments on the Interim Report, para. 25.
[78] Mexico's second written submission, para. 193.

seine fishery can be tracked back to the well in which it was stored during the fishing trip on which it was caught.

6.15. With respect to the part (a) of the United States' request, the Panel declines to make the additional finding requested by the United States, i.e. that can codes enable tuna to be tracked back to the captain's statement associated with the tuna contained in the can. In the first place, the additional finding would not be consistent with the United States' own argumentation. **[[BCI[79] [80]]]**. Accordingly, a general finding that can codes enable trace-back to captains' certifications would be inappropriate.

6.16. Additionally, we do not agree that the evidence supports the United States' allegation on this point. **[[BCI]]**.

6.17. Although we decline to make the additional finding requested by the United States, the Panel considers it appropriate to more clearly describe the United States' argument on this point. Accordingly, we have revised paragraphs 7.310 and 7.355.

6.18. With respect to part (b) of the United States' request, the Panel declines to make the change requested, that is, to find that captains' certifications appear to be assigned at the "first point of unloading". The Panel's finding **[[BCI[81] [82]]]** Nevertheless, in order to ensure clarity, we have replaced the word "production" with the word "loining", so that the text of paragraph 7.370 more closely reflects the evidence presented by the United States.

6.19. In respect of part (c) of the United States' request, the Panel declines to make the additional finding requested by the United States. We have revised paragraphs 7.356-7.359 to explain more clearly why we do not agree with the United States' interpretation of the evidence.

6.20. Moreover, Mexico requested the Panel to make an additional finding concerning the tracking and verification system for tuna caught other than in the ETP large purse seine fishery. Specifically, Mexico requests the Panel make clear that the United States "is not able to track the movement and dolphin safe status of tuna from the time of catch up to the point of delivery to a non-US cannery and subsequent shipment to the United States".[83] The United States disagrees with the changes suggested by Mexico.

6.21. The Panel has decided to revise paragraphs 7.365-7.368 by adding the word "directly" to Mexico's suggested text, the Panel has addressed the United States' contention that Mexico's proposed drafting was inaccurate because US importers themselves are supposed to have the documentation necessary to trace tuna back to the point of catch. We note that in its comments on this request the United States stated that it did not contest three of Mexico's four requested revisions.

6.2.6 The Panel's description of Mexico's argument on less favourable treatment

6.22. Mexico requested the Panel to revise its description of Mexico's argument in paragraphs 7.104 and 7.105. The United States does not support this request, and asks the Panel to reject it. According to the United States, the original paragraph properly characterizes Mexico's argument.

6.23. The Panel has decided to revise these paragraphs. In the Panel's view, Mexico's argumentation has consistently distinguished between the way in which the *different eligibility criteria* on the one hand and the *different certification and tracking and verification requirements* on the other hand have a detrimental impact on the competitive opportunities of Mexican tuna and tuna products. In particular, beginning in its second written submission, Mexico has maintained that whereas the eligibility criteria have a direct negative impact on Mexican tuna and tuna products by disqualifying tuna caught by setting on dolphins from ever accessing the label, the other two regulatory distinctions (the different certification and tracking and verification

[79] United States' response to Panel question No. 44, para. 242. [[BCI]].
[80] United States' response to Panel question No. 44, para. 242.
[81] United States' response to Panel question No. 44, para. 241.
[82] Cannery Slides on Tuna Trace Systems (Exhibit US-189) (BCI).
[83] Mexico's Comments on the Interim Report, para. 14.

requirements) have a detrimental impact on Mexican tuna and tuna products indirectly, as it were, because they provide "an illegitimate competitive advantage"[84] to tuna caught other than in the ETP large purse seine fishery. This illegitimate advantage *de facto* modifies the conditions of competition to the detriment of Mexican tuna and tuna products.

6.24. Mexico articulated this distinction most clearly in response to a question from the Panel. Mexico explained that the amended tuna measure has a detrimental impact on Mexican tuna and tuna products because:[85]

a. "Mexico's primary fishing method is permanently disqualified from being used to catch dolphin-safe tuna, while the fishing methods used by the United States and other countries are qualified to be used to catch dolphin-safe tuna;

b. Mexican-origin tuna and tuna products are subject to comprehensive and strict record keeping and verification requirements that prevent non-dolphin-safe tuna from being labelled as dolphin-safe. In contrast, tuna and tuna products from the United States and other countries are not subject to such comprehensive and strict requirements. As a consequence, tuna and tuna products from the United States and other countries can be mislabelled as dolphin-safe when, in fact, such tuna and tuna products are not dolphin-safe; and

c. In the case of Mexican tuna, the initial designation of dolphin-safe status is subject to mandatory independent observer requirements at the point when the tuna is harvested from the ocean, which prevents non-dolphin-safe tuna from being mislabelled as dolphin-safe. In the case of tuna from the United States and other countries, the initial designation of dolphin-safe status is not made by independent observers at the point when the tuna is harvested from the ocean, thereby allowing the tuna to be mislabelled as dolphin-safe".

6.25. The passage cited above clearly distinguishes between two types of alleged detrimental impact: the first, caused by the eligibility criteria, directly disadvantage Mexican tuna by disqualifying tuna caught using Mexico's primary tuna fishing method from accessing the dolphin-safe label; and the second, caused by the different certification and tracking and verification requirements, which disadvantage Mexican tuna products by granting an advantage to tuna caught outside the ETP large purse seine fishery and therefore modifies the conditions of competition to the detriment of Mexican tuna and tuna products.

6.26. In the Panel's view, by distinguishing between the detrimental impact caused by the eligibility criteria on the one hand and the different certification and tracking and verification requirements on the other hand, Mexico clearly premised its argument on the notion that the different regulatory distinctions caused detrimental treatment in different ways and for different reasons.

6.27. As such, the Panel believes that the text in paragraphs 7.104 and 7.105 and the interpretation of Mexico's argument contained therein is accurate and should stand. Nevertheless, the Panel has made some drafting revisions for added clarity, and has also completed the citation requested by Mexico.

6.2.7 Regulated vs. unregulated setting on dolphins

6.28. Mexico requested the Panel to modify the drafting of paragraph 7.577. Specifically, Mexico seeks the inclusion of language suggesting that setting on dolphins is "particularly harmful" to dolphins "when unregulated".

6.29. The Panel declines to make the changes requested by Mexico. As we have explained in various parts of this Report, our understanding is that setting on dolphins is "particularly harmful" to dolphins because, as a method of harvesting tuna, it requires, for its efficacy, that dolphins be

[84] Mexico's second written submission, para. 147.

[85] Mexico's response to Panel question No. 9, para. 36. The same point was made in Mexico's second written submission, paras. 147, 163; Mexico's response to Panel question No. 7, paras. 19 and 21.

"set on" – that is, chased and encircled, in each and every fishing set. As we have discussed in detail elsewhere, setting on dolphins gives rise to observable and unobservable harms. Although the observable harms, including mortality and serious injury, may be containable through regulation, the original panel made clear that the unobservable effects caused by the chase itself would "exist even if measures are taken to avoid the taking and killing of dolphins in the nets".[86] While unregulated setting on dolphins may very well be more dangerous than regulated setting on dolphins – and that is a point on which we need not decide – the relative safety of regulated or unregulated setting on does not, as we understand it, change fact that setting on dolphins is particularly harmful to dolphins because it causes unobserved effects beyond observable mortality and serious injury, and which cannot be removed through regulations that reduce mortality and serious injury.

7 FINDINGS

7.1 Claims

7.1. Mexico claims that the amended tuna measure is inconsistent with the following provisions of the covered agreements:

a. Article 2.1 of the TBT Agreement, because the amended tuna measure continues to accord Mexican tuna products treatment less favourable than that accorded to like tuna products of the United States and to like tuna products originating in any other country;

b. Article I:1 of the GATT 1994, because the amended tuna measure continues to confer on tuna products originating in other countries an advantage which is not accorded immediately and unconditionally to like tuna products originating in Mexico;

c. Article III:4 of the GATT 1994, because the amended tuna measure continues to accord Mexican tuna products treatment less favourable than that accorded to like tuna products of United States' origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

7.2. In its request for the establishment of a panel under Article 21.5 of the DSU, Mexico also claimed that the amended tuna measure was inconsistent with Article XXIII:1(b) of the GATT 1994 because it "nullifies or impairs benefits that accrue to Mexico under the GATT 1994". However, this claim was not pursued by Mexico in any of its submissions to the Panel, and accordingly the Panel does not address it in this Report.

7.2 Order of analysis

7.3. The parties have not requested that the Panel follow any particular order of analysis. Their written submissions address Mexico's claims under the TBT Agreement first and the GATT 1994 second.

7.4. It is well established that where:

> [A] provision of an agreement included in Annex 1A of the WTO Agreement … and a provision of the GATT 1994 that have identical coverage both apply, … the provision that deals specifically, and in detail with a question should be examined first.[87]

7.5. In the original proceedings in this matter, the panel found that:[88]

> [T]he TBT Agreement "deals in detail, and specifically" with the matters that it addresses. Therefore, where claims under GATT 1994 are presented in parallel with claims under the TBT Agreement, claims under the TBT Agreement should be considered first.

[86] Panel Report, *US – Tuna II (Mexico)*, para. 7.504.
[87] Appellate Body Report, *US – Softwood Lumber IV*, para. 134.
[88] Panel Report, *US – Tuna II (Mexico)*, para. 7.43.

7.6. Upon review, the Appellate Body similarly considered the parties' arguments concerning Article 2.1 of the TBT Agreement first.

7.7. In our view, there is no reason to depart from the approach of the original panel in respect of the proper order of analysis. Accordingly, the Panel will first analyse Mexico's claim under Article 2.1 of the TBT Agreement, and will then proceed to consider its claims under Article I:1 and Article III:4 of the GATT 1994.

7.8. Before considering Mexico's claims under the TBT Agreement and the GATT 1994, the Panel will address two preliminary issues: first, the measure at issue and the scope of these Article 21.5 proceedings; and second, the burden and standard of proof applicable in this case.

7.3 Parameters of the Panel's mandate: the measure at issue and the scope of these Article 21.5 proceedings

7.9. The Panel recalls that the Appellate Body's conclusion on the WTO-inconsistency of the tuna measure was framed broadly. Indeed, the Appellate Body's ultimate recommendation to the DSB was phrased in terms of the United States' "measure" – that is, the *entire* tuna measure, rather than one particular aspect or element of it. At paragraph 299 of its report, the Appellate Body explicitly concluded that:[89]

> [T]he US *dolphin-safe labelling provisions* provide "less favourable treatment" to Mexican tuna products than that accorded to tuna products of the United States and tuna products originating in other countries and are therefore inconsistent with Article 2.1 of the *TBT Agreement*.

7.10. At the end of its report the Appellate Body recommended that the DSB request the United States to "bring its *measure*" into conformity with WTO law.[90]

7.11. As the Appellate Body had previously indicated that it would use the terms "measure at issue", "US measure", and "the US 'dolphin-safe' labelling provisions" to refer to "the legal instruments challenged by Mexico collectively"[91], it is clear that the Appellate Body's conclusions and recommendations were meant to apply to the tuna measure *as a whole,* including all its components. Consider, for instance, the manner in which the Appellate Body defined the measure at issue in the original proceedings:[92]

> This dispute arises out of a challenge brought by Mexico against certain legal instruments of the United States establishing the conditions for the use of a "dolphin-safe" label on tuna products. In particular, Mexico identified the following legal instruments as the object of its challenge: the *United States Code*, Title 16, Section 1385 (the "Dolphin Protection Consumer Information Act" or "DPCIA"); the *United States Code of Federal Regulations*, Title 50, Section 216.91 and Section 216.92 (the "implementing regulations"); and a ruling by a US federal appeals court in *Earth Island Institute v. Hogarth* (the "Hogarth ruling"). Taken together, the DPCIA, the implementing regulations, and the Hogarth ruling set out the requirements for when tuna products sold in the United States may be labelled as "dolphin-safe".

7.12. In our view, it is clear that in referring to the "'dolphin-safe' labelling provisions", the Appellate Body's conclusions and recommendations were meant to apply to the tuna measure *as a whole*.

7.13. We note also that in its findings the Appellate Body made clear that there were various ways for the United States to bring its measure into conformity with the even-handedness requirement of Article 2.1 of the TBT Agreement:

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[89] Appellate Body Report, *US – Tuna II (Mexico)*, para. 299 (emphasis added).
[90] Appellate Body Report, *US – Tuna II (Mexico)*, para. 408 (emphasis added).
[91] Appellate Body Report, *US – Tuna II (Mexico)*, para. 172.
[92] Appellate Body Report, *US – Tuna II (Mexico)*, para. 172.

> The Panel further noted that the provisions of the DPCIA themselves envisage the possibility that a fishery outside the ETP would be identified as one having a "regular and significant mortality, or serious injury of dolphins", which would then lead to the application in such fishery of a requirement to certify that no dolphin has been killed or seriously injured on the trip on which the tuna was caught.[93]
>
> We see no error in the Panel's assessment. In addition, we note that nowhere in its reasoning did the Panel state that imposing a requirement that an independent observer certify that no dolphins were killed or seriously injured in the course of the fishing operations in which the tuna was caught would be the *only* way for the United States to calibrate its "dolphin-safe" labelling provisions to the risks that the Panel found were posed by fishing techniques other than setting on dolphins.[94] We note, in this regard, that the measure at issue itself contemplates the possibility that only the captain provide such a certification under certain circumstances.[95]
>
> In the light of the above, we conclude that the United States has not demonstrated that the difference in labelling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand, is "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean. It follows from this that the United States has not demonstrated that the detrimental impact of the US measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction. We note, in particular, that the US measure *fully* addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it does "not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP".[96] In these circumstances, we are not persuaded that the United States has demonstrated that the measure is even-handed in the relevant respects, even accepting that the fishing technique of setting on dolphins is particularly harmful to dolphins.[97]

7.14. In the current proceedings, with a view to complying with the DSB recommendations, the United States has modified its implementing regulation, along the line described in paragraphs 3.32-3.52 above. The United States takes the view that this regulatory change is sufficient to bring its measure into conformity with the rulings and recommendations of the DSB.

7.15. Mexico has initiated this dispute under Article 21.5 of the DSU, arguing that the modification has not brought the US measure into conformity with its WTO obligations.

7.16. The task of a panel established under Article 21.5 is to "decide[]" disputes "as to the existence or consistency with a covered agreement of measures taken to comply with … recommendations and rulings" of the DSB. In the current proceedings, the parties disagree as to the identity of the measure taken to comply which according to the United States defines the scope of review of this implementation panel.

7.17. Mexico takes a broad view, and argues that the measure taken to comply is coextensive with what both parties call the "amended tuna measure". We have described the "amended tuna measure" in some detail above; for present purposes we simply recall that it consists of (a) Section 1385 of Title 16 of the United States Code (the legislation), (b) Title 50, Part 216,

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[93] (footnote original) Panel Report, *US – Tuna II*, para. 7.543.

[94] (footnote original) We note, however, that such a requirement may be appropriate in circumstances in which dolphins face higher risks of mortality or serious injury.

[95] (footnote original) See DPCIA, subsection 1385(d)(1)(D):

> (D) by a vessel in a fishery other than one described in subparagraph (A), (B), or (C) that is identified by the Secretary as having a regular and significant mortality or serious injury of dolphins, unless such product is accompanied by a written statement executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, *provided that the Secretary determines that such an observer statement is necessary*. (emphasis added).

[96] (footnote original) Panel Report, *US – Tuna II (Mexico)*, para. 7.544. We note that the measure at issue does address driftnet fishing in the high seas.

[97] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 295-297.

Subpart H of the United States Code of Federal Regulations as amended by the 2013 Final Rule (the regulations as amended or regulations), and c) the court ruling in *Earth Island Institute v Hogarth* (the *Hogarth* ruling).[98] The United States urges the Panel to take a narrower view. In its opinion, while the three instruments identified by Mexico together constitute the "amended tuna measure", it is only the 2013 Final Rule, which was adopted in response to the original proceedings with the goal of "com[ing] into compliance with the DSB recommendations and rulings", that is the measure taken to comply and for the United States this Panel should limit the scope of its review to the measure it took to comply.[99]

7.18. The Appellate Body has explained that "[p]roceedings under Article 21.5 do not concern just *any* measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those 'measures *taken to comply* with the recommendations and rulings of the DSB'".[100] Accordingly, a panel established under Article 21.5 is not free to consider *any* measure adopted and maintained by a WTO Member. Rather, its jurisdiction is limited to assessing measures taken by a Member to "implement" rulings and recommendations made by the DSB in relation to *another*, pre-existing measure previously found by the DSB to be WTO-inconsistent – which other measure, while necessarily relevant to the inquiry under Article 21.5, is conceptually distinct.[101]

7.19. We begin our analysis by recalling that what is the "measure taken to comply" in a given case is not determined exclusively by the implementing Member. A Member's designation of a measure as one taken "to comply", or not, is relevant to this inquiry, but it cannot be conclusive. Conversely, nor is it up to the complaining Member alone to determine what constitutes the measure taken to comply. It is rather for the Panel itself to determine the ambit of its jurisdiction.[102] This determination, like all determinations made by a panel, must be conducted on the basis of an objective examination of all relevant facts.[103]

7.20. In our opinion, the United States is correct in asserting that the 2013 Final Rule is, strictly speaking, its "measure taken to comply". The 2013 Final Rule is, to use the Appellate Body's words, precisely that legal instrument adopted by the United States "*in the direction of,* or *for the purpose of achieving,* compliance" with the DSB's rulings and recommendations in the original proceedings.[104] As we have already discussed, at the end of the original proceedings the Appellate Body found that the "tuna measure", defined as consisting of the legislation, regulations, and *Hogarth* ruling, was "inconsistent with Article 2.1 of the *TBT Agreement*".[105] The 2013 Final Rule, which amends aspects of the original regulations, is the measure "taken" by the United States to remedy this WTO-inconsistency. It is precisely through the introduction of certain changes to the regulations embodied in the 2013 Final Rule that the United States seeks to correct the illegality that the original panel and the Appellate Body identified in the original tuna measure *as a whole*. As a regulatory amendment, the 2013 Final Rule is integrated into the original tuna measure for the precise purpose of remedying that measure, which the DSB found to be inconsistent with WTO law.

7.21. As a sovereign nation, the United States is of course free to come into compliance with a DSB ruling in any way it chooses. Panels have repeatedly recognized that in "the first instance the modalities of the implementation of [a] recommendation are for the [respondent] to determine".[106] Indeed, Article 21.3 of the DSU recognizes that a Member may come into compliance on the basis of and in accordance with its own "intentions in respect of implementation of the rulings and recommendations of the DSB". A panel's role in an Article 21.5 proceeding is thus not to determine

[98] Mexico's first written submission, para. 11.

[99] United States' first written submission, para. 13; see also United States' second written submission, para. 4. At the Panel's meeting with the parties, the United States confirmed that in its view the measure taken comply is the 2013 Rule and not the amended tuna measure as a whole.

[100] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36 (emphasis original).

[101] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36.

[102] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 73.

[103] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 205.

[104] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 66 (emphasis original).

[105] Appellate Body Report, *US – Tuna II (Mexico)*, para. 299.

[106] Panel Report, *US – Hot Rolled Steel*, para. 8.11. See also, e.g. Panel Report, *US – Steel Plate*, para. 8.8 ("the choice of means of implementation is decided, in the first instance, by the Member concerned"); Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 6.43 ("[T]he Members have discretion in how to bring a measure found to be WTO-inconsistent into conformity with WTO obligations").

whether the way chosen by a Member to come into compliance is in any sense the "best" way, but rather to make an "objective assessment"[107] of whether the course of action actually taken by the responding Member is sufficient to bring its measure into conformity with the WTO Agreement.

7.22. Having said that, we do not think that a Member's choice of how to come into compliance with DSB rulings and recommendations necessarily limits or circumscribes the jurisdiction of a panel composed under Article 21.5 of the DSU for the purpose of assessing whether compliance has been achieved. In our view, the overriding question for such a panel is always whether the measure found by the DSB to be incompatible with one or more obligations under the WTO Agreement has been brought into compliance so that it is no longer WTO-inconsistent. Thus where, for example, a Member modifies one aspect or element of a measure previously found by the DSB to be WTO-inconsistent in its entirety, a panel acting under Article 21.5 is not limited to only assessing the WTO-consistency of the modified aspect or element. Rather, this Panel's task remains that of assessing whether or not a Member has brought its entire measure – that is, the measure found by the DSB to be WTO-inconsistent - into conformity with WTO law, including through or by way of the modification made to the particular aspect or element. In the present proceedings, the Panel's task is not only to determine whether the 2013 Final Rule is in itself WTO-consistent, but rather, and more fundamentally, to assess whether, through or by way of the 2013 Final Rule, the United States has succeeded in bringing the tuna measure as a whole, as the measure found by the Appellate Body in the original proceedings to be WTO-inconsistent, into conformity with the WTO Agreement.

7.23. It follows that our finding that the "measure taken to comply" is the 2013 Final Rule in no way precludes the Panel from considering the broader question of whether the modifications to the original measure, including the new 2013 Final Rule, is now WTO-compliant. Such a task necessarily requires the Panel to consider not only the contents of the 2013 Final Rule itself, but also to examine how the 2013 Final Rule interacts (or does not interact) with the other elements that make up the amended tuna measure.

7.24. Accordingly, we conclude that our role in these proceedings is not limited to assessing the WTO-consistency of the 2013 Final Rule. Rather, we need to determine whether the amended tuna measure, including the 2013 Final Rule, brings the United States into compliance with the WTO Agreement.[108]

7.25. A further, though related, issue that we must address before proceeding to the merits of Mexico's case concerns the scope of Article 21.5 proceedings – or, to put it another way, the type of claims that may be raised against the 2013 Final Rule and the amended tuna measure more broadly. According to the United States, "Article 21.5 reports issued by the Appellate Body and panels have consistently drawn a distinction between claims made against new elements of a measure taken to comply and those elements that are *unchanged* from the original measure. These reports have repeatedly found that the terms of reference of a compliance panel do not include re-examining the WTO consistency of an *unchanged* aspect that was not found to be WTO-inconsistent in that dispute".[109] The United States recalls that, as a general rule, Article 21.5 proceedings must not give complainants an "unfair second chance with respect to any claims on which they did not prevail in the original proceedings", as such a chance would be inconsistent

[107] Article 11 of the DSU.

[108] The Panel notes that this approach is analogous to the approach taken by the panel (and not reversed by the Appellate Body) in *US – Softwood Lumber IV (Article 21.5 – Canada)*. In that case, the panel made clear that proceedings under Article 21.5 of the DSU are not limited in scope only to measures explicitly taken to implement DSB rulings and recommendations. Instead, a panel's jurisdiction under Article 21.5 extends to cover measures or instruments that are "closely connected" and "inextricably linked" to the measure taken in response to an adverse DSB ruling: Panel Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, paras. 4.38-4.48. In our opinion, the same reasoning applies with equal force here. The 2013 Final Rule can be said to be "closely connected" or "inextricably linked" to the tuna measure as a whole because, as explained above, the 2013 Final Rule was adopted by the United States precisely to bring the tuna measure as a whole into compliance with the DSB's ruling that it (that is, the tuna measure as a whole) was inconsistent with the United States' obligations under the WTO Agreement. Accordingly, the 2013 Final Rule does not stand alone, but assumes legal significance only as part of the amended tuna measure, which, as we have explained, is the measure whose WTO-consistency we are tasked to address in these proceedings.

[109] United States' first written submission, para. 170.

with both the need for "prompt settlement of disputes"[110] and, perhaps more importantly, the respondent's due process rights.[111] Additionally, the United States cautions that allowing Mexico to challenge unchanged aspects of the amended tuna measure would threaten the finality of DSB rulings and recommendations and undermine the unconditional acceptance of adopted Appellate Body reports required of Members by Article 17.14 of the DSU.[112]

7.26. Applying these principles to the facts of this case, the United States advances the following argument in its first written submission:[113]

> Mexico's entire Article 2.1 claim is premised on the theory that at least one of the following elements is not even-handed: 1) the distinction between the eligibility for the dolphin safe label for tuna product containing tuna caught by setting on dolphins in an AIDCP-consistent manner and tuna caught by other fishing methods; 2) the distinction between the differing record-keeping and verification requirements required for tuna caught inside and outside the ETP; and 3) the distinction between the differing observer requirements for tuna vessels operating inside and outside the ETP. According to Mexico, if any one of these three elements is not even-handed, the detrimental impact already found to exist in the original proceeding would reflect discrimination, and Mexico's Article 2.1 claim would succeed.
>
> Yet these three elements are unchanged from the original measure and the Appellate Body did not consider that any of them proved the original measure discriminatory. The only regulatory distinction the Appellate Body found not to be even-handed was the requirement that tuna product containing tuna caught in the ETP is ineligible for the label where a dolphin had been killed or seriously injured but tuna product containing tuna caught outside the ETP could be so labelled where a dolphin had been killed or seriously injured. And it is this distinction that the 2013 Final Rule addresses.

7.27. In essence, the United States' argument is that the three elements or aspects of the amended tuna measure on which Mexico bases its claims – the eligibility requirements for the dolphin-safe label or the so-called qualification/disqualification distinction[114], the different tracking and verification requirements[115], and the different observer or certification requirements[116] – are all unchanged from the original measure, and that, because none of these elements was found to be WTO-inconsistent by the Appellate Body in the original proceedings, Mexico cannot raise claims relating to these elements in the present proceedings.

7.28. In support of its argument on the scope of the Appellate Body's rulings and recommendations, the United States cites to paragraphs 289-292 and 298 of the Appellate Body report. At paragraph 298, the Appellate Body said:

> [I]n our view, the United States has not justified as non-discriminatory under Article 2.1 the different requirements that it applies to tuna caught by setting on dolphins inside the ETP and tuna caught by other fishing methods outside the ETP for access to the US "dolphin-safe" label.

7.29. Earlier, at paragraph 284, the Appellate Body found that:

> The aspect of the measure that causes detrimental impact on Mexican tuna products is thus the difference in labelling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand.

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[110] United States' first written submission, paras. 170 and 208 (arguing that if Members were allowed to challenge unchanged aspects of a measure in Article 21.5 proceedings, they would effectively be "allowed to raise, and re-raise arguments time and time again – without limit").
[111] United States' first written submission, paras. 171 and 207.
[112] United States' first written submission, para. 208.
[113] United States' first written submission, paras. 204 and 205.
[114] United States' response to Panel question No. 4, para. 14.
[115] United States' response to Panel question No. 4, para. 15.
[116] United States' response to Panel question No. 4, para. 16.

7.30. According to the United States, these statements show that the Appellate Body only found fault with the different certification requirement imposed on tuna caught by setting on dolphins on the one hand and tuna caught by other fishing methods outside the ETP on the other. It "thus did not consider that any of the other numerous regulatory distinctions contained in the original measure" – specifically, concerning tracking, verification, and observers – "proved the measure discriminatory".[117]

7.31. Mexico rejects the United States' argument on the Panel's jurisdiction on a number of related grounds. First, it contends that the Appellate Body's findings – and thus the DSB's rulings and recommendations – were "general", and applied to the "US 'dolphin-safe' labelling provisions" considered in their "totality".[118] Second, Mexico maintains that the amended tuna measure is "in principle, a new and different measure" from the one before the original panel and Appellate Body[119], and accordingly "the Panel should focus on [the measure] as a whole and not [on] elements comprising that measure".[120] Finally, Mexico argues that the United States is incorrect to characterize aspects of the amended tuna measure as "unchanged". According to Mexico, important changes have in fact been made to the provisions of the measure concerning tracking and verification and observer coverage.[121]

7.32. In our opinion, the United States' fundamental premise – that "[t]he *only* regulatory distinction the Appellate Body found not to be even-handed was the requirement that tuna products containing tuna caught in the ETP is ineligible for the label where a dolphin had been killed or seriously injured but tuna product containing tuna caught outside the ETP could be so labelled where a dolphin had been killed or seriously injured"[122], and that the Appellate Body did not find any other aspect of the measure to be WTO-inconsistent – is incorrect. Neither the original panel report nor the Appellate Body report is limited in the way the United States suggests.

7.33. Rather, the Appellate Body found that the original tuna measure as a whole was not even-handed, because while the regulatory scheme fully addressed the harms caused by setting on dolphins, it did not adequately address harms caused by other tuna fishing methods. The Appellate Body did not say that any one particular element of the regulatory scheme imposed other than on purse seine vessels in the ETP was solely responsible for this lack of even-handedness. Rather, the entire regulatory scheme was insufficient to address what the original panel and Appellate Body found to be the very real risks posed to dolphins by methods of fishing other than setting on dolphins. It was this overall lack of "even-handedness" that the Appellate Body found to be inconsistent with Article 2.1 of the TBT Agreement, and, as we read the Appellate Body's reasons, this lack of "even-handedness" was ultimately found to be characteristic of the entire system established by the original tuna measure. It was, in other words, the tuna measure as a whole, with its varying regulatory requirements, that was found to be inconsistent with Article 2.1 of the TBT Agreement.

7.34. We have already explained that the Appellate Body's recommendation to the DSB is phrased in terms of the United States' "measure" – that is, the entire tuna measure, rather than one particular aspect or element of it. As noted above, at paragraph 299 of its report, the Appellate Body explicitly concluded that "the US '*dolphin-safe' labelling provisions* provide 'less favourable treatment' to Mexican tuna products than that accorded to tuna products of the United States and tuna products originating in other countries and are therefore inconsistent with Article 2.1 of the TBT Agreement";[123] and at the end of its report the Appellate Body recommended that the DSB request the United States to "bring its *measure*" into conformity with WTO law.[124]

7.35. We do not agree that the passages of the Appellate Body's report cited by the United States support its contention. To the contrary, by referring in the plural to "the difference in labelling conditions" (para. 284) and "different requirements" (para. 298), we understand the Appellate Body to have been referring generally to the different requirements that the tuna measure

[117] United States' first written submission, para. 213.
[118] Mexico's second written submission, paras. 89 and 91.
[119] Mexico's second written submission, para. 89.
[120] Mexico's second written submission, para. 93.
[121] Mexico's second written submission, para. 95.
[122] United States' first written submission, para. 205 (emphasis added).
[123] Appellate Body Report, *US – Tuna II (Mexico)*, para. 299 (emphasis added).
[124] Appellate Body Report, *US – Tuna II (Mexico)*, para. 408 (emphasis added).

imposed on, on the one hand, tuna caught by large purse seine vessels inside the ETP and, on the other hand, tuna caught other than in the ETP large purse seine fishery.

7.36. We observe that the Appellate Body was careful to use the plural throughout its reasoning, including in its legal findings and overall conclusions. Thus, under the heading "Conclusion on Article 2.1 of the TBT Agreement", the Appellate Body said:

> [I]n our view, the United States has not justified as non-discriminatory under Article 2.1 the different requirements that it applies to tuna caught by setting on dolphins inside the ETP and tuna caught by other fishing methods outside the ETP for access to the US "dolphin-safe" label. The United States has thus not demonstrated that the detrimental impact of the US measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction.

7.37. Here again the Appellate Body used the term "requirements" in the plural. To us, this clearly indicates that the Appellate Body was not solely concerned with the different certification required in the ETP and outside of it. If that had been the case, the Appellate Body could, and indeed would have referred to the different "requirement" in the singular. The use of the plural indicates that the Appellate Body's findings were not limited to the difference in the certification requirement, but encompassed other differences embedded in the original tuna measure, including with respect to tracking, verification, and observers.[125]

7.38. It is true that the Appellate Body's reasoning focused primarily on the disqualification of tuna caught by setting on dolphins from accessing the dolphin-safe label. This may very well have been a consequence of the way the case was argued by the parties. At any rate, as Japan said in its third-party submission, the United States' attempt to limit this Panel's jurisdiction confuses "the Appellate Body's conclusion with the particular reasons that provided the basis for that conclusion".[126] Those reasons are of course central to our analysis in these proceedings, but they do not restrict our ability to entertain claims relating to other aspects of the tuna measure, which, by virtue of the Appellate Body's broad conclusions, is properly before us. As Japan put it in its third-party submission, "to the extent the amended measure continues to accord less favourable treatment to Mexican tuna products" – whether for the reasons identified by the Appellate Body or for any other reason – "the United States would have failed to comply fully with the DSB's recommendations and rulings".[127]

7.39. In our opinion, Mexico is correct that although the conditions that the amended tuna measure imposes on tuna caught by large purse seine vessels in the ETP are formally unchanged, the 2013 Final Rule may have altered the *legal import and significance* of those conditions, meaning that we cannot simply assume that the relevant aspects of the measure are truly – that is, in a legally meaningful sense – unchanged. Indeed, previous panel and Appellate Body reports have suggested that in cases such as this, where a measure found to be inconsistent in original proceedings is revised rather than repealed or completely recreated, such revision "transforms" the original measure, so that the amended measure "in its totality"[128] is properly considered as a

[125] We note that in its reasoning the Appellate Body referred to "tuna caught by setting on dolphins" in the ETP. However, we note also that tuna caught by setting on dolphins is always and under all circumstances *ineligible* to receive the dolphin-safe label. Such tuna cannot be said to be subject to any "labelling conditions" or "requirements" as there are no conditions or requirements under which such tuna would ever be eligible to receive the United States dolphin-safe label. Accordingly, in referring to "tuna caught by setting on dolphins", we understand the Appellate Body to be referring to the whole regulatory regime by which tuna caught by setting on dolphins is identified and excluded from accessing the label. This regime necessarily includes not only the substantive certification requirement, but also the various documentation obligations that support it. It is only through those obligations – tracking, verification, and observers – that tuna importers can show that they have satisfied the substantive standard (i.e. that no nets were intentionally set on dolphins and that no dolphins were killed or seriously injured). The differences in the labelling requirements therefore include both the substantive certification standard and the mechanisms by which compliance with that standard is monitored and demonstrated. This reading of the Appellate Body's reasoning is consistent with its overall finding, which, as we have mentioned, found the original tuna "measure" as a whole to be inconsistent with Article 2.1 of the TBT Agreement.

[126] Japan's third-party submission, para. 20.

[127] Japan's third-party submission, para. 19.

[128] Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia*), para. 87.

"new and different measure".[129] Accordingly, even though the tracking, verification, and certification (observer) requirements that apply to ETP-caught tuna may be formally unchanged, the introduction of the 2013 Final Rule has created a new set of legal relations between the various parts of the amended tuna measure, so that even formally unchanged elements may, in the context of the amended measure, establish a new set of legal circumstances such that it would be incorrect to regard them as "unchanged" from a legal perspective.

7.40. We also reject the United States' contention that Mexico's arguments relating to the different tracking and verification and observer requirements "are clearly separable from the US measure taken to comply". The US measure taken to comply (i.e. the 2013 Final Rule) relates directly to the substantive declarations or certifications that must be made before a catch of tuna can be labelled as being dolphin-safe. However, tracking and verification and observer requirements go directly to the issue of the reliability of such certifications. Insofar as the goal of the tuna measure remains, *inter alia*, the provision of accurate information to consumers, the tracking and verification mechanisms are central aspects of the tuna measure, working together with the substantive certification requirements so as to provide accurate information to consumers about the dolphin-safe status of a particular tuna catch. Moreover, we note that the 2013 Rule itself addresses situations in which independent observer certification may be required. In other words, it deals directly with one aspect of the measure that the United States claims is "separable".[130] In such circumstances, we cannot agree that the tracking and verification requirements are "separable" from the certification rules contained in the 2013 Final Rule.

7.41. To sum up, we do not agree with the United States that the 2013 Final Rule is separable from the rest of the tuna measure simply because it does not change any pre-existing requirements but instead adds new requirements. In our view, the 2013 Final Rule is not a stand-alone measure but an integral component of the amended tuna measure. To the extent that it interacts with, and indeed forms an integral part of, that measure, the fact that it adds new requirements rather than changing pre-existing requirements is immaterial, and certainly does not have the effect of removing the rest of the tuna measure, which was the object of the DSB's rulings and recommendations, from our jurisdiction.[131]

7.42. In finding that we have jurisdiction to consider all of Mexico's claims, we are not suggesting that we have authority to re-examine all of the factual and legal circumstances of the case *de novo*. We are in full agreement with the European Union that where the original panel or the Appellate Body has made a finding on the basis of certain facts and evidence, and where there is no change in the facts and/or evidence on the basis of which that finding was made, we should not re-assess the issue from the beginning, but rather refer to and rely upon the finding previously made.[132] This is not the same as saying, as the United States does, that such points are outside of our jurisdiction. Rather, our view is that such issues do fall within our jurisdiction, but that we should respect relevant findings made by the panel and the Appellate Body in the original proceedings, whether factual or legal, in the interests of maintaining the security and predictability of the multilateral trading system.

7.43. In light of the above, we conclude that the legal question before us in these proceedings is whether the amended tuna measure, including the 2013 Final Rule, brings the United States into compliance with WTO law. We find that we have jurisdiction to consider all of Mexico's claims, including as they relate to the eligibility criteria and the certification and tracking and verification requirements.

[129] Appellate Body Report, *US – Zeroing (Article 21.5 – EC)*, para. 432; Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36.

[130] See e.g. United States' response to Panel question No. 4, para. 16.

[131] Indeed, as we suggested above, in situations like the one at issue here, the line between adding new requirements to a regulatory scheme and changing pre-existing aspects of that scheme is very fine and perhaps illusory, since where an instrument adds new requirements it will necessarily have the effect of changing pre-existing requirements insofar as the latter interact with the former.

[132] European Union's third-party submission, para. 21.

7.4 Burden and standard of proof applicable in these proceedings

7.4.1 Burden of proof

7.44. As a starting point, we recall the fundamental principle that:[133]

> [T]he burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.

7.45. In disputes concerning the GATT 1994 in which Article XX is invoked, it is for the complaining party to show a breach of one or more provisions of that Agreement. If the complainant does so successfully, the burden then shifts to the respondent either to rebut the showing of violation or else to prove that the violation found is nevertheless justified under one of the general or security exceptions provided for in Articles XX and XXI.

7.46. However, the proper allocation of the burden of proof under Article 2.1 of the TBT Agreement appears to be somewhat less clear. Ensuring that we apply the proper burden of proof is especially important in these proceedings because, as both parties recognize, the relevant factual evidence is highly contested and, with respect to some of the issues in dispute, minimal. In particular, there appears to be limited scientific evidence concerning the scope and nature of dolphin mortalities in some non-ETP fisheries[134], which may have important consequences for the Panel's analysis.

7.47. We begin by recalling that, under Article 2.1, a technical regulation will be found to afford "less favourable treatment" to imported products where (a) it modifies the conditions of competition in the relevant market to the detriment of the imported products; and (b), such detrimental modification of the conditions of competition does not stem exclusively from a legitimate regulatory distinction. We discuss the legal test under Article 2.1 in more detail below.[135] For now, what we must consider is which party bears the burden of showing *which* of these two elements.

7.48. The Appellate Body has explicitly addressed the allocation of the burden of proof under Article 2.1 of the TBT Agreement. First, in the original proceedings in this matter, the Appellate Body said that:

> In the context of Article 2.1 of the *TBT Agreement*, the complainant must prove its claim by showing that the treatment accorded to imported products is "less favourable" than that accorded to like domestic products or like products originating in any other country. If it has succeeded in doing so, for example, by adducing evidence and arguments sufficient to show that the measure is not even-handed, this would suggest that the measure is inconsistent with Article 2.1. If, however, the respondent shows that the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction, it follows that the challenged measure is not inconsistent with Article 2.1.[136]

7.49. In *US – COOL*, the Appellate Body again set out the burden of proof under Article 2.1. It explained that:

> [A]s with all affirmative claims, it is for the complaining party to show that the treatment accorded to imported products is less favourable than that accorded to like domestic products. Where the complaining party has met the burden of making its *prima facie* case, it is then for the responding party to rebut that showing. If, for example, the complainant adduces evidence and arguments showing that the measure

[133] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, p. 323 at 335.
[134] R. Charles Anderson, *Cetaceans and Tuna Fisheries in the Central and Western Indian* Ocean (ITNLF Technical Report No. 2, 2014) (Exhibit MEX-161), p. 39.
[135] See section 7.5.1 below.
[136] Appellate Body Report, *US – Tuna II (Mexico)*, para. 216.

> is designed and/or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination of the group of imported products and thus is not even-handed, this would suggest that the measure is inconsistent with Article 2.1. If, however, the respondent shows that the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction, it follows that the challenged measure is not inconsistent with Article 2.1.[137]

7.50. We understand these passages as indicating that a complainant bears the burden of showing that a challenged measure modifies the conditions of competition in the relevant market (i.e. the relevant market in the responding Member) to the detriment of products from the complaining Member.[138] As noted above, this criterion must *always* be satisfied before a violation of Article 2.1 can be found, regardless of whether that violation is claimed to be *de facto* or *de jure*. What is less clear to us is whether the complainant or the respondent bears the burden of showing, in the first instance, that the detrimental impact established by the complainant stems (or does not stem) exclusively from a legitimate regulatory distinction because it is (or is not) even-handed.[139]

7.51. Our uncertainty arises for the following reason. In the passages quoted above, the Appellate Body indicated that a complainant is expected to show *prima facie* that the challenged measure "is designed and/or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination of the group of imported products and thus is not even-handed", but that once this showing is made the burden shifts to the respondent to show that the detrimental impact in fact stems exclusively from a legitimate regulatory distinction. However, the Appellate Body has also explained that when analysing whether detrimental treatment stems exclusively from a legitimate regulatory distinction, a panel must carefully consider whether that treatment "reflects discrimination", which is "[u]ltimately [a question of] whether the measure is even-handed".[140] In particular, while it seems clear that the complainant must show the existence of detrimental treatment, it is not entirely clear to us whether the complainant *also* must show that such treatment does not stem exclusively from a legitimate regulatory distinction, or if, rather, it is the *respondent* that must show *prima facie* that the detrimental treatment *does* stem exclusively from a legitimate regulatory distinction. In other words, does the complainant bear the burden of showing in the first instance that steps (a) and (b) of the test under Article 2.1 of the TBT Agreement are met, or does the complainant only need to meet step (a), after which point the burden shifts to the respondent to meet step (b)?

7.52. In its efforts to ascertain the proper allocation of the burden of proof under Article 2.1 of the TBT Agreement, the Panel asked the parties and third-parties to comment on the passages from the Appellate Body reports quoted above.[141] Both the United States and Mexico agreed that "the complainant bears the initial burden of establishing a *prima facie* case in respect of all elements of its claim under Article 2.1", and that this meant that "the complainant is required to establish a *prima facie* case that: (i) the measure at issue modifies the conditions of competition in the relevant market to the detriment of imported products *vis-à-vis* like domestic products and like products originating in any other Member; and (ii) that such detrimental impact reflects discrimination against the imported products and, thus, does not stem exclusively from a legitimate regulatory distinction".[142]

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[137] Appellate Body Reports, *US – COOL*, para. 272.

[138] Appellate Body Report, *US – Tuna II (Mexico)*, para. 215.

[139] In this connection, and as we discuss in more detail in our discussion of the legal test under Article 2.1 of the TBT Agreement, we note that, at least in cases where detrimental treatment is *de facto*, the Panel must proceed to examine whether this treatment stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination: see e.g. Appellate Body Report, *US – Cloves Cigarettes*, para. 182.

[140] Appellate Body Reports, *US – COOL*, para. 328.

[141] Panel question No. 58. In this question, the Panel quoted the passages from *US – Tuna II (Mexico)* and *US – COOL* cited above, and asked the parties to explain "the implications of [these statements] for the allocation of the burden of proof under Article 2.1 of the TBT Agreement".

[142] Mexico's response to Panel question No. 58, para. 157. See also United States' response to Panel question No. 58, paras. 284 and 285. See also Mexico's comments on the United States' response to Panel question No. 58, para. 192 ("Mexico and the United States appear to be in agreement that Mexico bears the initial burden of establishing a *prima facie* case in respect of all elements of its claim under Article 2.1 of the TBT Agreement. There is no disagreement that Mexico must adduce evidence and arguments sufficient to raise a presumption that, first, the Amended Tuna Measure modifies the conditions of competition in the U.S. market

7.53. Interestingly, a number of third-parties disagreed with the parties, and suggested that the burden of proof should be allocated under Article 2.1 of the TBT Agreement in a way that mirrors the allocation under Article III:4 and Article XX of the GATT 1994.[143]

7.54. Canada considered that the passages cited above "do not provide a clear indication of where the initial burden of proof lies".[144] After reviewing the way in which the burden of proof is allocated under Article III:4 and Article XX of the GATT 1994 and recalling the close connection drawn by the Appellate Body between those Articles and Article 2.1 of the TBT Agreement, Canada submitted that "[t]here is no logical or conceptual reason why this balance should not also be reflected in the allocation of the burden of proof in Article 2.1. Further, there is nothing in the text or context of Article 2.1 that militates against this interpretive approach".[145] It therefore concluded that in the context of:

> [A] claim of less favourable treatment under Article 2.1 of the TBT Agreement, it is reasonable to expect that the complaining party should bear the burden of establishing a *prima facie* case that the technical regulation modifies the conditions of competition in the relevant market to the detriment of imported like products. Where the complaining party has met the burden of making its *prima facie* case, it would then be for the responding party to rebut that *prima facie* case by demonstrating that the detrimental impact is justified because it stems exclusively from a legitimate regulatory distinction.[146]

7.55. Similarly, in its response the European Union observed that "in interpreting and applying Article 2.1 of the TBT Agreement in the case of a claim of a *de facto* breach of the national treatment obligation, it should be born in mind that the balance struck in that provision is not different from the balance struck in Article III:4 and Article XX of the GATT" and thus concluded that "in some respects the burden of proof will fall on the defending Member, just as it does under the GATT".[147]

7.56. Norway, after recalling that "the legal standard in Article 2.1 embodies the same balance as that in the two GATT Articles"[148] – that is, Article III:4 and Article XX – concluded that "the same burden of proof, and the same order of the shifting of the burden of proof, applies to Article 2.1 of the TBT Agreement" as under Article III:4 and Article XX of the GATT 1994.[149]

7.57. Finally, New Zealand also believed that while the "Complaining Party must adduce sufficient evidence to raise the presumption that the measure adversely impacts the conditions in which imported products compete with like domestic products in the regulating Member's market"[150],

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to the detriment of imported tuna products from Mexico *vis-à-vis* like tuna products of U.S. origin or like tuna products originating in any other country, and, second, this detrimental impact reflects arbitrary or unjustifiable discrimination because, for example, the measure at issue is designed or applied in a manner that lacks even-handedness. Further, the parties seem to agree that the burden then shifts to the United States to adduce sufficient evidence and arguments to rebut the *prima facie* case established by Mexico"); United States' comments on Mexico's response to Panel question No. 58, para. 122 ("Mexico correctly agrees with the United States that the complainant bears the initial burden of establishing a *prima facie* case in respect of all elements of its claim under Article 2.1 of the TBT Agreement") (internal citations omitted).

[143] Although some third-parties did agree with the parties: see e.g. Australia's response to Panel question No. 58; Japan's response to Panel question No. 58, para. 4 (recognizing, however, that "that there are competing considerations that suggest different allocations of the burden of proof": para. 3).

[144] Canada's response to Panel question No. 58, para. 1.

[145] Canada's response to Panel question No. 58, para. 4.

[146] Canada's response to Panel question No. 58, para. 6. Canada continued: "Where the responding party succeeds in demonstrating, on a *prima facie* basis, that the detrimental impact is justified because it stems exclusively from a LRD, the burden would shift back to the complaining party to demonstrate that the regulatory distinction is not even-handed, for example because it is designed and/or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination".

[147] European Union's integrated executive summary, para. 35.

[148] Norway's response to Panel question No. 58, para. 7.

[149] Norway's response to Panel question No. 58, para. 8. See also para. 10 ("Norway understands the Appellate Body's statements quoted in the Panel's question, as explaining that the allocation of the burden of proof under 2.1 should be allocated in much the same way as under Article III:4 and Article XX of the GATT 1994").

[150] New Zealand's response to Panel question No. 58, para. 3.

nevertheless once this showing is made "the Responding Party bears the burden of demonstrating whether any detrimental impact stems exclusively from a legitimate regulatory distinction".[151]

7.58. We are mindful that there may be systemic reasons for favouring an approach to the burden of proof that would require a complainant to show *prima facie* that a measure modifies the conditions of competition in the relevant market to the detriment of its (i.e. the complainant's) like products, but would place the burden of showing that such detrimental impact stems exclusively from a legitimate regulatory distinction on the responding Member. For instance, there may be concern that requiring a complainant to prove, in the first instance, *both* that a measure has a detrimental impact on its like products *and* that such impact does not stem exclusively from a legitimate regulatory distinction could have the undesirable effect of discouraging claims under Article 2.1 of the TBT Agreement. This would be so because complainants may decide not to bring a claim under Article 2.1 of the TBT Agreement if they are of the view that they could obtain essentially the same outcome (i.e. a finding of less favourable treatment) under the GATT 1994 without having to prove as many facts.

7.59. Notwithstanding these considerations, given that in the present proceedings both parties agree that it is Mexico that bears the burden of showing *prima facie both* that the amended tuna measure modifies the conditions of competition in the United States' market to the detriment of Mexican tuna and tuna products *and* that such detrimental treatment reflects discrimination because it does not stem exclusively from a legitimate regulatory distinction and is not even-handed, we have decided to adopt this approach in the remainder of our report. The Panel is aware that it is not bound by the legal interpretations offered by the parties or the third-parties;[152] however, in the context of the present proceedings, where Mexico itself has asserted that it bears the heavier burden of showing *prima facie* that both the first and second steps of the "less favourable treatment" test in Article 2.1 of the TBT Agreement are met, we think it prudent to follow this approach. Nevertheless, if at any point in our analysis we consider that allocating the burden of proof differently would or could lead to a different outcome or result, we will indicate this in our reasons, in order to ensure that the Appellate Body has sufficient findings of fact should this matter be appealed.

7.4.2 Standard of proof

7.60. It is useful at this point to say a few words about the standard of proof, since at various points in its submissions the United States accuses Mexico of not furnishing evidence to support its arguments about the possible operation of the amended tuna measure.[153] In particular, the United States suggests that Mexico's arguments about the possibility that non-dolphin-safe tuna could fraudulently access the US dolphin-safe label under the amended tuna measure are based on "bare allegation".[154] The Panel will deal with the evidence presented by both parties below in the context of assessing the merits of Mexico's claims and in light of the allocation of the burden of proof discussed above. For now, the Panel notes a few general points.

7.61. The Appellate Body has explained that, as a general principle, "precisely how much and precisely what kind of evidence will be required to establish [a *prima facie* case] will necessarily vary from measure to measure, and provision to provision, and case to case".[155] It has also made clear on numerous occasions that panels have a significant degree of discretion in weighing and analysing evidence, and this discretion includes the prerogative both to "decide which evidence it chooses to utilize in making its findings"[156] and "how much weight to attach to the various items of evidence placed before it by the parties".[157] Ultimately, it is the Panel that has authority to decide whether the evidence presented is sufficient to make out Mexico's claims (as well as any explanations or defences advanced by the United States).

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[151] New Zealand's response to Panel question No. 58, para. 4.

[152] Appellate Body Report, *EC – Tariff Preferences*, para. 105 ("Consistent with the principle of *jura novit curia*, is not the responsibility of [the parties] to provide us with the legal interpretation to be given to a particular provision").

[153] United States' first written submission, paras. 247 and 312-313; United States' second written submission, paras. 25, 37, 77, 99, 101, 102 and 196,

[154] United States' first written submission, para. 247.

[155] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, p. 323 at 335.

[156] Appellate Body Report, *EC – Hormones*, para. 135.

[157] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 229.

7.62. Additionally, the Appellate Body has clarified that under Article 2.1 of the TBT Agreement, a panel's task is to "carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation".[158] This direction has implications for the type of evidence that a panel analysing a claim under Article 2.1 may require to make its findings. It suggests that, especially where a claim is made against a technical regulation as such, rather than as applied, it will be vital for the panel to closely examine the objective features and characteristics of the measure. It also suggests that evidence regarding the actual operation of the measure, while important[159], may not be dispositive in cases where a measure's design, structure, and architecture are themselves claimed to be discriminatory.

7.63. In this context, we recall the Appellate Body's guidance that in cases concerning measures challenged as such, it may not be necessary for the complainant to prove that the application of a measure in fact "result[s] in a breach … for *each and every* import transaction".[160] Concomitantly, where a complainant is able to adduce clear and convincing evidence that the design, architecture, and revealing structure of a measure are themselves discriminatory, it may not be sufficient for a respondent simply to show that, in practice, the application of the measure has not in all instances resulted in actual discriminatory treatment being accorded imported products.

7.64. We note that this approach to the standard of proof was recently followed by the Appellate Body in its report on *EC – Seal Products*. In that case, the Appellate Body accepted the complainants' argument that the so-called IC exception in the European Communities seal measure was inconsistent with the chapeau of Article XX of the GATT 1994 because "seal products derived from what should in fact be properly characterized as "commercial" hunts *could potentially* enter the EU market under the IC exception".[161] The Appellate Body did not examine whether there had been actual instances of incorrect entry; rather, it focused its analysis on the design and structure of the measure. Ultimately, it found a violation on the basis of evidence concerning the *possible* WTO-inconstant operation of the measure, as well as evidence that there was no way to prevent or identify such operation.

7.65. In writing the above, we do not mean to suggest that Mexico can establish a violation of Article 2.1 of the TBT Agreement *negatively*, i.e. Mexico does not succeed merely because it cannot be shown that the measure at issue has *never* resulted in less favourable treatment. To the contrary, in a case such as the present where the claimed discrimination is *de facto* rather than *de jure*[162], the complainant must, in accordance with the burden of proof, show *positively* that the measure is designed or applied in a manner that detrimentally modifies the conditions of competition. To establish this fact, the complainant must provide evidence of the measure's design, architecture, and revealing structure, and link these aspects of the measure to the detrimental impact that it claims its imports are suffering. A complainant, especially in a case of *de facto* discrimination, cannot simply point to the measure at issue and then expect the panel to find a violation where the respondent fails to show that the measure at issue *never could* result in a violation of one or more WTO obligations.[163] In cases of *de facto* discrimination, the complainant must provide evidence and argument sufficient to show why a measure that appears to be non-discriminatory on its face nevertheless in fact provides less favourable treatment to imported products in a way that is repugnant to WTO law. This is not to say, however, that the complainant is expected to prove that a measure always has and always will, in each and every transaction, result in discrimination.

7.66. Before concluding our discussion of the burden and standard of proof, we wish to emphasize that, as the Appellate Body has affirmed on numerous occasions, a panel "enjoy[s] a margin of discretion in [its] assessment of the facts",[164]. A Panel is "not required to accord to factual

[158] Appellate Body Report, *US – Clove Cigarettes*, para. 215.

[159] In this respect, we note that the Appellate Body has instructed panels to consider "the totality of facts and circumstances" in the cases that come before them: Appellate Body Report, *US – Clove Cigarettes*, para. 206.

[160] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 62.

[161] Appellate Body Reports, *EC – Seal Products*, para. 5.328 (emphasis added).

[162] Mexico's first written submission, para. 233 ("Accordingly, it is clear that the operation of the Amended Tuna Measure in the relevant market has a *de facto* detrimental impact on the group of like imported products").

[163] Appellate Body Report, *US – Gambling*, para. 140.

[164] Appellate Body Reports, *China – Raw Materials*, para. 341.

evidence of the parties the same meaning and weight as do the parties";[165] and, provided that it provides "reasoned and adequate explanations"[166] of its treatment of the evidence, a panel does not violate Article 11 of the DSU merely because one of the parties disagrees with its treatment of the evidence or would have preferred the panel to come to a different conclusion.

7.67. Having set out our understanding of the rules on burden and standard of proof that must guide our analysis, we now turn to consider Mexico's claims under Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994.

7.5 Article 2.1 of the TBT Agreement

7.68. Having discussed certain preliminary matters in the preceding paragraphs, the Panel now turns to consider the merits of Mexico's case against the amended tuna measure. As explained above, we begin by considering Mexico's claim under Article 2.1 of the TBT Agreement.

7.5.1 Legal test under Article 2.1 of the TBT Agreement

7.69. 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.

7.70. Article 2.1 sets out a three-step test. In order to fall foul of Article 2.1, a measure must:

> (a) Be a "technical regulation" within the meaning of Annex 1.1 of the TBT Agreement;
>
> (b) Concern or cover "like products"; and
>
> (c) Accord to like products of the complaining Member treatment less favourable than that accorded to domestic like products or like products from any other Member.[167]

7.71. The present dispute does not raise questions under either (a) or (b) above. Both parties agree that, as the original panel found and the Appellate Body accepted, the tuna measure is a "technical regulation" for the purposes of the TBT Agreement.[168] Moreover, both parties agree that, as the original panel also found[169], Mexican and United States "tuna" and "tuna products" are like products.[170] Accordingly, this Panel accepts that the amended tuna measure is a technical regulation within the meaning of Annex I of the TBT Agreement, and that United States and Mexican "tuna" and "tuna products" are like.

7.72. The main issue that falls for decision under Article 2.1 of the TBT Agreement is thus whether the amended tuna measure accords to Mexican tuna and tuna products "treatment less favourable" than that which it accords to like tuna and tuna products from the United States and other WTO Members. We recall that, in accordance with our findings above about the scope of these Article 21.5 proceedings, our duty is not restricted to assessing the WTO-consistency of the 2013 Final Rule, but rather extends to considering whether the amended tuna measure as a whole, including but not limited to the 2013 Final Rule, is WTO-consistent, or whether it continues to accord less favourable treatment to Mexican tuna and tuna products.

7.73. The Appellate Body has developed a two-tier test for determining whether a technical regulation accords less favourable treatment to imported products than to domestic products or like products from other WTO Members. First, the Panel must assess whether the measure at issue

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[165] Appellate Body Reports, *US – COOL*, para. 403.
[166] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 136.
[167] Appellate Body Report, *US – Tuna II (Mexico)*, para. 202.
[168] Mexico's first written submission, para. 205; United States' first written submission, para. 181.
[169] Panel Report, *US – Tuna II (Mexico)*, para. 7.251 (confirmed in Appellate Body Report, *US – Tuna II (Mexico)*, para. 202 (noting that the United States did not challenge this finding on appeal).
[170] Mexico's first written submission, para. 208; United States' second written submission, para. 181.

modifies the conditions of competition in the US market to the detriment of Mexican tuna and tuna products as compared to like US tuna and tuna products or tuna and tuna products originating in any other Member.[171] Second, if the Panel finds that detrimental impact exists, it will proceed to examine whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflects discrimination against the group of imported products. [172]

7.74. In the following paragraphs, we briefly review the Appellate Body's guidance on the legal steps comprising these two tiers.

7.75. With respect to the first tier, i.e. the question whether the amended tuna measure modifies the conditions of competition in the US market to the detriment of Mexican tuna and tuna products, we recall that "Article 2.1 of the TBT Agreement prohibits both *de jure* and *de facto* discrimination between domestic and like imported products".[173] Accordingly, the amended tuna measure may modify the conditions of competition in the US market to the detriment of Mexican tuna and tuna products even if it does not, on its face, single out tuna for differential treatment on the basis of the flag under which it was caught and/or processed.[174] Moreover, detrimental treatment may exist even in the absence of *differential* treatment, and, in fact, a "formal difference in treatment between imported and like domestic products is … neither necessary, nor sufficient, to show a violation of" Article 2.1.[175] Where a complainant argues that a measure has a *de facto* detrimental impact on its exports, the reviewing panel should consider "the totality of the facts and circumstances before it, including any implications for competitive conditions discernible from the design and structure of the measure itself, as well as all features of the particular market at issue that are relevant to the measure's operation within that market". The Appellate Body has also made clear that "*any* adverse impact on competitive opportunities for imported products *vis-à-vis* like domestic products that is caused by a particular measure may potentially be relevant to a panel's assessment of less favourable treatment under Article 2.1".[176]

7.76. One of the major issues that arose for consideration in the original proceedings concerned the extent to which any proven detrimental impact must be shown to "result[] from the [challenged] measure itself rather than from the actions of private parties".[177] Reviewing the legal findings of the original panel on this issue, the Appellate Body clarified that, to succeed under Article 2.1 of the TBT Agreement, a complainant must show the existence of "a genuine relationship between the measure at issue and an adverse impact on competitive opportunities for imported products".[178] Reaffirming its earlier findings in *Korea – Various Measures on Beef*[179]*,* the Appellate Body concluded that "[t]he relevant question is … whether the *governmental* intervention [i.e. the measure itself] affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory".[180] In answering this question, the presence or existence of "some element of private choice" will not relieve a respondent of responsibility under the TBT Agreement[181] where the challenged measure has restricted or otherwise conditioned the exercise of that choice in a way that cannot be considered "normal" in the relevant market.[182]

7.77. With respect to the second tier of the less favourable treatment test, i.e. the question whether any detrimental treatment reflects illegitimate discrimination, the Appellate Body has

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[171] Appellate Body Report, *US – Tuna II (Mexico)*, para. 268.

[172] Appellate Body Report, *US – Clove Cigarettes*, para. 215.

[173] Appellate Body Reports, *US – COOL*, para. 286.

[174] Appellate Body Report, *US – Tuna II (Mexico)*, para. 225 ("a measure may be *de facto* inconsistent with Article 2.1 even when it is origin neutral on its face").

[175] Appellate Body Reports, *US – COOL*, para. 277 (citing Appellate Body Report, *Korea – Various Measures on Beef*, para. 137).

[176] Appellate Body Reports, *US – COOL*, para. 286. See also Appellate Body Reports, *US – Tuna II (Mexico),* para. 225 and *US – Clove Cigarettes*, para. 179.

[177] Appellate Body Report, *US – Tuna II (Mexico)*, para. 236.

[178] Appellate Body Report, *US – Tuna II (Mexico)*, para. 236.

[179] Appellate Body Report, *Korea – Various Measures on Beef*, para. 146.

[180] Appellate Body Report, *US – Tuna II (Mexico)*, para. 237 (citing Appellate Body Report, *Korea – Various Measures on Beef*, para. 149).

[181] Appellate Body Report, *US – Tuna II (Mexico)*, para. 239.

[182] Appellate Body Report, *Korea – Various Measures on Beef*, para. 146. Having said that, we also recognize that, as the Appellate Body made clear in *US – COOL*, "detrimental effects caused *solely* by the decisions of private actors cannot support a finding of inconsistency with Article 2.1": Appellate Body Reports, *US – COOL*, para. 291 (emphasis original).

explained that panels must "carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether the technical regulation is even-handed".[183] In essence, this inquiry requires the Panel to analyse whether the detrimental treatment found to exist under the first tier "stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products".[184]

7.78. In terms of the burden of proof, and as explained above, we will assess *first* whether Mexico has shown *prima facie both* that the amended tuna measure modifies the conditions of competition in the US market to the detriment of Mexican tuna and tuna products, *and second* that such detrimental impact does not stem exclusively from a legitimate regulatory distinction. If Mexico succeeds in making this showing, the burden will shift to the United States to rebut Mexico by showing that, despite Mexico's *prima facie* case, the detrimental treatment in fact does stem exclusively from a legitimate regulatory distinction.

7.79. With the above in mind, how should panels assess whether a detrimental impact stems exclusively from a legitimate regulatory distinction, rather than reflecting discrimination in a manner inconsistent with Article 2.1 of the TBT Agreement? The Appellate Body has provided some guidance on this issue in the recent "trilogy" of TBT cases[185] and in *EC – Seal Products*. Most importantly, the Appellate Body has explained that an analysis of whether detrimental impact stems exclusively from a legitimate regulatory distinction (or whether a technical regulation that causes detrimental impact is even-handed) must take account of whether the technical regulation at issue is "applied in manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade".[186]

7.80. This language is, of course, similar to the language of the chapeau of Article XX of the GATT 1994.[187] Should panels, then, draw on the jurisprudence elaborated under the chapeau in interpreting and applying Article 2.1 of the TBT Agreement? We now turn our attention to this question, which is highly contested by the parties in the present proceedings.

7.81. According to Mexico, "[a]lmost identical language [to that used by the Appellate Body in describing the test under Article 2.1 of the TBT Agreement] is included in the chapeau of Article XX of the GATT 1994. Accordingly, the interpretation of "arbitrary discrimination" in the chapeau of Article XX sheds light on the interpretation of "arbitrary discrimination" within the meaning of Article 2.1 of the TBT Agreement".[188] In particular, Mexico argues that the question "whether the discrimination can be reconciled with, or is rationally related to, the relevant policy objective" pursued by the technical regulation is central to a panel's analysis under Article 2.1 of the TBT Agreement. In Mexico's view, "[w]here the alleged rationale for the distinction created by the measure in question is inconsistent with, or actively undermines, its stated policy objective, it is reflective of arbitrary discrimination".[189] Thus, says Mexico, "the degree to which the resulting regulatory distinction can be reconciled to the policy objective pursued by the measure will provide a clear indication of whether arbitrary discrimination and a lack of even-handedness results".[190]

7.82. Mexico also argues that, read in light of the Appellate Body's interpretation of the chapeau of Article XX, the concept of "arbitrary or unjustifiable discrimination" under Article 2.1 of the TBT Agreement must be read as prohibiting, in the design or application of a technical regulation, "ambiguity that creates the potential for its [i.e. the technical regulation's] abuse and

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[183] Appellate Body Report, *US – Tuna II (Mexico)*, para. 225 (citing Appellate Body Report, *US – Clove Cigarettes*, para. 182).

[184] Appellate Body Report, *US – Tuna II (Mexico)*, para. 215 (citing Appellate Body Report, *US – Clove Cigarettes*, para. 182). See also Appellate Body Reports, *US – COOL*, para. 271.

[185] Appellate Body Report, *US – Clove Cigarettes*; *US – Tuna II (Mexico)*; and *US – COOL*.

[186] Appellate Body Report, *US – Clove Cigarettes*, para. 94; See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 213.

[187] The chapeau of Article XX of the GATT 1994 relevantly reads: "Subject to the requirement that such measures 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."

[188] Mexico's second written submission, para. 123.

[189] Mexico's second written submission, para. 132.

[190] Mexico's second written submission, para. 132.

misapplication, regardless of whether or not the body responsible for applying the measure is acting in good faith".[191] Moreover, according to Mexico, "a regulatory system that does not provide an effective means of verifying whether a measure is being applied in an accurate and diligent manner will also give rise to arbitrary discrimination. Where the design of the measure is such that it is impossible to audit or assess the degree to which it is being applied appropriately, the measure cannot be said to be even-handed".[192]

7.83. The United States disagrees with Mexico's interpretation of "arbitrary discrimination".[193] Specifically, it submits that Mexico's approach "artificially graft[s] the analysis used in the context of the chapeau of Article XX of the GATT 1994 onto Article 2.1 of the TBT Agreement", and concludes that this is "surely wrong" because "the two provisions are entirely different".[194] The United States also submits that "the Appellate Body *reversed* the *EC – Seal Products* panel's GATT Article XX chapeau analysis for considering the two analyses to be the same".[195]

7.84. The parties elaborated on these positions in response to a question from the Panel. In its response, Mexico emphasized that "the Appellate Body did not find that the analysis under Article 2.1 was irrelevant to the analysis under the chapeau. Rather, the Appellate Body only indicated that an independent analysis must be done under the chapeau and, if the analysis under Article 2.1 is used, then an explanation must be provided as to why this analysis is relevant and applicable".[196] According to Mexico, the Appellate Body has made clear that "there are important parallels between the analyses under Article 2.1 of the TBT Agreement and the chapeau"[197], and, indeed, that, "'arbitrary discrimination' is a common concept" shared by the two provisions.[198] Mexico concludes that it is "clearly appropriate to use the meaning of 'arbitrary discrimination' developed under the chapeau of Article XX as context for interpreting … Article 2.1 of the TBT Agreement".[199]

7.85. The United States' maintained its opposition to this interpretive approach in its response to the Panel's question. The United States explained that in *EC – Seal Products* the Appellate Body "refused to find that the analysis under the second step of Article 2.1 merely incorporates the analysis under the chapeau of Article XX, as Mexico would have the Panel believe". Although it acknowledged that "the 'balance' set out *within* the TBT Agreement is not, in principle, different from the balance set out in the GATT 1994"[200], the United States reasserted that Mexico's approach is "surely wrong," and submitted that "Mexico is unable to cite *even one paragraph* of the three TBT disputes for the proposition that the most important factor in an even-handedness analysis is whether the discrimination can be reconciled with, or is rationally related to, the relevant policy objective".[201]

7.86. We note that all third-parties that responded to the Panel's question on this issue agreed that the case-law on the chapeau of Article XX informs the interpretation of Article 2.1 of the TBT Agreement. New Zealand appeared to agree with Mexico's approach, and submitted that the Panel should consider whether "the rationale for the distinction [giving rise to the detrimental

[191] Mexico's second written submission, para. 129 (citing Appellate Body Reports, *EC – Seal Products*, paras. 5.326-5.328).
[192] Mexico's second written submission, para. 131.
[193] United States' second written submission, para. 83. The United States phrases its arguments in terms of the meaning of "even-handedness", but the substance of its claims concern Mexico's use of the law of the chapeau of Article XX of the GATT 1994 in interpreting "arbitrary discrimination" under Article 2.1 of the TBT Agreement. As we noted above, and as we will explain in more detail below, we think that "even-handedness", as an analytical tool that may be useful in assessing whether detrimental impact stems exclusively from a legitimate regulatory distinction, may have a wider meaning that "arbitrary discrimination", although there is certainly some overlap.
[194] United States' second written submission, para. 84.
[195] United States' second written submission, para. 84.
[196] Mexico's response to Panel question 5(c), para. 12 (citing Appellate Body Reports, *EC – Seal Products*, para. 5.310).
[197] Mexico's response to Panel question 5(c), para. 13 (citing Appellate Body Reports, *EC – Seal Products*, para. 5.310).
[198] Mexico's response to Panel question 5(c), para. 13 (citing Appellate Body Reports, *EC – Seal Products*, para. 5.310).
[199] Mexico's response to Panel question 5(c), para. 13.
[200] United States' response to Panel question No. 5(c), para. 36 (emphasis original).
[201] United States' response to Panel question No. 5(c), para. 36 (internal citations omitted).

treatment] [is] consistent with the measure's overall objective".[202] Similarly, Japan considered that "the assessment of even-handedness under Article 2.1 of the TBT Agreement involves consideration of whether the regulatory distinctions in question drawn in the technical regulation have rationales which are legitimate and rationally connected with the stated policy objective pursued by the technical regulation". In Japan's opinion, "a technical regulation that is designed in such a way that its provisions contradict each other and even undermine the stated policy objective pursued by the technical regulation would be difficult to be justified under Article 2.1 of the TBT Agreement".[203] The European Union also agreed that "the 'rationale' or 'objective' or 'purpose' or 'objective intent' of the regulatory distinction criticised by Mexico is indeed relevant to the assessment, just as it would be relevant in an assessment under Articles III:4 and XX of the GATT 1994".[204] And Canada, too, indicated that "in examining the even-handedness of the regulatory distinction, a panel should examine the rationale for the regulatory distinction advanced by the responding Member in light of the identified policy objective, to determine whether there is a rational connection between the regulatory distinction and the identified policy objective. A regulatory distinction cannot be even-handed where it hinders or undermines the overall objective of the technical regulation".[205]

7.87. We begin our analysis by expressing our disagreement with the United States' claim that "the two provisions [i.e. Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994) are entirely different". The United States is, of course, correct that the text of Article 2.1 does not contain the words "arbitrary or unjustifiable discrimination". Nevertheless, as we noted above, the Appellate Body has consistently instructed panels to look for "arbitrary or unjustifiable discrimination" as one indication that a technical regulation provides less favourable treatment to imported products in contravention of Article 2.1 of the TBT Agreement.[206] This language is drawn directly from the sixth recital of the TBT Agreement's preamble, which provides that technical regulations must "not [be] 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". By instructing panels to interpret TBT Article 2.1 in light of this recital, we believe the Appellate Body clearly intended that panels would apply the "less favourable treatment" requirement in Article 2.1 of the TBT Agreement in light of the jurisprudence developed in the context of the chapeau of Article XX. We agree with Mexico that there is no "basis to interpret the meaning of this term differently in different agreements".[207]

7.88. We also do not agree with the United States that the Appellate Body's recent ruling in *EC – Seal Products* prevents us from having recourse to Article XX chapeau jurisprudence in interpreting Article 2.1 of the TBT Agreement. In that case, the Appellate Body faulted the panel for "applying *the same legal test* to the chapeau of Article XX as it applied under Article 2.1 of the TBT Agreement".[208] According to the Appellate Body, the panel "should have provided more explanation as to why and how its analysis under Article 2.1 of the TBT Agreement was relevant and applicable to the analysis under the chapeau of Article XX of the GATT 1994"[209], instead of finding a violation of the chapeau merely because the measure at issue had previously been found to violate Article 2.1 of the TBT Agreement.[210]

7.89. We note that the Appellate Body found that the panel in *EC – Seal Products* had erred in importing its analysis under Article 2.1 of the TBT Agreement into the chapeau of Article XX; it did not say that the jurisprudence developed in the context of the chapeau could not be used to interpret Article 2.1 of the TBT Agreement. This finding is fully explicable on the basis that while

[202] New Zealand's oral statement, para. 6.

[203] Japan's response to Panel third-party question No. 1, para. 2. Japan also argued that "a technical regulation may contain elements that are in tension, or possibly even in conflict, with the particular policy objective pursued by the measure because such elements are seeking to accommodate other policy objectives. Japan believes that this, by itself, is insufficient to support a finding that the technical regulation is not even-handed": para. 4.

[204] European Union's response to Panel third-party question No. 1, para. 1. The European Union also submitted that "[i]t is possible that the regulatory distinction neither "assists" nor "hinders" the overall objective, but merely reflects a calibration of the different measures to different risks. The mere existence of such differences does not necessarily mean that there is discrimination, or unjustified discrimination": para. 2.

[205] Canada's response to Panel third-party question No. 1, para. 1.

[206] Appellate Body Reports, *US – Clove Cigarettes*, para. 173; *US – COOL*, para. 268.

[207] Mexico's comments on the United States' response to Panel question No. 5(c), para. 30.

[208] Appellate Body Reports, *EC – Seal Products*, para. 5.313 (emphasis added).

[209] Appellate Body Reports, *EC – Seal Products*, para. 5.310.

[210] Appellate Body Reports, *EC – Seal Products*, para. 3.507.

the tests in the chapeau of Article XX and Article 2.1 of the TBT Agreement overlap, they are not identical. Whereas Article 2.1 asks whether detrimental treatment stems from a legitimate regulatory distinction, and while the existence of "arbitrary or unjustifiable discrimination" is *one* way in which inconsistency with this aspect of Article 2.1 of the TBT Agreement can be shown, the chapeau of Article XX is focused *solely* on whether a measure is applied in an arbitrarily or unjustifiably discriminatory manner (or is a disguised restriction on international trade).[211] Additionally, analysis under Article 2.1 requires consideration of *both* the design *and* the application of the measure at issue[212], whereas the chapeau focuses only on the *application* of the measure at issue.[213] As we understand it, then, the error of the *EC – Seal Products* panel was in assuming that a violation of Article 2.1 of the TBT Agreement, which may involve analysis of factors that are not be germane to the analysis under Article XX of the GATT 1994, would automatically give rise to a violation of that latter provision. To our minds, this reasoning does not deny the possibility that jurisprudence concerning the chapeau of Article XX could be used to inform those aspects of the test under Article 2.1 of the TBT Agreement that call for an examination of whether an instance of detrimental treatment constitutes "arbitrary discrimination".

7.90. Moreover, we cannot ignore the Appellate Body's confirmation that "important parallels" exist between the chapeau of Article XX and the "less favourable treatment" limb of Article 2.1 of the TBT Agreement. Indeed, the Appellate Body specifically recognized that "the concepts of 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail' and of a 'disguised restriction on trade' are found both in the chapeau of Article XX of the GATT 1994 and in the sixth recital of the preamble of the TBT Agreement".[214] To us, these statements clearly indicate that, while the tests under Article 2.1 of the TBT Agreement and Article XX of the GATT 1994 should not be conflated, there are nevertheless important similarities and overlaps between them, and Appellate Body jurisprudence developed in the context of one may be used to interpret similar concepts in the other.

7.91. Accordingly, we are not convinced by the United States' argument that Mexico's approach to "arbitrary discrimination" in the context of Article 2.1 of the TBT Agreement is "surely wrong".[215] To the contrary, we agree with Mexico that, in considering whether detrimental impact caused by a technical regulation reflects "arbitrary discrimination", we may consider, among other things, whether the detrimental treatment can be reconciled with, or is rationally related to, the policy pursued by the measure at issue. This analysis may help the Panel determine whether the detrimental impact complained of (that is, if such impact is found by the Panel to exist) stems exclusively from a legitimate regulatory distinction – although, as we have said, the "legitimate regulatory distinction" may involve examination of more than just the existence (or not) of "arbitrary discrimination".

7.92. In addition, we note that, contrary to the United States' claim that there is no authority supporting this approach, the Appellate Body in *US – Clove Cigarettes*, the first of the "TBT trilogy" cases, *did indeed* base its finding that the United States' ban on clove cigarettes violated Article 2.1 on the fact that the exemption of menthol cigarettes from the ban was difficult to reconcile with the United States' purported goal of "prevent[ing] youth smoking" by banning flavoured cigarettes.[216] In the course of its findings, the Appellate Body explicitly noted that "menthol cigarettes have the same product characteristic [i.e. flavouring] that, from the perspective of the stated objective of [the challenged measure, i.e. discouraging youth smoking], justified the prohibition of clove cigarettes".[217] In other words, a central element of the Appellate

[211] Appellate Body Reports, *EC – Seal Products*, para. 5.311 (noting that Article 2.1 of the TBT Agreement analyses whether detrimental treatment stems exclusively from a legitimate regulatory distinction whereas the chapeau of Article XX is solely concerned with the existence of "arbitrary or unjustifiable discrimination").

[212] Appellate Body Reports, *US – COOL*, para. 271 (finding that detrimental treatment cannot be found to stem exclusively from a legitimate regulatory distinction where a regulatory distinction is "*designed or applied* in a manner that constitutes a means of arbitrary or unjustifiable discrimination" (emphasis added)).

[213] As we explain in more detail below, the analysis under Article XX of the GATT 1994 is "two-tiered: first, provisional justification by reason of characterization of the measure under [a subparagraph of Article XX]; second, further appraisal of the same measure under the introductory clauses of Article XX": Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, p. 3 at at 20.

[214] Appellate Body Reports, *EC – Seal Products*, para. 5.310.

[215] United States' second written submission, para.84; United States' response to Panel question No. 5(a), para. 28.

[216] This is noted by Canada in its response to Panel third-party question No. 1, para. 2.

[217] Appellate Body Report, *US – Clove Cigarettes*, para. 225.

Body's finding was the fact that the detrimental treatment at issue in that case could not be reconciled with or justified by reference to the policy objective of the technical regulation under review. In our view, the Appellate Body's approach in this case closely resembles the type of analysis conducted under the chapeau of Article XX of the GATT 1994, and confirms that there are important similarities between the analysis under Article XX and the analysis under Article 2.1 of the TBT Agreement.[218]

7.93. We turn now to the meaning of the term "even-handed". In our understanding, even-handedness is not a separate criterion whose existence must be proved *in addition* to a showing that the technical regulation at issue accords less favourable treatment to imported products. Rather, as we read the case-law, even-handedness is properly understood as an analytical tool, a kind of rhetorical measure or test that deploys a fluid, broadly equitable concept as a proxy or gauge to help a panel determine whether identified detrimental treatment stems exclusively from a legitimate regulatory distinction. In our view, the proposition that even-handedness is not an additional test follows clearly from the Appellate Body's statement that a panel must consider the even-handedness of a measure "*in order to* determine"[219] whether or not the detrimental impact caused by that measure stems exclusively from a legitimate regulatory distinction.

7.94. In our view, the notion of even-handedness is especially closely related to the question whether detrimental impact stems *exclusively* from a legitimate regulatory distinction. In particular, we think that asking whether a measure is even-handed can help a panel to determine whether the identified detrimental treatment is fully explainable as a consequence of a legitimate regulatory distinction – in which case it could be said to stem *exclusively* from that distinction – or whether the detrimental treatment, while perhaps connected to or broadly based on a legitimate regulatory distinction, is nevertheless not fully or precisely accounted for, in terms of both its nature and its scope, by the regulatory distinction that the responding Member seeks to pursue – in which case it could *not* be concluded that the detrimental treatment stems *exclusively* from the distinction pursued.

7.95. In other words, in our view even-handedness directs a panel's attention to what might be called the "fit" of the measure at issue, including the detrimental treatment caused by that measure, with the legitimate regulatory distinction pursued. Thus, even if a measure were *based on* a legitimate regulatory distinction, the measure would nonetheless not stem *exclusively* from that legitimate regulatory distinction if the detrimental impact were disproportionate, or if the measure otherwise reflected, for example, protectionism, and thus was not clearly justifiable by reference only to the legitimate regulatory distinctions invoked.

7.96. In our view, "even-handedness" directs our attention to what can perhaps best be called the "fairness" of a technical regulation. The plain meaning of "even-handed" is "impartial, fair". "Fair", in turn, means "just, unbiased, equitable". Terms like "fair" and "just" are notoriously difficult to define a-contextually; accordingly, the specific criteria or indicia through which the fairness of a technical regulation should be assessed are not comprehensively enumerable in the abstract. Instead, a panel's analysis must "take into consideration the totality of the facts and circumstances of the case".[220] In our view, "even-handedness" may overlap with the concept of "arbitrary discrimination". We think, however, that "even-handedness" is conceptually distinct from "arbitrary discrimination", and may be broader in terms of the features of a measure that it may take into account. Thus, while a showing of "arbitrary discrimination" is one way of demonstrating that a measure is not even-handed (as we explained above), the concept of "even-handedness", and the range of facts and circumstances that could lead a panel to find that a measure is not "even-handed" (and, therefore, to conclude that the detrimental impact in question, does not stem

[218] We wish to clarify one point. In finding that Article 2.1 requires, *inter alia*, an assessment of whether any proven detrimental impact is related to or otherwise explicable on the basis of the policy pursed by the technical regulation at issue, we are not suggesting that panels should, in the context of Article 2.1, inquire into either the legitimacy of that policy or the effective contribution that the technical regulation makes to it. These inquiries may be relevant under Article 2.2 of the TBT Agreement, which is not at issue in these proceedings.

[219] Appellate Body Report, *US – Clove Cigarettes*, para. 215.

[220] Appellate Body Reports, *US – COOL*, para. 286. We note our agreement with the United States that "[t]he particular set of facts that a Member is required to establish in order to prove that a technical regulation is not even-handed will depend on the particular facts and circumstances". United States' response to Panel question No. 5(a), para. 24.

exclusively from a legitimate regulatory distinction) is wider than those that could give rise to a finding of "arbitrary discrimination".

7.5.2 Application of Article 2.1 of the TBT Agreement

7.5.2.1 Mexico's claim

7.97. Having considered certain preliminary issues, and having set out our understanding of the legal test under Article 2.1 of the TBT Agreement, we now proceed to examine the merits of Mexico's Article 2.1 claims. As we have noted, our task is to determine whether the amended tuna measure as a whole affords "less favourable treatment" to Mexican tuna and tuna products than to tuna and tuna products from the United States and other WTO Members.

7.98. In its first written submission, Mexico explained that the analysis under TBT Article 2.1 "is on the regulatory distinction that accounts for the detrimental treatment on Mexican tuna products as compared to US tuna products and tuna products originating in other countries".[221] According to Mexico, the following are the central regulatory distinctions whose design and application give rise to the detrimental treatment of which Mexico complains:[222]

- First, Mexico complains about "[t]he disqualification of setting on dolphins in accordance with AIDCP as a fishing method that can be used to catch tuna in the ETP in a dolphin-safe manner and the qualification of other fishing methods to catch tuna in a dolphin-safe manner". We refer to this aspect of the amended tuna measure as the "eligibility criteria".

- Second, Mexico highlights "[t]he mandatory independent observer requirements for tuna caught in the ETP by setting on dolphins in accordance with the AIDCP and the absence of such requirements for tuna caught outside the ETP using the same and different fishing methods". We refer to this aspect of the amended tuna measure as the "different certification requirements".

- Third and finally, Mexico draws the Panel's attention to "[t]he record-keeping and verification requirements for tuna caught in the ETP by setting on dolphins in accordance with the AIDCP and the different requirements for tuna caught outside the ETP using both the same and different fishing methods". We refer to this aspect of the amended tuna measure as the "different tracking and verification requirements".

7.99. Mexico refers to these conditions and requirements collectively as "the difference in labelling conditions and requirements".[223] According to Mexico, "[w]hen the facts and circumstances related to the design and application of these conditions and requirements are examined, it is clear that the detrimental impact on imports of Mexican tuna products does not stem exclusively from a legitimate regulatory distinction".[224] Specifically, Mexico argues that "[a]s a consequence of the difference in labelling conditions and requirements, all like US tuna products and most tuna products of other countries have access to the dolphin-safe label, while, at the same time, the amended tuna measure denies access to this label for most Mexican tuna products".[225]

7.100. The United States has at various stages in these proceedings urged the Panel to ignore Mexico's claims concerning the different certification and tracking and verification requirements. According to the United States, the relevant detrimental impact does not stem from either of these two regulatory distinctions. Rather, "Mexico's first element [i.e. the eligibility criteria] *is* the detrimental impact", and since "Mexican tuna product containing tuna caught by setting on dolphins would still be ineligible for the 'dolphin safe' label" even if the different certification requirements did not exist, "Mexico simply cannot establish a causal connection between the detrimental impact" and the different certification and tracking and verification requirements".[226]

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[221] Mexico's first written submission, para. 235.
[222] Mexico's first written submission, para. 236.
[223] Mexico's second written submission, para. 112.
[224] Mexico's first written submission, para. 237.
[225] Mexico's second written submission, para. 112.
[226] United States' first written submission, para. 223 (emphasis original).

7.101. The United States repeats this contention in its second written submission. There, it argues that the certification and tracking and verification requirements "are not relevant to this analysis (under Article 2.1 of the TBT Agreement), in that neither aspect accounts for the detrimental impact … Simply put, the requirements regarding record-keeping/verification and observers do not cause the detrimental impact that was the basis for the DSB's recommendations and rulings".[227]

7.102. The Panel acknowledges that Mexico's argumentation on the detrimental treatment caused by the different certification and tracking and verification requirements appears to have developed over the course of its written submissions. In its first written submission, Mexico described the detrimental impact caused by the amended tuna measure as a whole as follows:

> While all like US tuna products and most tuna products of other countries have access to the "dolphin-safe" label, the Amended Tuna Measure denies access to this label for most Mexican tuna products.[228]

7.103. It seems to us that this description identifies, at least primarily, the detrimental impact caused by the *eligibility criteria*, because, as the United States argued in its own first written submission, even if the different certification and tracking and verification requirements were eliminated, "Mexican tuna product containing tuna caught by setting on dolphins would still be ineligible for the 'dolphin safe' label, and tuna product containing tuna caught using other methods would still be potentially eligible for the label".[229]

7.104. In its second written submission, however, Mexico elaborated on and clarified its arguments on the detrimental impact caused by the different certification and tracking and verification requirements. Mexico explained that:

> [T]he absence of sufficient fishing method qualification, record keeping, verification and observer requirements for tuna that is used to produce tuna products from the United States and other countries means that Mexican tuna products are losing competitive opportunities to tuna products that may be inaccurately labelled as dolphin-safe.[230]

7.105. This passage clearly identifies a distinct type of detrimental impact that, in Mexico's view, is caused by the different certification and tracking and verification requirements. Whereas the different eligibility requirements are responsible for the fact that most Mexican tuna products are ineligible to receive the label (in Mexico's words denying a competitive opportunity to Mexican tuna),[231] the different certification and tracking and verification requirements, on Mexico's argument, provide or "confer[]"[232] a "competitive advantage" to non-Mexican tuna products, and so detrimentally modify the conditions of competition. In our view, Mexico's arguments on the different certification and tracking and verification requirements constitute a clear and cognizable claim of detrimental impact *separate from* the detrimental impact identified by Mexico as the result of the eligibility criteria.[233] The Panel notes that although Mexico maintained in its first written submission that it is the "key elements of the design and structure of the measure" that "together" deny Mexican products competitive opportunities,[234] in the Panel's view Mexico's argumentation throughout these proceedings made clear that different elements of the amended tuna measure negatively affect Mexican tuna in different ways.

7.106. In its responses to the Panel's questions, the United States suggested that, by developing its argument on detrimental impact in its second written submission, "Mexico is now attempting to fundamentally alter all three of its claims, alleging that the tracking and verification and certification requirements of the amended measure modify the conditions of competition in the relevant market to the detriment of the group of Mexican tuna products *via-à-vis* the group of like

[227] United States' second written submission, paras. 75 and 76.
[228] Mexico's first written submission, para. 232.
[229] United States' first written submission, para. 223.
[230] Mexico's second written submission, para. 117 (emphasis original).
[231] Mexico's second written submission, para. 117.
[232] Mexico's second written submission, para. 117.
[233] Mexico articulated its argument in this way throughout these proceedings. See Mexico's response to Panel question No. 9, para. 36; Mexico's second written submission, paras. 147, 163; Mexico's response to Panel question No. 7, paras. 19 and 21. See also section 6.2.6 of this Report.
[234] Mexico's first written submission, para. 223.

US tuna product and like tuna product originating in other Members".[235] The import of this statement is not entirely clear: the United States has not, for example, argued that Mexico's arguments concerning the different certification and tracking and verification requirements are barred by Article 6.2 of the DSU. At any rate, in our view, parties in WTO dispute settlement are fully entitled to develop and clarify their argumentation over the course of their written submissions. In our opinion, the very purpose of having successive rounds of written submissions, followed by an oral hearing, is to enable the parties to refine, clarify, and develop their arguments. This is an essential element of the due process "implicit in the DSU"[236], according to which "each party [must] be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party".[237] We are of the view that Mexico's elaboration in its second written submission is a fully acceptable clarification of Mexico's claim and argument.

7.107. Additionally, the Panel notes that at various stages in this litigation, Mexico has argued that it is the "differences in these labelling conditions and requirements *together*" that "account for the detrimental impact on imports".[238] In other words, as Mexico explained in its response to a question from the Panel:

> [I]t is only the combined operation of the labelling conditions and requirements for tuna products containing tuna caught by setting on dolphins in the ETP, together with the labelling conditions and requirements for tuna products containing tuna caught outside the ETP, that gives rise to the regulatory distinction that affects the conditions of competition to the detriment of tuna products imported from Mexico *vis-à-vis* like tuna products of U.S. origin and like tuna products imported from other countries.[239]

7.108. Despite this, both parties have structured their arguments throughout these proceedings on the basis of the three regulatory distinctions identified by Mexico. That is, while Mexico has argued that the relevant less favourable treatment emerges only or at least most clearly when all three distinctions are considered together, it has nevertheless presented its arguments on a distinction-by-distinction basis. The United States has followed suit, and presented its arguments on the three regulatory distinctions separately. We have decided to follow the approach of the parties in presenting our own analysis. Although we will indicate the connections between these distinctions where relevant, we conduct our analysis in three parts, considering first the eligibility criteria; second, the different certification requirements; and third, the different tracking and verification requirements.

7.5.2.2 The eligibility criteria

7.5.2.2.1 Arguments of the parties

7.109. In its first written submission, Mexico describes the eligibility criteria in the following terms:

> Under the Amended Tuna Measure, the labelling conditions and requirements differ depending on the fishing method used to catch tuna. Setting on dolphins is a fishing method that is "disqualified" from being used to catch dolphin-safe tuna, even if the utilization of this method complies with the stringent AIDCP requirements and there are no dolphin mortalities or serious injuries in the set in which the tuna is caught, as confirmed by an independent on-board observer and certified under the comprehensive tracking and verification system established by the AIDCP and Mexican law. …

[235] United States' response to Panel question No. 58, para. 288.
[236] Appellate Body Report, *India – Patents*, para. 94.
[237] Appellate Body Report, *Thailand – Cigarettes (Philippines),* para. 150.
[238] Mexico's second written submission, para. 113 (emphasis added).
[239] Mexico's response to Panel question No. 8, para. 32: Mexico's comments on the United States' response to Panel question No. 4, para. 20 ("Mexico [has] highlighted that the three labelling conditions – i.e. (i) the disqualification of setting on dolphins and the qualification of other fishing methods to catch tuna; (ii) the record-keeping, tracking, and verification requirements; and (iii) the mandatory independent observer requirement – operating together, account for the detrimental impact on Mexican imports").

> The situation is different for fishing methods used to catch tuna outside the ETP. With the exception of driftnet fishing on the high seas by the Italian fleet, all of the other tuna fishing methods (including other driftnet fishing) are qualified to be used to catch tuna in a dolphin-safe manner, even though … these methods cause substantial dolphin mortalities and serious injuries.
>
> …
>
> Notwithstanding these substantial adverse effects on dolphins, the other fishing methods are not disqualified from being used to catch 'dolphin-safe' tuna. They are qualified to be used to catch dolphin-safe tuna, subject only to the requirement that there are no dolphin mortalities or serious injuries observed in the gear deployments in which the tuna is caught.[240]

7.110. As we understand it, Mexico's claim is that the amended tuna measure distinguishes between tuna caught by setting on dolphins and tuna caught by any other method. On the one hand, tuna caught by setting on dolphins is *never* eligible to receive the dolphin-safe label, even if no dolphins were actually killed or seriously injured in a particular net set. On the other hand, tuna caught by other fishing methods is, *in principle*, eligible to receive the dolphin-safe label, provided that no dolphins were killed or seriously injured in the particular gear deployment.

7.111. In Mexico's opinion, this regulatory distinction modifies the conditions of competition in the United States' market to the detriment of Mexican tuna products. Mexico recalls the Appellate Body's finding in the original proceedings that "the lack of access to the 'dolphin-safe' label of tuna products containing tuna caught by setting on dolphins has a detrimental impact on the competitive Mexican opportunities of Mexican tuna products in the US market"[241] because, although the label has "significant commercial value on the US market for tuna products"[242], "most tuna caught by Mexican vessels, being caught in the ETP by setting on dolphins, would not be eligible for inclusion in a dolphin-safe product under the US dolphin-safe labelling provisions".[243] In Mexico's view, the fact that tuna caught by setting on dolphins is ineligible to receive the label while tuna caught by other methods is, in principle, eligible is "clearly … not even-handed"[244] for a number of reasons. First, Mexico argues that the eligibility of tuna caught other than by setting on dolphins and the ineligibility of tuna caught by setting on dolphins "is not rationally connected to the objective of the measure"[245] because those fishing methods eligible to fish dolphin-safe tuna in fact "cause substantial dolphin mortalities and serious injuries".[246] To support this view, Mexico submitted evidence arguing that "tens to hundreds of thousands of [marine mammals] are killed each year through entanglement in fishing gear".[247] Indeed, Mexico maintains that "these 'qualified' fishing methods have adverse effects on dolphins that are equal to or greater than the disqualified tuna fishing method of setting on dolphins in an AIDCP-compliant manner",[248] although it also argues that to prove its case it need only show that "other fishing methods also cause mortalities and serious injuries to dolphins".[249] The Panel notes that a number of the exhibits submitted in these proceedings were also submitted in the original proceedings.

7.112. Second, Mexico maintains that the distinction is not even-handed because it "assumes that setting on dolphins in an AIDCP-compliant manner has adverse effects on dolphins that justify disqualification, and this assumption is permanent and will not change, even if evidence establishes that dolphin stocks are not being adversely affected. … At the same time, the Amended Tuna Measure assumes that catching tuna using other fishing methods does not have adverse

[240] Mexico's first written submission, paras. 247-249.
[241] Appellate Body Report, *US – Tuna II (Mexico)*, para. 235 (cited in Mexico's first written submission, para. 227).
[242] Appellate Body Report, *US – Tuna II (Mexico)*, para. 233.
[243] Mexico's first written submission, para. 226.
[244] Mexico's first written submission, para. 250.
[245] Mexico's first written submission, para. 252.
[246] Mexico's first written submission, para. 248.
[247] Mexico's first written submission, para. 109. On dolphin mortality and injury caused by gillnets, see Mexico's first written submission, paras. 126-131; on dolphin mortality and injury caused by longlines, see Mexico's first written submission, paras. 132-151; on dolphin mortality and injury caused by trawling, see Mexico's first written submission, paras. 152-155.
[248] Mexico's first written submission, para. 248.
[249] Mexico's comments on the United States' response to Panel question No. 5, para. 26.

effects on dolphins. However, the evidence presented by Mexico … contradicts this assumption and proves that other fishing methods have substantial adverse effects on dolphins that are equal to or greater than those of setting on dolphins in an AIDCP-compliant manner."[250]

7.113. In light of these arguments, Mexico maintains that "[t]here is no justification for the different treatment", and urges the Panel to find that "[i]n the circumstances of this dispute, all tuna fishing methods should be either qualified or disqualified"[251] from accessing the dolphin-safe label.

7.114. The United States asks the Panel to reject Mexico's claims for a number of reasons, both procedural and substantive. On the procedural front, the United States argues that "the Appellate Body has already rejected Mexico's claim" that the eligibility criteria violate Article 2.1 of the TBT Agreement.[252] According to the United States, "Mexico's misguided attempt to claw back what Mexico failed to achieve in its appeal of the original panel's Article 2.1 analysis should be rejected".[253]

7.115. On the substantive front, while the United States accepts that, as the Appellate Body found in the original proceedings, the eligibility criteria have "a detrimental impact on Mexican tuna products"[254], it rejects the claim that this impact does not stem exclusively from a legitimate regulatory distinction. In the opinion of the United States, "*all* tuna product containing tuna caught by setting on dolphins is ineligible for the label, *regardless of the fishery, nationality of the vessel, and nationality of the processor*"[255]; accordingly, "[t]he requirements are *equal* for all products and nothing in the design or structure of the amended measure indicates that Mexican producers are disadvantaged in any way *vis-à-vis* their competitors in the United States … or elsewhere".[256] In the view of the United States, any detrimental impact felt by Mexican producers stems from the fishing practices chosen by Mexican tuna fishers, and not from the amended tuna measure itself.[257]

7.116. Additionally, the United States argues that "the science *supports* the distinctions of the amended measure, and *directly contradicts* Mexico's approach".[258] In support of this position, the United States submitted evidence that, in its view, demonstrated that dolphin mortalities and serious injuries due to dolphin sets by large purse seine vessels in the ETP were many times greater than dolphin mortalities and serious injuries due to sets other than dolphin sets by large purse seine vessels.[259] In the original proceedings and in this dispute, the United States also presented evidence that, in its view, showed that dolphin mortalities and serious injuries in purse seine and longline fisheries outside the ETP were significantly lower, on a per set basis, than dolphin mortalities and serious injuries due to sets on dolphins by large purse seine vessels in the ETP.[260] Finally, the United States submitted evidence that, according to the United States, established that interactions with dolphins were much more frequent, and involved a much larger number of animals, in dolphin sets in the ETP large purse seine fishery than in other fisheries.[261] In the view of the United States, Mexico failed to present evidence that dolphins were being chased to catch tuna in any fishery other than the ETP large purse seine fishery.[262] The United States therefore concludes that "[t]here is nothing about setting on dolphins that is safe for dolphins, and

[250] Mexico's first written submission, para. 263 (emphasis original).
[251] Mexico's first written submission, para. 263.
[252] United States' first written submission, para. 214.
[253] United States' first written submission, para. 201.
[254] United States' first written submission, para. 215 (citing Appellate Body Report, *US – Tuna II (Mexico)*, paras. 234 and 235).
[255] United States' first written submission, para. 228; United States' second written submission, para. 89 (emphasis original).
[256] United States' first written submission, para. 231 (emphasis original).
[257] United States' first written submission, para. 232.
[258] United States' first written submission, para. 237.
[259] United States' response to Panel question No. 19, paras. 111–113; United States' second written submission, para. 23; United States' first written submission, para. 92.
[260] United States' response to Panel question No. 21. Paras. 136-142; United States' response to Panel question No. 19, paras. 116-118; United States' first written submission, paras. 132-134 and 145.
[261] United States' response to Panel question No. 17, paras. 88-89.
[262] United States' response to Panel question No. 20, paras. 121-130.

the measure rightly denies access to the label for tuna products containing tuna caught by this method".[263]

7.5.2.2.2 Analysis by the Panel

7.117. We begin by recalling that we have addressed the United States' claims on jurisdiction above.[264] In that discussion, we disagreed with the United States' argument that Mexico's "claim falls outside this Panel's terms of reference because [it] is premised entirely on the elements of the measure that the DSB did not find to be in breach of Article 2.1 and that are unchanged from the original measure".[265] We noted that the Appellate Body's findings, and the DSB's rulings and recommendations, concerned the original tuna measure *as a whole*, so that the United States was not "entitled to assume" that any aspect of the measure was automatically and uncontestably consistent with the covered agreements.[266]

7.118. Nevertheless, in our opinion, the United States' argumentation on the eligibility criteria raises an additional (though certainly related) issue that we dealt with only briefly above: the place and role in this report of findings made by the panel and the Appellate Body in the original proceedings. The eligibility criteria were, after all, at the very heart of the original proceedings, and in the United States' view "the original panel has already fully addressed Mexico's argument [on this point] and found it lacking".[267] According to the United States, the Panel should not give Mexico the opportunity to "appeal" the Appellate Body's report[268], since doing so would upset the finality of DSB rulings and recommendations. In the opinion of the United States, adopted Appellate Body findings "must be treated by the parties to a particular dispute *as a final resolution to that dispute*".[269]

7.119. As we explained above in our discussion of the legal test under Article 2.1 of the TBT Agreement, it is appropriate for this Panel, as a compliance panel composed under Article 21.5 of the DSU to review compliance with a ruling made by the DSB in previous proceedings, to rely upon factual and legal conclusions made by the original panel and the Appellate Body, at least in the absence of compelling new evidence that would render those previous findings unsustainable. The Panel agrees with the United States that, as a matter of principle, parties in compliance proceedings should not be afforded the opportunity to re-litigate questions that have already been "definitively settled" by the Appellate Body.[270] The question for us, however, is what precisely was "definitively settled" by the Appellate Body in the original proceedings in this matter.

7.120. In the Panel's view, it is quite clear that the Appellate Body in the original proceedings settled the question whether the United States can disqualify tuna caught by setting on dolphins from accessing the dolphin-safe label. The Appellate Body found that setting on dolphins is "particularly harmful to dolphins"[271], because:

> [V]arious adverse impacts can arise from setting on dolphins, beyond observed mortalities, including cow-calf separation during the chasing and encirclement, threatening the subsistence of the calf and adding casualties to the number of observed moralities, as well as muscular damage, immune and reproductive system failures, and other adverse health consequences.

7.121. Importantly, the Appellate Body also accepted that these harms arise as a result of the "chase itself". Consequentially, it affirmed the original panel's conclusion that "the US objectives …

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[263] United States' second written submission, para. 93.
[264] See section 7.3 above.
[265] United States' first written submission, para. 202.
[266] Cf United states' first written submission, para. 207. Indeed, as we explained, the fact that aspects of the measure remain unchanged may be *problematic* precisely because the Appellate Body found that the original tuna measure *as a whole* was inconsistent with Article 2.1 of the TBT Agreement. The question before us is whether, by modifying one part of the original measure (i.e. the implementing regulations), the United States has been able to bring the entire measure, which consists of the (unchanged) DPCIA and the *Hogarth* ruling as well as the relevant implementing regulations, into conformity with the WTO Agreement.
[267] United States' first written submission, para. 230.
[268] United States' first written submission, para. 202.
[269] United States' first written submission, para. 198 (emphasis original).
[270] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 98.
[271] Appellate Body Report, *US – Tuna II (Mexico)*, para. 289.

to minimize unobserved consequences of setting on dolphins" would not be attainable if tuna caught by setting-on dolphins were eligible for the dolphin-safe label[272], because "'to the extent that it would not discourage these unobserved effects of setting on dolphins and their potential consequences on dolphin populations … [allowing tuna caught by setting on dolphins to be labelled dolphin-safe] … could potentially provide a lesser degree of protection than the existing US dolphin-safe provisions", even where setting on dolphins is conducted in an AIDCP-compliant manner.[273] The Appellate Body thus concluded that the disqualification of tuna caught by setting on dolphins from accessing the dolphin-safe label "fully addresse[s]" the risks posed to dolphins by setting on dolphins, and made clear that requiring the United States to remove that disqualification would undermine the United States' achievement of its desired level of protection.[274]

7.122. As the Panel reads it, then, the Appellate Body clearly found that setting on dolphins causes observed and unobserved harm to dolphins. However, as we understand it, what makes setting on dolphins particularly harmful is the fact that it causes certain unobserved effects *beyond* mortality and injury "as a result of the chase itself".[275] These harms would continue to exist "even if measures are taken in order to avoid the taking and killing of dolphins on the nets".[276] It is precisely because these unobserved harms cannot be mitigated by measures to avoid killing and injuring dolphins that the original panel and the Appellate Body found that the United States is entitled to treat setting on dolphins differently from other fishing methods.

7.123. Therefore, we reaffirm the Appellate Body's finding that the United States is entitled, in pursuit of its desired level of protection, to disqualify tuna caught by that method from ever being labelled as dolphin-safe. We recall that the original US measure was considered WTO-inconsistent (and in particular inconsistent with Article 2.1 of the TBT), not because it disqualified tuna caught by setting on dolphins from accessing the dolphin-safe label, but because the original tuna measure *was not even-handed with respect to other methods of fishing* which may also cause harm to dolphins – a fact that was not reflected in the original dolphin labelling regime.

7.124. In our view, a careful reading of the Appellate Body report also shows that the Appellate Body considered and answered the question whether the failure of the tuna labelling regime to disqualify *other* methods of tuna fishing necessarily deprives the measure of even-handedness. Importantly, the Appellate Body found that "imposing a requirement that an independent observer certify that no dolphins were killed or seriously injured in the course of fishing operations in which the tuna was caught would [not] be the *only* way for the United States to calibrate its 'dolphin-safe' labelling provisions to the risks that … [are] posed by fishing techniques other than setting on dolphins".[277] As we read it, this statement has a number of important implications. First, it recognizes that, although "the risks to dolphins from other fishing techniques are [not] insignificant"[278], nevertheless the United States *may* distinguish between setting on dolphins, which, as we noted, it found was "particularly harmful", and other methods of tuna fishing.

7.125. Secondly, and crucially for the question before us, the statement indicates that, in the view of the Appellate Body, the United States may bring its dolphin-safe labelling regime into conformity with Article 2.1 of the TBT Agreement *without disqualifying methods of tuna fishing other than setting on dolphins*. This is so because the question of observer certification only arises in respect of tuna fishing methods that are, in principle, qualified to catch dolphin-safe tuna. Certification requirements are simply not relevant to fishing methods that are disqualified from catching dolphin-safe tuna, because tuna caught by those methods are *always* and *under all circumstances ineligible* to receive the label. Certification, which is the documentary precondition to accessing the label, is thus only relevant in respect of tuna that is in principle eligible to be labelled dolphin-safe. In stating that the United States could "calibrate" its measure without necessarily requiring observer coverage for tuna caught other than by setting on dolphins, the Appellate Body implicitly recognized that tuna fishing methods other than setting on dolphins *do not need to be disqualified in order for the United States to bring its measure info conformity with the TBT Agreement*. Put simply, we do not believe that the Appellate Body would even have touched upon the issue of certification, which is only relevant to tuna fishing methods that are, at

[272] Panel Report, *US – Tuna II (Mexico)*, para. 7.613.
[273] Panel Report, *US – Tuna II (Mexico)*, para. 7.613.
[274] Appellate Body Report, *US – Tuna II (Mexico)*, para. 287.
[275] Panel Report, *US – Tuna II (Mexico)*, para. 7.504.
[276] Panel Report, *US – Tuna II (Mexico)*, para. 7.504.
[277] Appellate Body Report, *US – Tuna II (Mexico)*, para. 296 (emphasis original).
[278] Appellate Body Report, *US – Tuna II (Mexico)*, para. 289.

least in principle, *eligible* to catch dolphin-safe tuna, if it had considered that the United States must necessarily disqualify methods of fishing other than setting on dolphins in order to make its measure even-handed.

7.126. Accordingly, in the Panel's opinion, the original proceedings have settled the question whether the disqualification of tuna caught by setting on dolphins, together with the qualification of tuna caught by other fishing methods, is inconsistent with Article 2.1 of the TBT Agreement. The Appellate Body found that it is not. In light of this finding, we do not think it is appropriate for us to re-open this inquiry. Rather, we respect and reaffirm the finding of the Appellate Body that, to the extent that they modify the conditions of competition in the US market to the detriment of Mexican tuna and tuna products, the eligibility criteria are even-handed, and accordingly are not inconsistent with Article 2.1 of the TBT Agreement.

7.127. Of course, we note that the Appellate Body ultimately found that the original tuna measure was inconsistent with Article 2.1 of the TBT Agreement. This finding was based, however, *not* on the fact that the United States disqualified tuna caught by setting on dolphins from accessing the dolphin-safe label, but rather on the fact that the regulatory scheme imposed by the United States on tuna fishing methods *other* than setting on dolphins, which are eligible to catch dolphin-safe tuna, did not sufficiently address the risks posed to dolphins by those methods.[279] The measure was therefore not "even-handed", in violation of Article 2.1.

7.128. Accordingly, the question for this Panel is *not* whether the United States can, consistently with Article 2.1 of the TBT Agreement, disqualify all tuna caught by setting on dolphins from accessing the dolphin-safe label while qualifying all other methods. The question for us is rather whether the amended tuna measure, including through or by way of the modifications made by the 2013 Final Rule, sufficiently addresses the risks posed to dolphins from methods of tuna fishing other than setting on dolphins, that is, fishing methods that are qualified to catch dolphin-safe tuna. It is, therefore, only the regulatory regime that currently applies to *those* other fishing methods, which are qualified to catch dolphin-safe tuna, that this Panel should examine.

7.129. In the course of arguing about this issue, both parties have made reference to a range of exhibits. Some were presented in the original proceedings, and some were new. In our view, the new evidence presented by both parties on this question ultimately supports our decision to reaffirm the conclusions in the original dispute that the United States is entitled to treat setting on dolphins differently from other tuna fishing methods. The evidence presented by Mexico, especially in its first written submission, certainly suggests that very significant numbers of dolphins are killed in tuna fishing operations outside of the ETP large purse seine fishery.[280] Like the original panel and the Appellate Body[281] (and, we note, the United States itself)[282], we accept that tuna fisheries other than the ETP large purse seine fishery may, and in fact have, caused significant harms to dolphins.

7.130. In our view, none of the new evidence submitted by Mexico is sufficient to undermine the Appellate Body's finding that no fishing method other than setting on dolphins has effects on dolphins as consistently harmful as those caused by setting on dolphins.[283] With respect to gillnet fishing, Mexico has submitted substantial evidence showing that gillnets kill and seriously injure dolphins. None of this evidence, however, suggests that gillnets have the same kind of unobservable effects as setting on dolphins. The closest that the evidence comes to making such an allegation is the finding by Gomercic et al[284] that "[e]ven when dolphins do not immediately drown in a gillnet, interactions with the net causes dolphins to die later".[285] Specifically, the report suggests that gillnets may cause eventual strangulation even of dolphins that manage to break free from the net. Accompanying this statement is a photograph of a dolphin with a "gillnet part…protruding from [its] mouth".[286] While it may be that dolphins injured in gillnets *die* at some

[279] Appellate Body Report, *US – Tuna II (Mexico)*, para. 298.
[280] See generally Mexico's first written submission, section III.A.
[281] Appellate Body Report, *US – Tuna II (Mexico)*, para. 289.
[282] United States' response to Panel question no. 15, para. 81.
[283] Appellate Body Report, *US – Tuna II (Mexico)*, para. 289 (noting that other fishing methods may give rise to the "same level of risk" only "in some circumstances").
[284] M. Gomercic et. al., "Bottlenose Dolphin (Tursiops Truncatus) Depredation resulting in Larynx Strangulation with Gill-net Parts", 25 *Marine Mammal Science* 392 (2009) (Exhibit MEX-52), p. 396.
[285] Mexico's first written submission, para. 131.
[286] Mexico's first written submission, para. 131.

later time, injuries such as those leading to gillnet parts "protruding from the mouth" of dolphins would seem clearly to be the kind of "serious injury" that is observable and that must, under the amended tuna measure, be certified. Accordingly, while the evidence presented by Mexico suggests that gillnets caused *delayed* death or serious injury, it does not suggest that such nets cause the same kind of unobservable harms as are caused by setting on dolphins.

7.131. With respect to longline fishing, Mexico has presented convincing evidence that "longline fishing operations kill and maim dolphins".[287] Mexico's evidence also suggests that, at least in some fisheries, longlining is having a negative effect on the sustainability of dolphin populations.[288] Here again, however, none of Mexico's evidence suggests that longline fishing has unobservable effects similar to those caused by setting in dolphins. Mexico claims that "even when dolphins do not immediately die from an interaction with a longline, they are at risk to suffer from maiming of their mouths, dorsal fins, and other body parts, as well as from eventual drowning when they cannot free themselves from the lines".[289] In its second written submission, Mexico submits that "dolphins suffer observed and unobserved adverse effects – including serious injury or death – as a result of commercial tuna fishing operations throughout the fisheries of the world (i.e., both within and outside the ETP) by every country with a commercial tuna fishing fleet".[290] In support of this claim, Mexico cites to section II.A.2 of its second written submission. This section concerns "Mexico's evidence of risks to dolphins in non-ETP fisheries". While the evidence summarized in this section clearly establishes that tuna fishing methods other than setting on dolphins pose serious threats to dolphins, we have been unable to find any indication in this evidence that fishing methods other than setting on dolphins cause the kinds of unobservable harms that are caused by setting on dolphins.

7.132. In order to help the Panel understand whether fishing methods other than setting on dolphins cause unobservable harms similar to those caused by setting on dolphins – that is, harms of which no evidence is present at the time of the catch – the Panel asked the parties to explain whether "fishing methods other than setting on dolphins cause unobserved harms".[291] In its response, Mexico summarized a substantial number of reports and studies testifying to the deleterious effects that tuna fishing methods other than setting on dolphins may have on dolphins. This evidence presents a compelling case that various tuna fishing methods around the world are negatively impacting the health and well-being of dolphin populations.[292] None of it, however, suggests that fishing methods other than setting on dolphins inflict the same kinds of unobservable harms that are caused by net sets. To the contrary, Mexico's evidence concerns the extent of mortality and serious injury caused by tuna fishing methods including FAD fishing,[293] longline fishing,[294] gillnet fishing,[295] trawl fishing,[296] and driftnet fishing.[297] These, however, are precisely the kind of interactions that can and, under the amended tuna measure, must be certified, and whose occurrence renders ineligible for the dolphin-safe label any tuna caught in the set in which the harmful interaction (i.e. the death or serious injury) occurred. They are not the

[287] Mexico's first written submission, para. 138.

[288] D. Hamer, S. Childerhous and N. Gales, "Odontocete Bycatch and Depredation in Longline Fisheries: A Review of Available Literature and of Potential Solution", 28 *Marine Mammal Science* 345 (2012) (Exhibit MEX-55), p. 345.

[289] Mexico's first written submission, para. 149.

[290] Mexico's second written submission, para. 319.

[291] Panel's question No. 15.

[292] See Mexico's response to Panel question No. 15, paras. 85-92.

[293] K.S.S.M. Yousuf et. al., "Observations on Incidental Catch of Cetaceans in Three Landing Centres Along the Indian Coast", 2 *Marine Biodiversity Records* 1 (Exhibit MEX-50), p 4.

[294] *Kobe II Bycatch Workshop Background Paper* (Exhibit MEX-39), p. 2; D. Hamer, S. Childerhous and N. Gales, "Odontocete Bycatch and Depredation in Longline Fisheries: A Review of Available Literature and of Potential Solution", 28 *Marine Mammal Science* 345 (2012) (Exhibit MEX-55); Pelagic Longline Take Reduction Team, *Key Outcomes* (NOAA Memorandum, 21-23 August 2012) (Exhibit MEX-62), pp. 4 and 5; Turtle Restoration Project, *Pillaging the Pacific: Pelagic Longline Fishing Captures About 4.4 Million Sharks, Billfish, Seabirds, Sea Turtles, and Marine Mammals Each Year in the Pacific Ocean* (November 16, 2004) (Exhibit MEX-64); R. Baird and A. Gogone, "False Killer Whale Dorsal Fin Disfigurements as a Possible Indicator of Long-Line Fishery Interactions in Hawaiian Waters", 59 *Pacific Science* 592 (2005) (Exhibit MEX-66, p. 597).

[295] *Kobe II Bycatch Workshop Background Paper* (Exhibit MEX-39), p. 2.

[296] A. Ross and S. Isaac, *The Net Effect? A Review of Cetacean Bycatch in Pelagic Trawls and other Fisheries in the North-East Atlantic* (Exhibit MEX-71), p. 15; L. Nunny, *The Price of Fish: A Review of Cetacean Bycatch in Fisheries in the North-East Atlantic* (Exhibit MEX-72), p. 16.

[297] Z. Smith et. al., *Net Loss: The Killing of Marine Mammals in Foreign Fisheries* (NRDC Report R:13-11-B, January 2014) (Exhibit MEX-103), p. 29.

kind of unobservable harm that we have found occurs as a result of setting on dolphins, and which cannot be certified because it leaves no observable evidence.

7.133. We note Mexico's argument that the United States has "expressly agreed that fishing methods other than setting on dolphins cause unobserved harms".[298] In support of this claim, Mexico cites footnote 20 of the United States' second written submission, which reads:[299]

> [T]he United States does not suggest that fishing methods other than setting on dolphins do not cause *any* unobserved harms to dolphins. As we have said, many fishing techniques have the potential to harm marine mammals, including dolphins, and direct harms will have indirect (and unobserved) effects. If a mother dolphin is accidentally drowned in a FAD purse seine set, for example, that observed harm may result in unobserved harm to her calf, namely increased vulnerability to predators and starvation. But Mexico puts forward no evidence that other fishing methods produce anywhere close to the level of unobserved harm that setting on dolphins causes as a result of the chase in itself.

7.134. In the Panel's opinion, footnote 20 is not, as Mexico argues, a concession that fishing methods other than setting on dolphins cause the kind of unobservable harms that dolphins suffer as a "result of the chase in itself". Footnote 20 recognizes that indirect and unobservable harms may follow consequentially from *observable* harms caused by tuna fishing methods other than setting on dolphins. Where, for example, a mother dolphin is killed or seriously injured in a gear set, her calf may also suffer as a result of her (the mother's) inability to provide care, including food and protection. The key point, however, is that these harms flow from mortalities or injuries that are themselves observable, and whose occurrence renders non-dolphin-safe all tuna caught in the set or gear deployment in which the injury or mortality was sustained. These harms may be serious. However, because they flow directly from observable harms, such as serious injury, all of which could be detected and reported, unlike the kinds of unobservable harms caused by setting on dolphins, these types of indirect harms are thus qualitatively different from the kind of unobservable harms caused by setting on dolphins. As explained above, these latter harms (i.e. caused by setting on dolphins) are unobservable in the sense that no evidence of their occurrence is produced during the set. They may be inflicted even in cases where no dolphin is caught in the net, or where any caught dolphin is released without apparent injury. Accordingly, they are harms whose occurrence cannot be recorded. Obviously, this would undermine the United States' objectives, which, as Mexico acknowledges, are "(i) ensuring that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins; and (ii) contributing to the protection of dolphins by ensuring the US market is not used to encourage fishing fleets in a manner that adversely affects dolphins".[300]

7.135. In light of the above, our view is that Mexico has not provided evidence sufficient to demonstrate that setting on dolphins does not cause observed and unobserved harms to dolphins, or that other tuna fishing methods consistently cause similar harms. Rather, the Panel agrees with the United States that "*even if* there are tuna fisheries using…gear types that produce the same number of dolphin mortalities and serious injuries allowed or caused in the ETP…it is simply *not* the case that such fisheries are producing the same level of unobserved harms, such as cow-calf separation, muscular damage, immune and reproductive system failures, which arise as a result of the chase in itself".[301] As we understand it, this position was also the basis of the original panel and Appellate Body's holding on this issue. Therefore, we find that the new evidence presented in these proceedings merely supports the conclusion reached by the panel and the Appellate Body in the original proceedings.

7.5.2.3 Mexico's remaining claims of less favourable treatment: the different certification and tracking and verification requirements

7.136. In the original proceedings, the panel found, and the Appellate Body accepted, that disqualifying tuna caught by setting on dolphins from accessing the dolphin-safe label "fully

[298] Mexico's response to Panel question No. 15, para. 88.
[299] United States' second written submission, para. 17, footnote 20.
[300] Mexico's second written submission, para. 3.
[301] United States' first written submission, para. 113 (internal citations omitted).

addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP".[302] The Appellate Body also found, however, that "'the use of certain fishing methods other than setting on dolphins 'outside the ETP may produce and has produced significant levels of dolphin bycatch', and that 'the US dolphin-safe provisions do not address observed mortality', and any resulting adverse effects on dolphin populations, for tuna not caught by setting on dolphins".[303] Because the original measure fully addressed the risks posed to dolphins by the ETP large purse seine fishery, but did not sufficiently address the risks to dolphins arising in other fisheries, the Appellate Body found that the measure was inconsistent with Article 2.1 of the TBT Agreement.

7.137. As we understand it, then, the Appellate Body required the United States to modify its dolphin-safe labelling regime so as to ensure that it sufficiently addresses similar risks posed to dolphins by all fishing methods in all oceans. In the present proceedings, Mexico argues that the United States has not done so. In support of this position, as we set out above, it points to three regulatory distinctions that, in its view, continue not to adequately address the risks posed to dolphins by methods of fishing other than setting on dolphins in the ETP: the eligibility criteria, the different certification requirements, and the different tracking and verification requirements. We explained above that the eligibility criteria were found by the Appellate Body in the original proceedings not to violate Article 2.1 of the TBT Agreement. Our analysis now turns to the remaining two distinctions. Our task in respect of these is to determine whether the amended tuna measure sufficiently addresses the various risks arising to dolphins as a result of different fishing methods in different oceans, or whether it continues "not [to] address observed mortality … for tuna" caught other than by setting on dolphins in the ETP.

7.138. We note that this determination arises only insofar as the United States has chosen to address risks arising to dolphins as a result of tuna fishing. In other words, there is no general obligation under WTO law for the United States to protect dolphins. The United States' obligation under the WTO Agreement is, speaking generally, not to discriminate against imported products. But insofar as the United States has chosen – and succeeded – to fully address the risks posed to dolphins by setting on dolphins in the ETP, the Appellate Body found that it must also address risks to dolphins arising from other fisheries if it is to be non-discriminatory.[304]

7.139. In the original proceedings, the Appellate Body accepted that "the use of certain tuna fishing techniques other than setting on dolphins may … cause harm to dolphins".[305] It also found that even though "certain environmental conditions in the ETP (such as the intensity of tuna-dolphin association) are unique, the evidence … suggests that the *risks* faced by dolphin populations in the ETP are *not*".[306] The Appellate Body was "not persuaded that at least some of the dolphin populations affected by fishing techniques other than setting on dolphins are not facing risks at least equivalent to those currently faced by dolphin populations in the ETP".[307]

7.140. Importantly, the Appellate Body found that the certification required by the original tuna measure for methods of fishing other than setting on dolphins – that "no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip" – did "not address risks from other fishing methods, such as FADs". The Appellate Body explained that "risks to dolphins resulting from fishing methods other than setting on dolphins could 'only be monitored by imposing a different substantive requirement, i.e. that no dolphins were killed or seriously injured in the sets in which tuna was caught'".[308]

7.141. Of course, imposing a new substantive requirement is precisely what the United States has done by way of the 2013 Final Rule. As the Panel noted in the descriptive part of its report, the 2013 Final Rule requires that, from the date of its entry into force, *all* tuna, wherever and however caught, can only be labelled as dolphin-safe if it was not caught in a set or other gear deployment

[302] Appellate Body Report, *US – Tuna II (Mexico)*, para. 297.
[303] Appellate Body Report, *US – Tuna II (Mexico)*, para. 298.
[304] Appellate Body Report, *US – Tuna II (Mexico)*, para. 298.
[305] Appellate Body Report, *US – Tuna II (Mexico)*, para. 288 (citing Panel Report, *US – Tuna II (Mexico)*, para. 7.520).
[306] Appellate Body Report, *US – Tuna II (Mexico)*, para. 288 (citing Panel Report, *US – Tuna II (Mexico)*, para. 7.552) (emphasis original).
[307] Appellate Body Report, *US – Tuna II (Mexico)*, para. 288 (citing Panel Report, *US – Tuna II (Mexico)*, para. 7.617).
[308] Appellate Body Report, *US – Tuna II (Mexico)*, para. 292 (citing Panel Report, *US – Tuna II (Mexico)*, para. 7.561).

in which one or more dolphins was killed or seriously injured. This means that the substantive certification required for all tuna, regardless of where or how it was caught, is now the same. In the Panel's view, this new uniformity in the required substantive certification addresses the specific concern identified by the Appellate Body at paragraph 292 of its report, and moves the amended measure towards compliance with WTO law.

7.142. While Mexico has not challenged the new substantive certification requirements, it argues that the continued differences in *who* must make the substantive certifications in what circumstances, and the different tracking and verification requirements applied inside the ETP large purse seine fishery and outside it, mean that the amended tuna measure does not address similar risks posed to dolphins in different fisheries in an even-handed manner, and therefore continues to violate Article 2.1 of the TBT Agreement.

7.143. Before proceeding, the Panel recalls that the two distinctions at issue in this section of our Report are relevant only to tuna eligible and intended to receive the dolphin-safe label. The amended tuna measure does not *prohibit* non-dolphin-safe tuna from being sold in the United States, but only controls access to the US dolphin-safe label.[309] Accordingly, tuna that is either ineligible to access this label (i.e. tuna caught by setting on dolphins) or not intended to be sold under the dolphin-safe label is not affected by these regulatory distinctions.

7.144. Regarding our order of analysis, the Panel notes that in its submissions Mexico deals first with the different tracking and verification requirements and second with the different certification requirements. In our report, however, we deal with the different certification requirements first and the different tracking and verification requirements second, to reflect what we understand to be the chronological order in which the requirements imposed by the relevant regulatory distinctions arise.[310] This is simply a matter of presentation, and we do not believe that it has any significance for the content of our analysis.

7.5.2.4 The different certification requirements

7.145. Mexico describes the different certification requirements as follows:

> The mandatory independent observer requirements for tuna caught in the ETP by setting on dolphins in accordance with the AIDCP and the absence of such requirements for tuna caught outside the ETP using the same and different fishing methods.[311]

7.146. Before proceeding to our substantive analysis, we note that Mexico's description of the regulatory distinction in its first written submission is not entirely complete, insofar as it may seem to suggest that tuna fishing vessels outside the ETP and vessels other than large purse seine vessels inside the ETP are *never* subject to mandatory observer requirements. Such suggestion would be incorrect. As we explained in the descriptive part of the report, such vessels may indeed be subject to mandatory observer requirements if certain conditions are met.[312]

7.147. Additionally, Mexico's description of the distinction in its first written submission refers to observer requirements for "tuna caught in the ETP by setting on dolphins". As we understand it, however, the amended tuna measure requires an observer certification for all tuna caught by large purse seine vessels in the ETP. What is decisive for the observer certification requirement is thus not the method actually used to catch tuna (e.g. setting on dolphins) but the type of vessel and the location of its fishing operation. Large purse seine vessels in the ETP are, under the amended tuna measure, required to present proof of an AIDCP-compliant observer certification (and therefore to carry observers) whether or not they intend to or actually do set on dolphins.

7.148. Accordingly, the relevant regulatory distinction could, in our view, be more accurately articulated as being: The mandatory independent observer certification requirements for all tuna caught in the ETP large purse seine fishery and the absence of such requirements (unless certain

[309] See para. 3.2 above.

[310] Thus, the certification obligations arises first, at the time catch; and the record-keeping obligations arise only subsequently, once the tuna catch has been stored on board the fishing vessel.

[311] Mexico's first written submission, para. 236.

[312] See para. 3.45 above.

determinations have been made with respect to the fishery in which the tuna was caught) for *all* tuna caught in all other fisheries.

7.149. Indeed, Mexico itself revised its description of this regulatory distinction over the course of the proceedings. In its opening statement at the Panel's meeting with the parties, Mexico described the distinction in the following terms:

> In the case of Mexican tuna, the initial designation of dolphin-safe status is subject to mandatory independent observer requirements at the point when the tuna is harvested from the ocean, which prevents non-dolphin-safe tuna from being mislabelled as dolphin-safe, while, in the case of tuna from other countries, the initial designation of dolphin-safe status is not made by independent observers, thereby allowing the tuna to be mislabelled as dolphin-safe when, in fact, it is not.[313]

7.150. In our view, this formulation more accurately captures the regulatory distinction at issue (although we note that all tuna caught in the ETP large purse seine fishery, including tuna caught by vessels belonging to countries other than Mexico, is subject to the observer requirement, so that the distinction is *de facto* rather than *de jure*). This formulation is consistent with our understanding as explained in paragraph 7.148 above. Therefore, our analysis proceeds on the basis of this description of the relevant regulatory distinction.

7.151. In the following paragraphs, we consider, first, whether the different certification requirements modify the conditions of competition in the United States' tuna market to the detriment of Mexican tuna and tuna products. If Mexico is able to convince us that such detrimental impact exists, we will continue to examine whether the detrimental impact stems exclusively from a legitimate regulatory distinction.

7.5.2.4.1 Whether the different certification requirements modify the conditions of competition in the United States' market to the detriment of like Mexican tuna and tuna products

7.5.2.4.1.1 Arguments of the parties

7.152. As the Panel noted in the context of its discussion above of the eligibility criteria, the core of Mexico's claim on detrimental treatment is that, under the amended tuna measure, the majority of Mexican tuna and tuna products – being caught or made from tuna caught by setting on dolphins – is ineligible to receive the United States dolphin-safe label, while the majority of tuna and tuna products caught or manufactured by the United States and other WTO Members – being caught or made from tuna caught other than by setting on dolphins – are eligible. In light of this central claim, Mexico's argument about the detrimental impact caused by the different certification requirements is not that these requirements in themselves block or hinder Mexican access to the dolphin-safe label. Rather, Mexico's complaint is that:

> [T]he absence of sufficient … observer requirements for tuna that it used to produce tuna products from the United States and other countries means that Mexican tuna products are losing competitive opportunities to tuna products that may be inaccurately labelled as dolphin-safe. This difference is what is creating the detrimental impact.[314]

7.153. According to Mexico, the detrimental impact caused by the different certification requirements does not stem from the "denial of a competitive opportunity" – that is, beyond or additional to the denial inherent in the disqualification of tuna caught by setting on dolphins[315] – but rather from the granting of "a competitive advantage" to tuna and tuna products from the United States and other WTO Members.[316]

7.154. As we understand it, then, Mexico's claim is that by requiring observer certification for all tuna caught by large purse seine vessels in the ETP while not requiring the same for tuna caught

[313] Mexico's opening statement, para. 52.
[314] Mexico's second written submission, para. 117 (emphasis original).
[315] Mexico's opening statement, para. 50.
[316] Mexico's second written submission, para. 117.

other than by large purse seine vessels in the ETP, the amended tuna measure imposes a lighter burden, in terms of accessing the dolphin-safe label, on tuna caught in fisheries other than by setting on dolphins in the ETP.[317] By making it easier for tuna caught other than by setting on dolphins in the ETP to access the label, the different certification requirements provide such tuna with a competitive advantage. This modifies the conditions of competition to the detriment of Mexican tuna and tuna products. Mexico also alleges that the different certification requirements create an opportunity for tuna caught in a set or other gear deployment in which a dolphin was killed or seriously injured to be incorrectly labelled as dolphin-safe. As a result, tuna that is not in fact dolphin-safe could enjoy the commercial advantage of bearing the dolphin-safe label. In contrast, "[i]n the case of Mexican tuna, the initial designation of dolphin-safe status is subject to mandatory independent observer requirements at the point when the tuna is harvested from the ocean, which *prevents* non-dolphin-safe tuna from being mislabeled as dolphin-safe".[318]

7.155. The United States rejects Mexico's arguments. As we noted above, the United States' primary submission is that "the detrimental impact does not stem from either" the different certification requirements or the different tracking and verification requirements. Rather, "Mexico's first element [i.e. the eligibility criteria] *is* the detrimental impact", and since "Mexican tuna product containing tuna caught by setting on dolphins would still be ineligible for the 'dolphin safe' label" even if the different certification and tracking and verification requirements did not exist, "Mexico simply cannot establish a causal connection between the detrimental impact" and the different certification and tracking and verification requirements".

7.156. In support of this claim, the United States argues that "Mexico has put forward *zero* evidence to prove" that either the different certification or the different tracking and verification requirements modify the conditions of competition in the United States tuna market to the detriment of Mexican tuna and tuna products. According to the United States:

> [W]hat Mexico appears to be asserting is that its market access would increase if either one of two things happen: 1) the United States eliminates the need for the Form 370 that accompanies Mexican tuna product to list the AIDCP mandated tracking number and a Mexican government certification that an observer was on board the vessel; or 2) the United States requires all tuna product containing tuna to adhere to AIDCP-equivalent record-keeping/verification and observer coverage requirements.
>
> But Mexico puts forward no evidence that more Mexican non-dolphin safe tuna product would be sold in the US market under either scenario. Consumer preferences have not changed in the United States. Consumer demand for non-dolphin safe tuna product remains low. No causal connection exists between these requirements and denial of "access" to the label that the Appellate Body determined constituted the detrimental impact.[319]

7.157. Additionally, in its opening statement at the Panel's meeting with the parties, the United States submitted that "Mexico [has not] put forward any evidence that even if one could find any illegal marketing, this unfortunate occurrence would be happening at a higher rate than for tuna product containing ETP tuna".[320]

7.158. As such, the United States asks the Panel to reject Mexico's arguments.

7.5.2.4.1.2 Analysis by the Panel

7.159. As the Panel explained in its discussion of the legal test under Article 2.1[321], less favourable treatment within the meaning of Article 2.1 of the TBT Agreement arises where (a) the measure at issue modifies the conditions of competition in the relevant market to the detriment of imported products; and (b) at least where that detrimental treatment is *de facto*, the detrimental

[317] Mexico's second written submission, para. 193 (arguing that the amended tuna measure imposes "one standard for tuna caught inside the ETP, and a separate and lower standard for tuna caught outside the ETP").

[318] Mexico's opening statement, para. 52 (emphasis added).

[319] United States' second written submission, paras. 76-77.

[320] United States' opening statement, para. 26.

[321] See section 7.5.1 above.

treatment identified in (a) does not stem exclusively from a legitimate regulatory distinction. A panel must necessarily make a finding on the existence of detrimental treatment before proceeding to consider whether such detrimental treatment stems exclusively from a legitimate regulatory distinction. If a complainant is unable to make a *prima facie* case for the existence of such treatment, a panel cannot proceed to the second step of the less favourable treatment analysis, since, as the Appellate Body has said, only those aspects of a technical regulation giving rise to detrimental treatment must be examined under the legitimate regulatory distinction test.[322] Accordingly, if Mexico is unable to show *prima facie* that the different certification requirements afford detrimental treatment to its tuna products in the United States' market, we do not need to proceed to the second part of the analysis under Article 2.1 of the TBT Agreement.

7.160. The Panel has already found above that Mexico has put forward a distinct claim of less favourable treatment in respect of the different certification and tracking and verification requirements, and that it is appropriate for us to consider that claim, even though it developed over the course of Mexico's first and second written submissions. Accordingly, we now turn to consider the merits of Mexico's case.

7.161. The first question we must address is whether Mexico has succeeded in proving, *prima facie*, that the different certification requirements modify the conditions of competition to the detriment of like tuna and tuna products from Mexico. In particular, we must determine whether, as Mexico has argued, the absence of an observer coverage requirement for fishing vessels other than large purse seine vessels in the ETP does grant a competitive advantage by imposing a lighter burden, in terms of accessing the dolphin-safe label, on tuna and tuna products made from tuna caught other than by large purse seine vessels in the ETP, including by increasing the likelihood that such tuna may be labelled as dolphin-safe even if caught in a set or other gear deployment in which dolphins were killed or seriously injured.

7.162. In the Panel's view, it is clear that by not requiring observer coverage outside of the ETP large purse seine fishery, the amended tuna measure imposes a lighter burden on tuna and tuna products made from tuna caught other than by large purse seine vessels in the ETP. The United States has recognized that observer coverage involves the expenditure of significant resources[323], and both parties in their oral responses at the Panel meeting and in their written responses to the Panel's questions made clear that the costs of implementing observer coverage can be significant.[324] Indeed, the United States explicitly recognized that the resource expenditure required to establish and maintain observer programs "impose[s] [an] enormous barrier to entry" into the US tuna market, and may cost hundreds of millions of dollars.[325] In our view, these facts clearly point to the conclusion that the different certification requirements impose a lesser burden on tuna and tuna products made from tuna caught outside the ETP large purse seine fishery, and thus modify the conditions of competition to the detriment of Mexican tuna and tuna products.

7.163. With respect to Mexico's allegation that the different certification requirements detrimentally modify the conditions of competition because they make it more likely that tuna caught outside the ETP large purse seine fishery will be inaccurately labelled, we agree with the United States that Mexico has not provided specific "evidence that non-dolphin safe tuna product produced outside the ETP is being illegally marketed in the United States as dolphin safe".[326] We are not convinced, however, that Mexico is, as a matter of law, required to produce such evidence to sustain its claim. As we explained in our discussion of the standard of proof[327], it is well established that, to make out a claim of detrimental impact, a complainant is not expected to show that the measure at issue will "give rise to less favourable treatment for the like imported products in each and every case".[328] In fact, the Appellate Body has repeatedly held, in the context of the less favourable treatment analysis under Article III:4 of the GATT 1994, that "the examination [of

[322] Appellate Body Report, *US – Tuna II (Mexico)*, para. 286.
[323] United States' first written submission, paras. 265 and 266.
[324] United States' first written submission, para. 265; United States' and Mexico's responses to Panel questions Nos. 48, 49 and 50. See especially Mexico's response to Panel question No. 48, paras. 137 and 138 (explaining the costs borne by Mexico).
[325] United States' response to Panel question No. 49, para. 266.
[326] United States' opening statement, para. 26.
[327] See section 7.4.2 above.
[328] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 221.

whether a measure modifies the conditions of competition to the detriment of imported products] need not be based on the *actual effects* of the contested measure in the marketplace".[329]

7.164. This observation applies with special force in the context of the detrimental treatment analysis under Article 2.1, concerning which the Appellate Body has instructed panels to pay close attention to the "design, architecture, revealing structure, operation, and application" of the technical regulation at issue.[330] According to this instruction, panels are both entitled and, indeed, required to carefully consider what might be called the "objective" features or characteristics of the measure – that is, not only how the measure in fact operates, but how it is designed, how its various parts fit together, and what consequences might flow from its overall structure and architecture. Accordingly, although we would not be barred from considering evidence of actual instances of incorrect labelling had Mexico submitted it, we do not believe that Mexico's failure to submit such evidence is fatal to its claim that the different certification requirements modify the conditions of competition in the United States' market to the detriment of Mexican tuna and tuna products.

7.165. This, of course, does not mean that Mexico need not provide *any* evidence to substantiate its claims: a finding of detrimental treatment "cannot rest on mere assertion".[331] Mexico may, however, make its case on the basis of evidence and arguments going to the "design, architecture, and revealing structure" of the amended tuna measure. And this is, in fact, what Mexico has attempted to do.

7.166. The core factual assertion underlying Mexico's allegation that the different certification requirements make it easier for tuna caught outside the ETP large purse seine fishery to be incorrectly labelled is that "captains are neither qualified nor able to make" an accurate designation that no dolphins were killed or seriously injured in a particular gear deployment.[332] Accordingly, in Mexico's view, "it is both appropriate and necessary to have an independent observer requirement for tuna fishing outside the ETP".[333] According to Mexico, the incapacity of captains to accurately certify the dolphin-safe status of tuna "create[s] a very real risk that tuna may be improperly certified as dolphin-safe", with the consequence that "tuna caught in the ETP, which is accurately certified as dolphin-safe by independent observers, will lose competitive opportunities to tuna caught outside the ETP, which has received an inherently unreliable dolphin-safe certification".[334]

7.167. The United States rejects these allegations. In its view, "[t]he simple fact is that a captains' statement is an effective vehicle to determine the eligibility of tuna for the label".[335] According to the United States, "Mexico's argument *assumes* that captains operating outside the ETP are fraudulently certifying tuna as dolphin safe when it is not"[336], but "Mexico has not provided any evidence of such fraud".[337] The United States concludes that "Mexico cannot hope to prove its claim based simply on its insistence – without more – that certifications by captains operating outside the ETP are inherently unreliable".[338]

7.168. We note that the United States has itself recognized that observer certification "strengthens" the dolphin-safe certification.[339] As we understand it, this is a concession that observer certification heightens or increases the accuracy and reliability of the label. Such

[329] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215. See also Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 129 ("This analysis need not be based on empirical evidence as to the actual effects of the measure at issue in the internal market of the Member concerned. Of course, nothing precludes a panel from taking such evidence of actual effects into account") and 134 (Such scrutiny may well involve – but does not require – an assessment of the contested measure in light of evidence regarding the actual effects of that measure in the market").

[330] Appellate Body Report, *US – Clove Cigarettes*, para. 206; see also Appellate Body Report, *US – Tuna II (Mexico)*, para. 225.

[331] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 130.

[332] Mexico's first written submission, para. 285; Mexico's second written submission, para. 168.

[333] Mexico's second written submission, para. 167.

[334] Mexico's second written submission, para. 182.

[335] United States' first written submission, para. 267.

[336] United States' second written submission, para. 122 (emphasis original).

[337] United States' second written submission, para. 100.

[338] United States' second written submission, para. 122.

[339] See United States' responses to Panel question No. 31, para. 175 and Panel question No. 32, para. 180.

concession does not entail the conclusion that, without observers, captains' certifications are always and necessarily "inherently unreliable"[340]; but by recognizing that the observer certification "strengthens" the dolphin-safe certification[341], the United States has acknowledged that observer certification may heighten the veracity, reliability and, importantly, the accuracy of the relevant certification. Thus, even the United States' own argument appears to recognize that it may be *easier* or *more likely* for dolphin-safe certifications made only by captains to be inaccurate than it is for dolphin certifications made by captains and observers. And of course, the consequence of this is that it may be more likely that tuna caught by vessels other than large purse seine vessels in the ETP will be inaccurately labelled as dolphin-safe than it is that tuna caught by large purse seine vessels in the ETP will be.

7.169. In the Panel's view, however, it is not necessary to make a definitive finding on this point. The Panel's finding that the different requirements impose a lighter burden, in terms of accessing the dolphin-safe label, on tuna and tuna products made from tuna caught other than by large purse seine vessels in the ETP is sufficient to justify a finding that this aspect of the measure modifies the conditions of competition to the detriment of Mexican tuna and tuna products. In light of what we understand to be the United States' concession, the Panel does see some merit in Mexico's allegation that the different certification requirements may make it more likely that tuna caught outside the ETP could be inaccurately labelled. Ultimately, however, a definitive finding on this point would require a complex and detailed analysis of all of the various factors that may lead to tuna being inaccurately labelled. Such an analysis is not necessary in the context of the present dispute.

7.170. Accordingly, the Panel accepts Mexico's claim that the different certification requirements detrimentally modify the conditions of competition because they impose a significantly lighter burden on tuna and tuna products made from tuna caught outside the ETP large purse seine fishery than on tuna caught within it.

7.171. Before concluding our consideration of whether the different certification requirements modify the conditions of competition in the United States' market to the detriment of Mexican tuna and tuna products, the Panel must address the United States' contention that any detrimental impact suffered by Mexican tuna and tuna products on account of the different observer requirements stems from the AIDCP regime and not the amended tuna measure[342], with the consequence that there is no "genuine relationship between the measure at issue and the adverse impact on competitive opportunities for imported products".[343] Although the United States first raised this issue in the section of its first written submission entitled "Mexico Fails to Prove that Detrimental Impact does not Stem Exclusively from a Legitimate Regulatory Distinction", the United States explicitly acknowledged that the question of "genuine relationship" is relevant to the question whether "the US measure has a detrimental impact on the conditions of competition".[344] Accordingly, we think it is appropriate to deal with this issue in the present context, although we will revisit it as well in the course of our discussion on whether any detrimental treatment caused by the different certification requirements stems exclusively from a legitimate regulatory distinction.

7.172. According to the United States, there is no genuine connection between the amended tuna measure and any detrimental impact suffered by Mexican tuna and tuna products on account of the different certification requirements because these different requirements are not "establishe[d]"[345] by the amended tuna measure, but rather by the AIDCP, an international treaty that Mexico joined in the free exercise of its sovereignty. The proof of this assertion, according to the United States, is the fact that even "if the United States eliminated all references to the AIDCP (and its requirements) from the amended measure, the differences in record-keeping and observers that Mexico complains about *would still exist*".[346] As the United States explains:

[340] Cf e.g. Mexico's second written submission, para. 147.
[341] United States' response to Panel question No. 31, para. 175; United States' response to Panel question No. 32, para. 180.
[342] United States' first written submission, para. 226.
[343] United States' first written submission, para. 295 (citing Appellate Body Reports, *EC – Seal Products*, para. 5.101).
[344] United States' first written submission, para. 195.
[345] United States' first written submission, para. 226.
[346] United States' first written submission, para. 226 (emphasis original).

> [T]he requirement of the AIDCP observer coverage program are contained in the AIDCP and related documents. These requirements are *not* repeated in US law.
>
> Rather, the amended measure requires that, for … [non-US-flagged large purse seine vessels in the ETP], the tuna must be accompanied by a Form 370 and valid documentation, signed by the representative of the appropriate IDCP member nation, that certifies, among other things, that there was an IDCP-approved observer on board for the entire trip.[347]

7.173. As such, "[t]he requirement for large purse seine vessels operating in the ETP to carry observers (while other vessels are not similarly required) *stems from the AIDCP*, not US law".[348] In fact, says the United States, the requirement is not even "repeated in US law".[349]

7.174. Mexico appears to recognize that the different certification requirements stem from, in the sense of having their origin in, the AIDCP. However, in Mexico's view "[t]he US argument seeks to avoid the fact that the amended tuna measure expressly incorporates the AIDCP requirements".[350] Mexico explains that:

> Section (d)(2)(B) of the DPCIA establishes that, for a tuna product containing tuna caught in the ETP to qualify as dolphin-safe, it must be accompanied by a written statement executed by (i) a Commerce Department official, (ii) a representative of the IATTC [i.e. the Inter-American Tropical Tuna Commission], or (iii) an authorized representative of a participating nation whose national program meets the requirements of the AIDCP, which states that there was an observer approved by the AIDCP on board the vessel during the entire trip and that the observer certified that no dolphin sets were made during the entire voyage and no dolphins were killed or seriously injured during the set in which the tuna were caught. There is no such requirement for non-ETP tuna products.[351]

7.175. In Mexico's view, because the requirements of the AIDCP are embedded in the amended tuna measure, "[t]he US argument that there is no connection between the Amended Tuna Measure and the AIDCP is … unsupportable".[352]

7.176. It is well established that, as the Appellate Body has held in the context of both Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, "there must be in every case a genuine relationship between the measure at issue and its adverse impact on competitive opportunities for imported versus like domestic products".[353] In considering whether there is a "genuine connection" between the amended tuna measure and the detrimental impact alleged by Mexico, we also recall the Appellate Body's explanation, given in the course of the original proceedings in this matter, that "[i]n assessing whether there is a genuine relationship between the measure at issue and an adverse impact on competitive opportunities for imported products, the relevant question is whether governmental action 'affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory'".[354] This statement directs our attention to the question whether the detrimental impact is *attributable* to government action, or whether it stems from some other source.

7.177. In our view, although the observer coverage requirement for large purse seine vessels fishing in the ETP has its origin in the AIDCP, the different certification requirements – that is, the *regulatory distinction* between the requirements for tuna caught by large purse seine vessels on the one hand and the requirements for other vessels on the other hand – stem from the amended

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[347] United States' first written submission, paras. 253 and 254 (emphasis original). See also United States' second written submission, para. 111 ("For Mexican large purse seine vessels operating in the ETP, any tuna sold as dolphin safe must be accompanied by a Form 370 and valid documentation signed by a representative of the Government of Mexico that certifies, among other things, that there was an AIDCP-approved observer on board for the entire trip").

[348] United States' first written submission, para. 256 (emphasis original).

[349] United States' second written submission, para. 112.

[350] Mexico's second written submission, para. 80.

[351] Mexico's second written submission, para. 80.

[352] Mexico's second written submission, para. 83.

[353] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 134.

[354] Appellate Body Report, *US – Tuna II (Mexico)*, para. 236.

tuna measure itself. The AIDCP imposes certain certification requirements on large purse seine vessels fishing in the ETP, but it has nothing to say about other methods of fishing in the ETP or about fishing in other oceans. The amended tuna measure, by contrast, imposes certain certification requirements on the ETP large purse seine fishery and certain, different certification requirements on other fisheries. It is the amended tuna measure that provides for two sets of rules for access to the dolphin-safe label – one set for tuna caught by large purse seine vessels in the ETP, and another set for all other tuna. And it is therefore the amended tuna measure itself that sets up a distinction, within a single regulatory framework (i.e. the amended tuna measure) between large purse seine vessels in the ETP and other vessels. That the requirements imposed on large purse seine vessels in the ETP are themselves adapted from the AIDCP cannot detract from the fact that it is the design and structure of the amended tuna measure itself that establishes the regulatory distinction about which Mexico complains.

7.178. As such, the United States' insistence that "if the United States eliminated all references to the AIDCP (and its requirements) from the amended measure, the differences in record-keeping and observers that Mexico complains about *would still exist*"[355] is somewhat beside the point. In one sense, the United States is correct: the certification requirements that the AIDCP imposes on large purse seine vessels fishing in the ETP exist, of course, in the AIDCP itself, and will continue to exist as a matter of international law regardless of whether they are incorporated into the domestic legal system of the United States. But as we have explained above, Mexico's complaint is not directed at the existence of these AIDCP-mandated requirements under international law, or at its own acceptance of these conditions as an adherent to the AIDCP. Rather, Mexico's complaint is based on the fact that the amended tuna measure does not require observer coverage on vessels other than large purse seine vessels fishing in the ETP. In not doing so, the amended tuna measure imposes a lighter burden on vessels other than large purse seine vessels in the ETP, and may make it easier for tuna and tuna products made from tuna caught by such vessels to access the dolphin-safe label, thus distorting the conditions of competition on the United States' tuna market to the detriment of Mexican tuna and tuna products.

7.179. In light of the foregoing, we conclude that Mexico has made a *prima facie* case that the different certification requirements in the amended tuna measure modify the conditions of competition in the United States' tuna market to the detriment of like Mexican tuna and tuna products. The United States has not rebutted this case. The Panel now proceeds to consider whether this detrimental impact stems exclusively from a legitimate regulatory distinction, or whether it rather reflects discrimination in violation of Article 2.1 of the TBT Agreement.

7.5.2.4.2 Whether the detrimental treatment caused by the different certification requirements stem exclusively from a legitimate regulatory distinction

7.5.2.4.2.1 Arguments of the parties

7.180. According to Mexico, the different certification requirements cannot be said to stem exclusively from a legitimate regulatory distinction because "captain self-certification for tuna caught outside the ETP does not provide reliable or accurate information on the dolphin-safe status of the tuna products comprising this tuna because captains are not trained, educated, or qualified to identify whether tuna are caught in a dolphin-safe manner, captains may not be directly involved in the setting of nets and the capturing of fish, and captains will not reliably declare non-dolphin-safe sets or non-compliance with dolphin-safe requirements".[356] Mexico submits that "[a]s a consequence, the initial designation of the dolphin-safe status of tuna caught outside the ETP is unreliable and inaccurate", and therefore "consumers are receiving unreliable and inaccurate information on such products".[357]

7.181. As such, in Mexico's view, the effect of the different certification requirements is to create "two distinct and conflicting standards for the accuracy of information regarding the dolphin-safe status of tuna: one standard for tuna caught inside the ETP, and a separate and much lower standard for tuna caught outside the ETP".[358] Given, however, that one of the goals of the amended tuna measure is "ensuring that consumers are not misled or deceived about whether

[355] United States' first written submission, para. 226 (emphasis original).
[356] Mexico's first written submission, para. 297.
[357] Mexico's first written submission, para. 298.
[358] Mexico's second written submission, para. 193.

tuna products contain tuna caught in a manner that adversely affects dolphins"[359], Mexico concludes that the amended tuna measure's system of captain self-certification "does not bear a rational connection to", and is "entirely inconsistent"[360] and "irreconcilable"[361] with, the objectives of the amended tuna measure, and accordingly cannot be considered to be "even-handed".[362]

7.182. Moreover, in Mexico's view, the two different standards of accuracy created by the different certification requirements cannot be explained or justified on the basis of "calibration" of the different risks to dolphins arising in different areas of the ocean and resulting from the use of different tuna fishing methods. According to Mexico:

> The United States' calibration argument implies that it is acceptable and even-handed to provide consumers with unreliable, unverified, and inaccurate information regarding the dolphin-safe status of tuna where the tuna originates from all ocean regions save the ETP, but to ensure that such information is independently certified and accurate where the tuna originates specifically in the ETP.[363]

7.183. However, according to Mexico:

> Under the Amended Tuna Measure, the terms "dolphins … killed or seriously injured" are clearly designed and applied in an absolute way in the context of observed adverse effects. Tuna caught in a fishing set or gear deployment cannot be labelled as dolphin-safe if only a single dolphin mortality or serious injury is observed during the set or deployment. It is not a question of the relative number of dolphins that are killed or seriously injured during fishing sett or gear deployments. It is simply a question of whether or not such adverse effects merely exist.[364]

7.184. In light of this "zero tolerance benchmark for risk" embodied in the amended tuna measure, Mexico argues that "a comparison of the magnitude of dolphin mortalities and serious injuries in different fisheries is not relevant to, and does not affect, Mexico's arguments regarding the lack of even-handedness in the design and application of the different labelling conditions".[365]

7.185. In other words, in Mexico's view, the differences in the nature and degree of risk to dolphins from setting on dolphins in the ETP or from other methods in the ETP or other fisheries in no way explain or justify the different certification requirements. The amended tuna measure is designed so as to disqualify from accessing the label any and every tuna catch as soon as even a single dolphin is killed or seriously injured. Both parties accept that dolphins are at some risk from *all tuna fishing methods* and in *all* fisheries.[366] As such, the amended tuna measure should require the same level of accuracy in reporting regardless of whether one or 1,000 dolphins are killed. And for this reason, "calibration" does not respond to Mexico's claim that the different certification requirements are inconsistent with the amended tuna measure's objectives.[367]

7.186. Additionally, Mexico attacks the different certification requirements on the basis that captain self-certification "permits or requires a private industry party to participate in the administration of [a law] which affect[s] the party's own commercial interests".[368] In Mexico's view, there is a "financial incentive for captains to declare the tuna caught by their vessels to be 'dolphin-safe', and a corresponding financial disincentive to declare any tuna caught by their vessels to be non-dolphin-safe", because "if a captain were to decline to certify tuna caught by his or her own vessel as dolphin-safe … the value of the tuna would be significantly diminished".[369] According to Mexico, the different certification requirements place captains "in an inherent conflict

[359] Mexico's second written submission, para. 3.
[360] Mexico's second written submission, para. 194.
[361] Mexico's second written submission, para. 195.
[362] Mexico's first written submission, para. 298.
[363] Mexico's second written submission, para. 173.
[364] Mexico's response to Panel question No. 11, para. 50.
[365] Mexico's response to Panel question No. 11, para. 52.
[366] Except for pole-and-line fishing: see Mexico's response to Panel question No. 11, para. 51; United States' first written submission, para. 236.
[367] Mexico's response to Panel question No. 11, paras. 51 and 52.
[368] Mexico's second written submission, para. 178 (citing Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.902 and 7.904).
[369] Mexico's second written submission, para. 181.

of interest", because they "have a vested commercial and financial interest in securing dolphin-safe certification for the tuna that they catch". In Mexico's opinion, this creates "a very real risk that the tuna may be improperly certified as dolphin-safe", which would be inconsistent with the amended tuna measure's stated objectives.[370]

7.187. According to Mexico, the risk that captains will make improper or inaccurate statements is heightened by the fact that "there are no safeguards in the form of effective legal sanctions or enforcement mechanisms for fishing vessel captains who inaccurately or improperly certify the dolphin-safe status of tuna that is caught by their own vessels".[371] As such, Mexico submits that "there are no incentives to accurately and properly administer the dolphin-safe certification requirements for tuna caught outside the ETP".[372]

7.188. The United States rejects Mexico's allegations.

7.189. First, and simply, the United States argues that "Mexico puts forward *not a single piece of evidence* that any tuna product has been marketed in the United States as 'dolphin safe' when, in fact, it did not meet the conditions of US law".[373] According to the United States', Mexico's argument is based "entirely on speculation and innuendo rather than any actual evidence".[374]

7.190. Secondly, the United States denies that captains' statements are "inherently unreliable" or "meaningless".[375] On the contrary, the United States observes that "captains statements, logbooks, and the like have always been a core implementation tool for Members to verify compliance with [a range of] applicable fishing rules".[376] Additionally, "the United States also relies on the self-reporting by vessels for implementation of its domestic laws, such as the MMPA".[377] In the view of the United States, "Mexico's suggestion – that such an approach [e.g. reliance on captain self-certification to prove compliance with fishing laws and regulations] is inherently unreliable – would be *hugely trade disruptive*. Members simply do not have the resources to require the independent verification of all the activities of domestic and foreign producers".[378]

7.191. The United States also submits that Mexico's arguments concerning the reliability of captains "ignores the fact that this is a closely watched industry", as well as one that is "very risk averse".[379] Moreover, the United States notes that, contrary to Mexico's allegation, United States domestic law imposes various civil and criminal penalties on captains and other persons who make false dolphin-safe declarations.[380]

7.192. Thirdly, the United States suggests that the even-handedness of the different certification requirements is inherent in the very fact the "amended measure requires an observer certification where one particular international agreement requires observers, and does not require an observer certification where the relevant authority for the fishery does not require observers to certify as to the tuna's eligibility for a 'dolphin safe' label".[381] According to the United States, Mexico's claim against the different certification requirements "ignores why the AIDCP was agreed to in the first place … [T]he IATTC Members agreed to *different* requirements regarding record-keeping/verification and observer coverage because the ETP *is different*".[382]

7.193. Fourthly, and relatedly, the United States asserts that the difference about which Mexico complains does not stem from US law, but merely reflects that the AIDCP imposes requirements that differ from those of other RFMOs. According to the United States, even if the United States eliminated from its measure all reference to observers, "the difference that Mexico criticizes *would*

[370] Mexico's second written submission, para. 182. See also Mexico's first written submission, para. 286.
[371] Mexico's second written submission, para. 185.
[372] Mexico's second written submission, para. 185.
[373] United States' first written submission, para. 263 (emphasis original).
[374] United States' response to Panel question No. 18(b), para. 101.
[375] United States' first written submission, para. 264.
[376] United States' first written submission, para. 266.
[377] United States' first written submission, para. 266.
[378] United States' first written submission, para. 265 (emphasis original).
[379] United States' second written submission, para. 123.
[380] United States' second written submission, para. 124.
[381] United States' first written submission, para. 257.
[382] United States' second written submission, para. 126 (emphasis original).

still exist".[383] In the United States' view, Mexico's argument is essentially that it (i.e. the United States) can only make this element of the amended tuna measure "even-handed" by "unilaterally require[ing] 100 per cent observer coverage throughout the world".[384] According to the United States, this argument seeks to make Mexico's own international commitments the "floor" for the requirements that the United States must impose on itself and all other trading partners. This, the United States argues, is inconsistent with the principle that a Member may take measures "at the levels that it considers appropriate".[385]

7.194. Finally, the United States observes that the Appellate Body in the original proceedings expressly noted that "nowhere in its reasoning did the [original] Panel state that imposing a requirement that an independent observer certify that no dolphins were killed or seriously injured in the course of the fishing operations in which the tuna was caught would be the only way for the United States to calibrate its 'dolphin-safe' labelling provisions".[386] In the view of the United States, this statement represents an "explicit acknowledge[ment] that the United States could 'calibrate' its measure without requiring all its trading partners to put independent observers on their respective tuna fleets".[387]

7.5.2.4.2.2 Analysis by the Panel

7.195. We begin our analysis by recalling that the question before us is whether the detrimental impact identified in the preceding section of this Report stems exclusively from a legitimate regulatory distinction, because, for instance, it is even-handed. In considering this question, we must constantly bear in mind that, pursuant to the allocation of the burden of proof advanced by both parties and accepted by the Panel, it is for Mexico to show, at least *prima facie*, that the different certification requirements do *not* stem exclusively from a legitimate regulatory distinction. Only if Mexico makes this showing will the burden shift to the United States to show that, contrary to Mexico's case, the detrimental impact does in fact stem exclusively from a legitimate regulatory distinction.

7.196. Before proceeding, the Panel notes that in its discussion above of the legal test under Article 2.1 of the TBT Agreement, it set out the factors that may be taken into account when considering whether identified detrimental impact stems exclusively from a legitimate regulatory distinction.[388] It is not necessary to repeat in full what was said there. Nevertheless, we would note again that, in our opinion, the jurisprudence developed by the Appellate Body in respect of the chapeau of Article XX of the GATT 1994 may be relevant in elucidating the meaning of the discipline contained in the second tier of Article 2.1 of the TBT Agreement.[389] In particular, it is our opinion that in examining whether detrimental treatment stems exclusively from a legitimate regulatory distinction, a panel may take into account the extent to which the identified detrimental treatment is explained by, or at least reconcilable with, the objectives pursed by the measure at issue. We therefore reject the United States' suggestion that Mexico's arguments on the relationship between the different certification requirements and the objectives of the amended tuna measure are "not relevant to the analysis".[390]

7.197. We turn now to the substance of the parties' arguments. Mexico appears to accept that, as the Appellate Body found, the system currently in place in the ETP *fully* addresses the risks posed to dolphins by setting on dolphins in the ETP.[391] Its complaint is that the amended tuna measure, like the original measure before it, does not fully address the risks posed by other fishing methods in the ETP and other oceans, and therefore is not even-handed. Accordingly, the essence of Mexico's argument is not that the United States should *remove* the certification requirements that exist in the ETP, but, conversely, that "it is both appropriate and necessary to have an independent observer requirement for tuna fishing outside the ETP"[392] – and, indeed, that without imposing an observer requirement for vessels other than large purse seiners in the ETP, the

[383] United States' second written submission, para. 118 (emphasis original).
[384] United States' first written submission, para. 272.
[385] United States' first written submission, para. 273.
[386] Appellate Body Report, *US – Tuna II (Mexico)*, para. 296.
[387] United States' first written submission, para. 258.
[388] See section 7.5.1 above.
[389] See para. 7.87 above.
[390] United States' second written submission, para. 125.
[391] Appellate Body Report, *US – Tuna II (Mexico)*, para. 297.
[392] Mexico's second written submission, para. 167.

amended tuna measure cannot be even-handed as required under Article 2.1 of the TBT Agreement.

7.198. As we understand it, Mexico's claim that the different certification requirements are not even-handed rests on the fundamental factual premise that captains' certifications are "inherently unreliable"[393] and "meaningless".[394] This is so, in Mexico's view, for two distinct reasons: *first*, captains have a financial incentive to certify that their catch is dolphin-safe even when it is not, and the amended tuna measure contains no mechanism to check this incentive; and *second*, captains lack the technical expertise necessary to properly certify that no dolphins were killed or seriously injured in a given set or other gear deployment, and therefore their certifications do not ensure that tuna labelled dolphin-safe in fact meets the statutory and regulatory requirements. We will address each of these allegations separately.

7.199. We examine first Mexico's claim that captains' statements are unreliable because captains have a financial incentive to certify that tuna is dolphin-safe even when it is not. To help the Panel understand the possible incentives that might play into a captain's decision on certification, the Panel asked the parties to explain "[w]hat, if anything, is the relationship between, on the one hand, the number and/or dolphin-safe status of tuna caught, and, on the other hand, a captain's remuneration and/or other incentives".[395]

7.200. In its response, Mexico argues that "the value of tuna caught by a purse seine vessel would range from approximately US$1.4 million to US$2.2 million for skipjack tuna, and US$2.7 million to US$4 million for yellowfin tuna".[396] According to Mexico, "canneries will not buy tuna that is not designated as dolphin-safe", and accordingly "[t]here is an extremely strong disincentive for a captain to self-report a dolphin set".[397] Mexico submits this economic disincentive would exist even where captains are not paid on the basis of the value or the volume of the tuna they catch. According to Mexico, "[i]f tuna cannot be sold to canneries, or if the catch volume of the vessel is low because it tried to avoid dolphins, those outcomes would be contrary to the economic interests of the companies that own and operate the vessels. A captain would not long be employed under such circumstances".[398]

7.201. In support of this claim, Mexico cites to the decision in the *Freitas* case[399], a United States administrative law judgment concerning illegal sets on marine mammals. In particular, Mexico highlights the following statement by the Commerce Department judge:

> Given the incentives for making unlawful sets on marine mammals when the amount of potential economic gain associated with a catch of large tuna is so great, compliance with the mandates not to set on marine mammals is difficult to enforce. Here, Respondents knew not to intentionally set on whales and yet elected to do so anyway presumably because the economic benefits outweighed the potential cost under the MMPA.[400]

7.202. The United States in its response argues that "[t]here is no evidence on the record to establish that a relationship exists between the number of fish caught on a particular trip or the dolphin-safe status of such fish and the vessel captain's remuneration (and/or other incentives)".[401] Indeed, contrary to Mexico's position, the United States suggests that vessel captains have economic incentives *not* to lie on their dolphin-safe declarations, because "[i]f a captain is untruthful about his catch, and a cannery discovers this, it would likely have a negative impact on the captain's income, because the cannery would no longer want to do business with

[393] Mexico's first written submission, para. 295.
[394] Mexico's first written submission, para. 285.
[395] Panel question No. 36.
[396] Mexico's response to Panel question No. 36, para. 106.
[397] Mexico's response to Panel question No. 36, para. 107.
[398] Mexico's response to Panel question No. 36, para. 110.
[399] *In the Matter of Matthew James Freitas, et al* (Exhibit MEX-46).
[400] *In the Matter of Matthew James Freitas, et al* (Exhibit MEX-46), p. 96.
[401] United States' response to Panel question No. 36, para. 190.

that captain".[402] Additionally, the United States reiterates that "untruthfulness … could … provide an evidentiary basis for a captain to suffer civil and criminal penalties".[403]

7.203. To help the Panel explore this issue further, the Panel also asked the parties the following question:

> In both of its written submissions and in its oral statement to the Panel, the United States emphasizes that captain certifications are regularly relied upon by national and international regulators, and that such statements are generally accepted as being reliable. Is it international practice to accept captains' certifications to prove compliance with regulatory requirements? In other RFMOs, are captains' certifications sufficient to establish compliance with relevant regulatory requirements?[404]

7.204. In its response, Mexico acknowledges that "captain's self-certifications might be reliable for certain purposes", but denies that they are "reliable for the purpose of certifying the dolphin-safe status of the tuna caught by the captain's own fishing vessel".[405] In support of this position, Mexico notes that a variety of academic, governmental, and supra-governmental authorities have, in the past, expressed doubt about the extent to which captains accurately self-report.

7.205. Mexico notes, for instance, a 2006 study conducted jointly by the Duke University Marine Laboratory and the University of St. Andrews that found "that accurate estimation of bycatch rates in any fishery requires an independent observer scheme".[406] Mexico also notes a technical memorandum prepared by the United States Commerce Department, which recognizes that "[d]espite fairly good outreach and the distribution of reporting forms to all state and Federally-permitted fishermen each year, compliance with the reporting requirement is thought to be very low".[407] To give one more example, Mexico observes that an "Observer Program Operations Manual" prepared by Canada and published by the United Nations Food and Agriculture Organization states that "under-reporting is common practice and … even now, after years of persistent enforcement, discrepancies between real and reported catch can be as high as … two to ten times higher for regulated bycatch species".[408]

7.206. The United States takes the opposite position in its response to the Panel's question. According to the United States, "[c]aptain statements and logbooks are an integral part of regional fishery management organisation (RFMO) regimes and other international regimes and agreements".[409] For example, both the IATTC and the WCPFC require that vessels keep detailed logbooks of information on various aspects of fishing operations. According to the United States, "the fact that most RFMOs rely on logbook data to manage fish stocks demonstrates that captains' statements, in the form of logbooks, are viewed as reliable".[410] Additionally, the United States points to various international treaties whose implementation relies on captains' self-certifications and logbooks. To give one example, the Convention for the Conservation of the Antarctic Marine Living Resources (CCAMLR), a treaty that "makes it unlawful to engage in harvesting Antarctic marine living resources in violation of any conservation measure in force under the Convention or to violate any regulation promulgated under the implementing statute", is implemented by the United States through "a catch documentation scheme, whereby captains have to supply fishing details to NOAA [i.e. the National Oceanic and Atmospheric Administration]".[411]

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[402] United States' response to Panel question No. 36, para. 193.
[403] United States' response to Panel question No. 36, para. 193.
[404] Panel question No. 39.
[405] Mexico's response to Panel question No. 39, para. 113.
[406] Andrew J. Read, Phebe Drinker and Simon Northridge, "Bycatch of Marine Mammals in US and Global Fisheries", 20 *Conservation Biology* 163 (2006) (Exhibit MEX-6), p. 167.
[407] United States Department of Commerce, "Evaluating Bycatch", NOAA Technical Memorandum NMFS-F/SPO-66 (October 2004) (Exhibit MEX-77), p. 28.
[408] United Nations Food and Agriculture Organization, "Observer Program Operations Manual" (Exhibit MEX-127).
[409] United States' response to Panel question No. 39, para. 205.
[410] United States' response to Panel question No. 39, para. 209.
[411] United States' response to Panel question No. 39, para. 214.

7.207. In sum, the United States urges the Panel to find that:

> Captain statements and logbooks are an integral part of RFMO and other international regimes, as well as regimes of individual nations. These regimes depend on such documentation to regulate in a whole host of areas that are critical for the appropriate management of fisheries and the environment more broadly. These areas include closed area rules, fish stock management, and implementation of environment requirements … nations and international organizations depend on this information, despite that [*sic*] it may be contrary to the narrow financial interests of the particular vessel to provide accurate information.[412]

7.208. In the Panel's opinion, Mexico's argument concerning the reliability – and, indeed, the integrity – of vessel captains has significant implications. The Panel accepts the evidence submitted by the United States that many regional and international organizations and arrangements rely on captains' certifications and logbooks both to monitor compliance with regulatory requirements and as a means of data collection. In the Panel's view, the fact that many domestic, regional, and international regimes rely on captains' self-certification raises a strong presumption that, from a systemic perspective, such certifications are reliable. RFMOs and other fisheries and environmental organizations are experts in their respective fields, and the fact that they have relied, and continue to rely, on captains' statements in a variety of fishing and environmental areas strongly suggests that, as a general matter, they consider such certifications to be reliable. Of course, the Panel must make its own "objective assessment of the matter", and in this regard the fact that a particular practice is accepted by one or more domestic, regional, or even international organizations is not, by itself, determinative. But the Panel considers that such acceptance is a highly relevant and probative fact.

7.209. The Panel is not convinced that the evidence submitted by Mexico is sufficient to rebut this demonstration by the United States. The documents submitted by Mexico certainly suggest that there have been instances in which captains' certifications have been unreliable. Nevertheless, in the Panel's view, the fact that domestic, regional, and international regimes have continued to rely on captains' certifications and logbooks even though instances of non-compliance have been reported suggests to us that such instances of non-compliance should not be considered as seriously undermining the general reliability of captains' certifications, as Mexico would have the Panel find.

7.210. Additionally, the Panel is not convinced by Mexico's argumentation concerning the economic incentives facing captains. As we noted above, Mexico asserted that, even where a captain's personal remuneration is not tied to the value of the fish caught, she or he is nevertheless unlikely to accurately report dolphin mortality and serious injury because doing so may result in dismissal from employment. But Mexico has provided no evidence that this would be the case, and the United States' alternative understanding of the economic incentives facing captains seems just as plausible to us.

7.211. In light of the above, the Panel finds that Mexico has not met its burden of making a *prima facie* case that captains' certifications are unreliable because captains have a financial incentive not to report accurately on the dolphin-safe status of tuna caught in a given set or other gear deployment. Therefore, this argument does not convince us that relying on captains' certifications outside the ETP deprives the amended tuna measure of even-handedness.

7.212. We now turn to consider Mexico's second argument, that captains' certificates are unreliable because captains may not have the technical expertise necessary to accurately certify that no dolphins were killed or seriously injured in a particular set or gear deployment.

7.213. In considering whether captains can be assumed to have the technical expertise necessary to make an accurate dolphin-safe certification, we find it helpful to compare the kind of tasks expected to be carried out by observers in the ETP and other oceans with those that are customarily carried out by captains. Such a comparison should shine some light on whether captains are generally expected to have the kind of skills necessary to certify that no dolphins were killed or seriously injured in a given set or other gear deployment.

[412] United States' comments on Mexico's response to Panel question No. 39, para. 93.

7.214. We begin by noting that both parties have recognized that the task of observers in the ETP is complex.[413] Both parties have also provided evidence indicating that observers under the IATTC Observer Program:

> [A]re biologists trained to collect a variety of data on the mortalities of dolphins associated with the fishery, sightings of dolphin herds, catches of tunas and by catches of fish and other animals, oceanographic and meteorological data, and other information used by the IATTC staff to assess the conditions of the various stocks of dolphins, study the causes of dolphin mortality, and assess the effect of the fishery on tunas and other components of the ecosystem.[414]

7.215. We also take note of the evidence provided by both parties regarding the "Guidelines for Technical Training of Observers," which elaborate on the training requirements expected from observers qualifying for the IATTC Observer Program; such requirements include: (i) candidates should be university graduates with a degree in biology or a related subject (zoology, ecology, etc.); (ii) training should include the identification of certain fish and animals, including tuna and those dolphins associated with tuna fishing; (iii) information on how to accurately fill out data forms; and (iv) information on identification, dealing with, and documenting "instances of interference (including bribery attempts), intimidation or obstruction by vessel crew during a trip".[415]

7.216. Significantly, we note that in the 2013 Final Rule, the National Marine Fisheries Service (NMFS) also recognized the complexity of accurately certifying that no dolphins were killed or seriously injured, and stated that it:

> [A]nticipates that qualified observers will undergo training programs that include such topics as recognizing an intentional set, dolphin species identification, and criteria for determining a serious injury. NMFS acknowledges that these skills are complex, and that many existing observer programs give little attention to marine mammal interactions. NMFS will determine an observer program is qualified and authorized only after rigorous scrutiny of the program's training programs, and a finding that the observers are able to make the requisite determinations.[416]

7.217. We also recall that the NMFS Assistant Administrator has published a Qualified and Authorized Notice listing the criteria that must be met in order for observers to be considered as "qualified and authorized" for purposes of the dolphin-safe labelling program under the DPCIA.[417] The NMFS Assistant Administrator has established, *inter alia*, the following criteria: (i) observers are trained and able to identify dolphins endemic to the area of the fishery; (ii) observers are trained and able to determine dolphin mortality and serious injury ('serious injury' meaning any injury likely to cause mortality); and (iii) observers are trained and able to collect written or photographic documentation sufficient for an authorized representative participating in the observer programme to verify or make a determination about the disposition of any dolphin. The Assistant Administrator also indicates that under NMFS observer programmes, observers participate in training programs that "include such topics as dolphin species identification, dolphin mortality recognition, data collection requirements for use in making a serious injury determination, and recognition of an intentional purse seine set".[418]

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[413] Mexico's first written submission, paras. 70-72. Mexico's response to Panel additional question No. 61, paras. 10-11. United States' second written submission, paras. 126 and 128. United States' response to Panel additional question No. 61, paras. 22-23.

[414] Inter-American Tropical Tuna Commission, Quarterly Report (April-June 2013) (Exhibit MEX-29), p. 14.

[415] Agreement on the International Dolphin Conervation Program, "18th Meeting of the Parties: Minutes of the Meeting" (Exhibit US-243), p. 6. See also International Dolphin Conservation Program, "Guidelines for Technical Training of Observers" (Document. OBS-2-O3b) (Exhibits MEX-164), International Dolphin Conservation Program, "Directrices para la Selección de Candidatos de Observador del APICD" (Document OBS-2-03a) (MEX-165), and Inter-American Tropical Tuna Commission, "Manual de Campo" (MEX-166).

[416] 2013 Final Rule, 78 Fed. Reg. 40997 (July 9 2013) (Exhibit MEX-7) (emphasis added).

[417] Determination of Observer Programs as Qualified and Authorized by the Assistant Administrator for Fisheries, 79 Fed. Reg. 40,718 (July 14 2014) (Exhibit US-113).

[418] Determination of Observer Programs as Qualified and Authorized by the Assistant Administrator for Fisheries, 79 Fed. Reg. 40,718 (July 14 2014) (Exhibit US-113).

7.218. The evidence above strongly suggests that certifying whether a dolphin has been killed or seriously injured in a set or other gear deployment is a highly complex task. It is especially telling, in the Panel's view, that the amended tuna measure itself recognizes the necessity of training and education in equipping persons with the necessary technical know-how to ensure that they can properly certify the dolphin-safety of a tuna catch.

7.219. The Panel has looked closely at the evidence submitted by the parties concerning the competencies and tasks generally expected of captains. This evidence includes the various regional and international treaties discussed above in the context of Mexico's argument concerning the financial incentives facing captains. As we explained above, this evidence indicates that captains are generally expected to conduct a wide variety of tasks on board the vessels they command. As we read the evidence, captains are generally expected to have the knowledge and ability to fulfil a range of activities that tends to extend to certifying the existence of facts over which they have control and/or direct knowledge, e.g. port of entry and exit, co-ordinates, date and time of gear deployment, and type of gear deployed.[419] In some cases captains are also expected to certify the species of fish caught, or the presence of whale or bird bycatch. In our opinion, however, these tasks are significantly different from those involved in certifying that no dolphins were killed or seriously injured in sets or other gear deployments.

7.220. The United States has also submitted evidence showing that, at least in some fisheries, captains are sometimes expected or enabled to record mammal, and specifically dolphin, bycatch. According to the United States, "minimum RFMO logbook standards may require tracking of marine mammal bycatch, including species identification, [but] such minimum standards may not require recording whether the marine mammal was killed or seriously injured. However, certain logbooks required by national programs covering fisheries in the WCPFC and IOTC areas do require determinations concerning the fate of any marine mammal bycatch".[420]

7.221. In support of this claim, the United States has submitted seven documents. The first two of these documents are logbook templates produced by the United States National Marine Fisheries Service for use in the Western Pacific Longline (Exhibit US-175) and Atlantic (Exhibit US-176) fisheries. Exhibit US-175 does indeed include a column in which captains are required to identify both the species and fate of dolphin bycatch. Specifically, captains are required to note whether a dolphin was released "uninjured", "injured", or "dead".[421] Similarly, Exhibit US-196 requires that captains indicate whether certain dolphin species were "involved", "injured", or "dead".[422]

7.222. The next two documents are logbook templates produced by Australia in the Australian pelagic longline (Exhibit US-197) and purse seine (Exhibit US-198) fisheries. Exhibit US-197 provides space for the captain to note both the point during a fishing operation in which dolphins were caught ("haul", "set", or other"), as well as the fate of dolphins caught ("alive", "dead", or "injured").[423] The same information, as well as additional information on whether a protected species (including a dolphin) was "hooked" or "entangled", is required by the logbook in Exhibit US-198.[424]

7.223. The final three exhibits are logbook templates from China (Exhibit US-179), Japan (Exhibit US-180), and Korea (Exhibit US-181). Exhibit US-179 contains a box directing captains to record "dolphin and whale status".[425] "Status" is not defined in the document. Additionally, the reference to dolphins is found in a section of the logbook headed "remarks". Accordingly, it is not clear whether this information is required to be provided. Exhibit US-180 does not mention dolphins at all.[426] It does, however, appear to require the captain to record the "condition after release" of "whales". A captain is required to indicate whether the whale was "survive – swim",

[419] United States' response to Panel question No. 37, paras. 194-196. Mexico's comments to United States' response to Panel question No. 37, paras. 130-134.

[420] United States' response to Panel question No. 37, para. 195.

[421] National Marine Fisheries Service, "Western Pacific Longline Fishing Log" (Exhibit US-175).

[422] National Marine Fisheries Service, "2014 Atlantic Highly Migratory Species Logbook – Set Form" (Exhibit US-196), p. 3.

[423] Australian Fisheries Management Authority, "Australian Pelagic Longline Daily Fishing Log" (Exhibit US-197), p. 6.

[424] Australian Fisheries Management Authority, "Purse Seine Daily Fishing Log" (Exhibit US-198), p. 7.

[425] China, "Logsheet Form" (Exhibit US-179).

[426] Japan, "Reporting Form of Incidentally Encircled of Whale Shark (RHN) or Whales" (Exhibit US-180).

"dead before release", or "other". Finally, Exhibit US-181 appears to require a captain to provide certain information about "other species including sea birds, marine turtles, etc". Dolphins are not mentioned, and the document does not appear to require that captains indicate the state in which such "other species" were released.[427]

7.224. In the Panel's view, this evidence does not show that captains are generally expected, or regarded as having the skills necessary, to certify dolphin mortality and serious injury. The only documents suggesting that captains are expected to certify dolphin interactions come from two WTO Members – Australia and the United States itself – and even these documents do not appear to distinguish between "injury" and "serious injury", which distinction is embedded in the amended tuna measure. The remaining documents from China, Japan, and Korea similarly do not show that captains are usually expected to be able to certify dolphin mortality and injury. Although Exhibit US-179 provides space for a captain to make "remarks" about "dolphin and whale status", it is not clear on the face of the document what such reporting entails and the United States has not provided any relevant explanation in this regard. Exhibits US-180 and US-181 do not mention dolphins at all, and accordingly we cannot attribute much probative value to them.

7.225. Taken as a whole, these documents suggest to the Panel that captains are generally *not* expected to certify dolphin mortality and serious injury. The United States has not convinced us that this evidence shows that certifying dolphin mortality or serious injury is the kind of task generally expected of captains or, for that matter, that captains necessarily have the skills to certify whether dolphins have been killed or seriously injured.

7.226. Ultimately, therefore, the evidence suggests to us that certifying dolphin mortality and serious injury is a highly specialized skill, and one that has so far generally not been required of captains. None of the evidence before us suggests, nor has the United States explained why it believes, that captains (or, we would add, any other crew member) are always and necessarily in possession of those skills.

7.227. In the Panel's view, then, Mexico has submitted evidence and argumentation sufficient to show that certifying the dolphin-safety of a tuna catch is a highly complex task.

7.228. As part of its efforts to understand this issue more clearly, the Panel asked the United States the following question:

> According to the United States' own case, individuals require significant training before they can be authorized to certify that no dolphins were killed or seriously injured in a fishing set. In light of this fact, why does the United States believe that captains are qualified and authorized to make such certifications? Do captains undergo any kind of training that would enable them to certify that no purse seine nets was intentionally deployed on or used to encircle dolphins during the fishing trip?[428]

7.229. The United States began its response by explaining that "training would not be necessary for a captain to understand whether he or she 'intentionally' set on dolphins. The captain should know his or her *own* intention without formal training".[429]

7.230. In the remainder of its response, the United States provided details on the training required by the AIDCP for fishing vessels seeking to operate purse seine vessels in the ETP.[430] The United States also stated the following:

> The United States does not understand that the WCPCF, IOTC, or other RFMOs require training for operators of purse seine vessels of the type required by the AIDCP
>
> ...

[427] Korea, "LL, PS / Bycatch Lognook (Ecologically Related Species) (Exhibit US-181). This document appears to require only that the captain indicate the number of such "other species" "released', and not the state in which they were released.

[428] Panel question No. 40.

[429] United States' response to Panel question No. 40, para. 216 (emphasis original).

[430] United States' response to Panel question No. 40, paras. 217-221.

> Similarly, the United States is not aware that the IATTC requires analogous training for captains of other types of vessels (longline, pole-and-line, etc.) operating inside the ETP. Likewise, the United States does not understand that the WCPFC or other RFMOs require analogous training for captains of non-purse seine vessels operating outside the ETP.[431]

7.231. The Panel accepts, of course, that captains will have knowledge of their *own* intentions where they have ordered that a net be set on dolphins. The Panel notes, however, that Mexico has submitted evidence showing that at least in some cases nets may be set without the explicit order or permission of a vessel captain, who may not be directly involved in every fishing operation.[432]

7.232. With respect to all other aspects of the responsibilities generally expected of dolphin-safe observers, the Panel considers that the United States did not answer the question. The United States' response shows that captains seeking to master a purse seiner in the ETP must undergo training; but the United States provided the Panel with no explanation why it expects that captains will always and necessarily have the technical expertise necessary to accurately certify whether a dolphin was killed or seriously injured in a set or other gear deployment when the amended tuna measure itself recognizes that these skills are highly complex and must be acquired through training.

7.233. In the Panel's view, the United States has not rebutted Mexico's showing that captains may not necessarily and always have the technical skills required to certify that no dolphins were killed or seriously injured in a set or other gear deployment, and this may result in inaccurate information being passed to consumers, in contradiction with the objectives of the amended tuna measure. The Panel therefore finds that the different certification requirements are not even-handed, and so cannot be said to stem exclusively from a legitimate regulatory distinction.

7.234. We want to be clear that, in finding that Mexico has made a *prima facie* case that captains may not always and necessarily have the technical skills necessary to ensure accurate dolphin-safe certification, we are not finding that the *only* way for the United States to make its measure even-handed is to require observer coverage. To the contrary, as we found above, captains' certifications are relied upon by domestic, regional, and international regimes for a wide variety of purposes, and we see no reason why captains could not, in principle and as a general matter, accurately certify the dolphin-safe status of a tuna catch.[433] As we see it, the key problem with the amended tuna measure as currently designed is that the United States has not explained why its measure assumes that captains have at their disposal the skills necessary to ensure accurate certification. Accordingly, we are not convinced that the different certification requirements, as currently designed, sufficiently address "the risks to dolphins arising from different fishing methods in different areas of the ocean".[434]

7.235. Before concluding, the Panel will briefly sketch how it would approach the issue under consideration in this section if the burden of proof were allocated in the way suggested by the third-parties.

7.236. Having found that Mexico has made a *prima facie* case that the different certification requirements modify the conditions of competition to the detriment of Mexican tuna and tuna products, the Panel would need to determine whether the United States has made a *prima facie* case that this detrimental treatment nevertheless stems exclusively from a legitimate regulatory distinction.

7.237. In our view, and taking into account our factual findings above, we do not think we could find that the United States has successfully shown that the detrimental impact stems *exclusively* from a legitimate regulatory distinction. Our reasons are as follows.

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[431] United States' response to Panel question No. 40, paras. 222 and 223.

[432] Mexico's first written submission, paras. 180 and 181.

[433] In saying this, we are not suggesting that captains' certification is the *only* way for the United States to monitor the dolphin-safe status of tuna. There may well be other methods, including through the use of technology, by which such monitoring could be undertaken. Nevertheless, because the United States has decided to rely on captains' certification, our duty is only to assess whether *this* method could comply with Article 2.1 of the TBT Agreement.

[434] Appellate Body Report, *US – Tuna II (Mexico)*, para. 297.

7.238. As we indicated above, we accept that, as the Appellate Body appears to have found in the original proceedings, requiring observer certification for vessels other than large purse seiners in the ETP was not the only way in which the United States could have brought its measure into compliance with the rulings and recommendations of the DSB.[435] Moreover, we accept the United States' argument that the 100 per cent observer requirement in the ETP is intricately tied to the special and, in some senses, "unique" nature of the harms that the ETP large purse seine fishery poses to dolphins.

7.239. During the Panel's meeting with the parties, and again in its responses to the Panel's questions, the United States explained that observers are necessary in the ETP large purse seine fishery because "it is those vessels that are capable and permitted to take advantage of the unique association of yellowfin tuna and dolphins in the ETP by engaging in multi-hour chases and captures of huge herds of dolphins".[436] As the United States explained:

> A large ETP purse seine vessel carries a crew of approximately 20 persons on any particular trip. The primary job of the crew is to harvest tuna. However, given the intensity and length of the interactions in a dolphin set between the dolphins, on the one hand, and the vessel, speed boats, helicopter, and purse seine net on the other, the AIDCP parties concluded that it was appropriate to require a vessel capable and permitted to engage in such a dangerous activity to carry a single person to observe the impact of the vessel on the dolphins that it was chasing and capturing.[437]

7.240. In other words, as we understand it, the United States' position is that observers are necessary on ETP large purse seiners but may not be necessary on other vessels in other fisheries *not* because the risk of dolphin mortality or serious injury is somehow less important in other fisheries, but rather because the nature of the fishing technique used by ETP large purse seiners, which essentially involves the chasing and encirclement of many dolphins over an extended period of time, means that it is necessary to have one single person on board with the responsibility of keeping track of those dolphins caught up in the chase and/or the purse seine nets set. Other fishing methods in other oceans may – and, as the United States recognizes, do – cause dolphin mortality and serious injury, but because the nature and degree of the interaction is different in quantitative[438] and qualitative[439] terms (since dolphins are not set on intentionally, and interaction is only accidental), there is no need to have a single person on board whose sole task is to monitor the safety of dolphins during the set or other gear deployment.

7.241. The Panel notes that Mexico disagrees that the situation in the ETP is unique or different in any way that would justify the United States' different treatment of the ETP purse seine fishery and other fisheries. According to Mexico, "tuna dolphin associations have been sighted and deliberately set on" outside of the ETP,[440] and accordingly the absence of independent observers outside the ETP is unjustifiable. In the Panel's view, however, the evidence submitted by Mexico is not sufficient to rebut the United States' argumentation on this point. Most importantly, the evidence submitted by Mexico suggests that, even though there may be some interaction between tuna and marine mammals, including dolphins, outside of the ETP, "dolphins in the Atlantic, Indian, and western Pacific Oceans [do not associate with tuna] as systematically as they do in the Eastern Tropical Pacific".[441] Thus, even according to conservative estimates, it appears that, in the WCPFC, only "3.2 per cent of all purse seine nets are deliberately set on cetaceans".[442] Similarly, a recent paper submitted by Australia to the IOTC stated that "[i]n observer data collected between 1986-1992 from Soviet vessels in the Western Indian Ocean, 494 purse seine sets were observed

[435] Appellate Body Report, *US – Tuna II (Mexico)*, para. 296.
[436] United States' response to Panel question No. 30, para. 166.
[437] United States' response to Panel question No. 30, para. 168.
[438] United States' response to Panel question No. 20, paras. 120-121; United States' response to Panel question No. 21, paras. 136-142.
[439] United States' response to Panel question No. 20, paras. 120-125; United States' response to Panel question No. 22, paras. 147-149.
[440] Mexico's first written submission, para. 113.
[441] National Marine Fisheries Service, "An Annotated Bibliography of Available Literature Regarding Cetacean Interactions with Tuna Purse-Seine Fisheries Outside of the Eastern Tropical Pacific Oceans" (November 1996) (Exhibit MEX-40), p. 2.
[442] New York Times, "A Small Victory for Whale Sharks" (December 6, 2012) (Exhibit MEX-44).

over the seven year period, with 27 intentionally set on whale sharks and cetaceans".[443] These numbers are entirely consistent with the finding by the original Panel that there are "no records of consistent or widespread fishing effort on tuna-dolphin associations anywhere other than in the ETP".[444] On the other hand, evidence submitted by the United States suggests that "9220 intentional sets on dolphins inside the ETP in 2012"[445], amounting to 40 per cent of all sets in that ocean.

7.242. These statistics confirm for the Panel that although dolphins may occasionally and incidentally be set on outside the ETP, it is only inside the ETP that setting on dolphins is practiced consistently or "systematically", in the words of the original Panel. Thus the Panel find the United States' position on this point compelling. Indeed, in our view, the United States' arguments on this point would be sufficient to raise a presumption that the different certification requirements stem from a legitimate regulatory distinction, assuming that other fishing methods are treated even-handedly.

7.243. The Panel is also aware of Mexico's argument that because both parties agree that tuna fishing methods other that setting dolphins have the potential to kill and injure dolphins, "[w]hether or not the operators of the vessel claim the mortalities were an accident is not relevant"[446], and cannot explain the different certification requirements. In the Panel's opinion, however, Mexico has misunderstood the United States' point in recalling the "accidental" or "incidental" nature of dolphin interactions with fishing methods other than setting on dolphins. As we understand it, the United States is not arguing that "accidental" dolphin mortality or injury is less serious than "intentional" mortality or injury. Neither is it arguing that tuna can be considered dolphin-safe where it is caught in a gear deployment that accidentally kills or mains dolphins, or that tuna can or should only be considered non-dolphin-safe only when a dolphin is intentionally killed or injured. On the contrary, the amended tuna measure makes clear that tuna cannot be considered dolphin-safe *whenever* a dolphin is killed or seriously injured in the gear deployment in which the tuna was caught, regardless of whether such death or injury was intentional.[447]

7.244. Rather, as we understand it, the United States' invocation of the accidental nature of dolphin interactions with fishing methods other than setting on dolphins goes to difference between fishing methods that cause harm to dolphins only incidentally and those, like setting on, that interact with dolphins "in 100 per cent of dolphin sets".[448] This distinction is especially important where, as the United States argues is the case with setting on – the particular nature of the interaction is itself "inherently dangerous"[449] to dolphins, even where no dolphin is seen to be killed or seriously injured, because it has unobservable deleterious effects on dolphins' physical and emotional well-being.

7.245. On the basis of the above, we would find that the United States has made a *prima facie* case that the different certification requirements stem exclusively from a legitimate regulatory distinction.

7.246. Nevertheless, in light of the evidence submitted by Mexico concerning the complexity of certifying the dolphin-safe status of tuna catch[450] - which evidence was not rebutted by the United States - we would find that the United States has not explained sufficiently why it assumes that captains are capable of carrying out an activity that the amended tuna measure itself recognizes as highly complex and for which training and education are required. In the absence of such explanation, we would be compelled to find that while the United States may legitimately draw distinctions between the ETP large purse seine fishery and other fisheries, the lack of explanation concerning the technical capacities of captains means that the different certification

[443] Australia and Maldives, "On the Conservation of Whale Sharks (Rhincodon Typus)" (IOTC-2013-S17-PropD[E]) (April 5, 2013) (Exhibit MEX-45).
[444] Panel Report, *US – Tuna II (Mexico)*, para. 7.520.
[445] AIDCP, "Fishing Mortality Limits 2012-2014" (Exhibit US-22).
[446] Mexico's second written submission, para. 142.
[447] See e.g. United States' second written submission, para. 22 ("any tuna product containing tuna caught where a dolphin was killed or seriously injured would not be eligible for the dolphin safe label").
[448] United States' response to Panel question no. 17, para. 88.
[449] United States' second written submission, para. 23.
[450] Mexico's first written submission, paras. 70-72; Mexico's second written submission, para. 168; Mexico's response to Panel question No. 13, para. 79; Mexico's response to Panel question No. 61, paras. 10-11.

requirements cannot be said to be even-handed, and as such to stem *exclusively* from a legitimate regulatory distinction.

7.247. Before concluding our analysis of the different certification requirements, we think it is worthwhile to briefly note one additional aspect of the amended tuna measure that bears on the certification distinction and that, while not discussed extensively by the parties, nevertheless seems to us to be of some importance.

7.248. In one of the questions sent by the Panel to the parties, the parties were asked to comment on a table prepared by the Panel that summarized the various eligibility, certification, and tracking and verification requirements that apply in different fisheries.[451] The Panel prepared this table and sought comments on it to help clarify its understanding of the amended tuna measure.

7.249. In its response to the Panel's question, the United States clarified a number of issues.[452] Most importantly for present purposes, the United States explained that "the determination provided for under section 216.91(a)(4)(iii)[453] only applies to those fisheries not otherwise covered by sections 216.91(a)(1)-(3). As purse seine vessels operating outside the ETP are covered by (a)(2), this determination does not apply to purse seine fisheries outside the ETP".[454] The United States also explained that "the determination made pursuant to section 216.91(a)(2)(i)[455] only applies to non-ETP purse seine fisheries".[456]

7.250. In its comments on the United States' response, Mexico addressed these clarifications. It submitted that:

> [T]he United States interprets the statute to authorize small purse seine vessels in the ETP to be made subject to mandatory observer requirements with a determination that they are causing regular and significant mortality (unrelated to tuna-dolphin association), while both large and small purse seine vessels outside the ETP are not subject to such a possibility.
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> ...
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> [Additionally,] [t]he US response highlights that the Amended Tuna Measure is unconcerned with tuna-dolphin associations in any fisheries other than purse seine fisheries. Especially in light of the association of dolphins with longline fisheries, that is yet another indication or arbitrariness.[457]

7.251. The United States' response and Mexico's comments thereon thus appeared to raise issues of some importance in respect of the system whereby observer certifications could be required outside the ETP large purse seine fishery in certain circumstances. To further explore this matter, the Panel sent an additional question the parties in the following terms:

> To both Parties: In its response to Panel question no. 59, the United States clarified that "the determination provided for under section 216.91(a)(4)(iii) [of the 2013 Final Rule, i.e. that a fishery is causing "regular and significant dolphin mortality or serious injury of dolphins"] only applies to those fisheries not otherwise covered by sections 216.91(a)(1)-(3). As purse seine vessels operating outside the ETP are covered by (a)(2), this determination does not apply to purse seine fisheries outside the ETP". In its comments on this response, Mexico noted that "the United States interprets the statute to authorize small purse seine vessels in the ETP to be made

[451] Panel question No. 59.
[452] United States' response to Panel question No. 59.
[453] This provision states "In any other fishery that is identified by the Assistant Administrator as having a regular and significant mortality or serious injury of dolphins"; See para. 3.45 above.
[454] United States' response to Panel question No. 59, para. 295.
[455] This provision states "In a non-ETP purse seine fishery in which the Assistant Administrator has determined that a regular and significant association occurs between dolphins and tuna (similar to the association between dolphins and tuna in the ETP)"; See para. 3.45 above.
[456] United States' response to Panel question No. 59, para. 301.
[457] Mexico's comments on the United States' response to Panel question No. 59, para. 198.

subject to mandatory observer requirements with a determination that they are causing regular and significant mortality (unrelated to tuna-dolphin association), while both large and small purse seine vessels outside the ETP are not subject to such a possibility".

In light of the above, the Panel understands that (a) large and small purse seine fisheries outside the ETP can never be required to have observers on board because of "regular and significant mortality or serious injuries of dolphins". Rather, observers can only be required in such fisheries where there is "regular and significant association between dolphins and tuna similar to the ETP". Conversely, the Panel understands that non-purse seine fisheries outside the ETP, as well as small purse seine fisheries inside the ETP, can only be required to have observers in board in cases where they are causing "regular and significant mortality or serious injury of dolphins". A determination of "regular and significant association" cannot be made in respect of these fisheries.

a. Is the Panel's understanding correct? If so, why is the amended tuna measure structured in this way? Why, in other words, can no determination of "regular and significant mortality or serious injury" be made in respect of large and small purse seine vessels outside the ETP, and why can no determination of "regular and significant association of dolphins and tuna" be made with respect to non-purse seine fisheries outside the ETP and small purse seine fisheries inside the ETP? The Panel is aware that small purse seine vessels in the ETP are not allowed to set on dolphins under the AIDCP.

b. If the Panel's understanding of the above-mentioned provisions is correct, could the fact that no determination of "regular and significant mortality or serious injury" can be made in respect of large and small purse seine vessels outside the ETP, or that no determination of "regular and significant association of dolphins and tuna" can be made with respect to non-purse seine fisheries outside the ETP and small purse seine fisheries inside the ETP result in non-dolphin safe tuna fishing?[458]

7.252. In its response, the United States confirmed the Panel's understanding as set out in its question to the parties. The United States explained that the two determinations in question "allow[] for the *possibility*" that conditions in fisheries other than the ETP large purse seine fishery may be such as to justify requiring an observer certification (in addition to a captain's statement) for tuna caught outside the ETP. On the issue of why the DPCIA only allows a determination of "regular and significant tuna-dolphin association" to be made in respect of purse seine fisheries outside the ETP, the United States stated that:

> [I]n contrast to purse seine fisheries, it would seem to make little sense to connect an observer requirement to the existence of an association between tuna and dolphins similar to the one that exists in the ETP for purposes of non-purse seine fishing. That is to say, while it is undisputed in this proceeding that the unparalleled harm to dolphins caused by large purse seine vessels in the ETP is directly related to the existence of the association between yellowfin tuna and dolphins, there is *no* evidence that a similar correlation exists between association and harm to dolphins from *other* fishing methods. The reason for this is simple – other gear types cannot take advantage of such an association.[459]

7.253. The United States did not explain why, under the DPCIA, a determination of "regular and significant dolphin mortality" cannot be made in respect of purse seine fisheries outside the ETP.

7.254. In its comments on the United States' response, Mexico argued that "[t]he United States is also wrong to claim that there is no evidence that there is a correlation between harm to dolphins from non-purse seine fishing methods and an association between tuna and dolphins". In Mexico's view:

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[458] Panel question No. 60.
[459] United States' response to Panel question No. 60, para. 11 (emphasis original).

> Mexico has presented uncontested evidence that dolphins are attracted to longlines to eat the fish on the hooks, and that this attraction results in dolphin mortalities and serious injuries. Mexico has also submitted evidence that many thousands of dolphins die in gillnets, indicating that dolphins are "associated" with that the [*sic*] tuna caught with that fishing method. The United States cannot reasonably deny the role that the association plays in dolphin mortalities outside the ETP.[460]

7.255. Mexico thus urges the Panel to accept that "it is irrational to exclude outright non-purse seine fishing methods from the determination of regular and significant association between dolphins and tuna and to exclude purse seine fishing from the determination of regular and significant mortality or serious injury of dolphins".[461] For Mexico, this irrationality "is further proof that the Amended Tuna Measure is arbitrary and not even-handed".[462]

7.256. The Panel recognizes that the aspect or feature of the amended tuna measure at issue here – which we call the "determination provisions" – was not explicitly argued by Mexico as a separate ground of WTO-inconsistency prior to the Panel's raising this issue. Indeed, even in its response to the Panel's question Mexico did not ask the Panel to find that the determination provisions in themselves give rise to inconsistency with Article 2.1 of the TBT Agreement or Articles I and III of the GATT 1994. Rather, as we understand it, Mexico's view is that the determination provisions are simply one more example or manifestation of the uneven-handed nature of the different certification requirements, which, as we have discussed above, have a detrimental impact on Mexican tuna and tuna products.[463]

7.257. The determination provisions are an integral part of the certification system put in place by the amended tuna measure, and therefore they are relevant to the Panel's analysis of whether the United States has brought its measure into conformity with the rulings and recommendations of the DSB by developing procedures and requirements that adequately address the risks to dolphins caused by tuna fishing methods other than setting on dolphins inside the ETP. This, indeed, is precisely why the Panel sent an additional question to the parties seeking further information once the issue emerged clearly.

7.258. In the Panel's opinion, the determination provisions appear to reduce the range of circumstances in which observers can be required outside of the ETP large purse seine fishery (or in small purse seine fisheries inside the ETP), further entrenching the less favourable treatment caused by the different certification requirements. This is so because the design of the determination provisions is such that like tuna products may be subject to different requirements even where, as a matter of fact, the conditions in a non-ETP fishery (or a small purse seine fishery inside the ETP) are the same as those in the ETP large purse seine fishery. They thus seem to us to represent a further way in which the amended tuna measure lacks even-handedness in its treatment of different tuna fishing methods in different oceans, and may also make it easier for tuna caught other than by large purse seine vessel in the ETP to be incorrectly labelled as dolphin-safe, thus modifying the conditions of competition in the US tuna market to the detriment of Mexican tuna and tuna products.[464]

7.259. Moreover, in the Panel's opinion, the determination provisions appear to be arbitrary in the sense that they are difficult to reconcile with, or justify by reference to, the objectives pursued by the amended tuna measure itself.

7.260. We note first that the United States did not explain to the Panel why purse seine vessels outside the ETP cannot be subject to a declaration that they are causing "regular and significant dolphin mortality". Accordingly, the Panel is not in a position to assess whether this determination provision stems exclusively from a legitimate regulatory distinction.

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[460] Mexico's comments on the United States' response to Panel question No. 60, para. 4.
[461] Mexico's comments on the United States' response to Panel question No. 60, para. 5.
[462] Mexico's comments on the United States' response to Panel question No. 60, para. 5.
[463] Mexico's comments on the United States' response to Panel question No. 60, para. 7.
[464] The Panel recalls that, as it explained above, it is not necessary in this proceeding to undertake the kind of extensive and detailed analysis that would be required in order to conclude definitively that the different certification requirements make it easier for tuna caught other than by large purse seine vessels in the ETP to be inaccurately labelled: see para. 7.169 above.

7.261. Secondly, we have doubts about the United States' argument that the existence and nature of tuna-dolphin association has no impact on the degree of mortality or serious injury caused by fishing methods other than setting on dolphins. As a matter of common-sense, it appears to the Panel that the risk of mortality or serious injury is necessarily heightened where dolphins associate with tuna, even if the fishing method in question does not deliberately target that association, as does setting on dolphins. Where dolphins associate with tuna, it seems to the Panel that they are more likely to interact with tuna fishing gear, even if such interaction is accidental or unintentional. This is simply a question of numbers: the more dolphins there are in the vicinity, the more likely that one or more dolphins will be killed or seriously injured. For instance, as Mexico explains in its response to and comments on the Panel's question on this issue, it seems far more likely that dolphins will be killed or seriously injured by longlines in areas where there is a "regular and significant" tuna-dolphin association, since in such circumstances dolphins will be in close physical proximity to the tuna that are attracted to the longlines and are thus more likely to be hooked themselves.

7.262. Moreover, in the Panel's opinion, the United States' own explanation as to why observers are necessary in the ETP seems to suggest that observers may be necessary whenever there is a "regular and significant" tuna-dolphin association, regardless of whether the association occurs in a purse seine fishery or any other type of fishery. It will be recalled that the United States argued (and the Panel accepted) that observers are needed in the ETP large purse seine fishery because the intensity of the tuna-dolphin interaction in that fishery makes it indispensable to have a single individual charged with monitoring the safety and well-being throughout the fishing operation. In the Panel's view, it is difficult to see why that logic does not apply equally in the cases of other fisheries where there is "regular and significant tuna-dolphin association", even if the fishing method used in that fishery does not intentionally target the association. Insofar as a "regular and significant" tuna-dolphin association is likely to increase the chance of dolphin mortality or serious injury, it may make sense to require observers *wherever* a "regular and significant" tuna-dolphin association exists, in order to ensure that consumers receive accurate dolphin-safe information.

7.263. For the foregoing reasons, the Panel believes that the determination provisions open up a gap in the certification procedures applied outside the ETP large purse seine fishery. These provisions appear to be designed to enable the United States to impose conditions on fisheries other than the ETP large purse seine fishery where the conditions in the former approach those of the latter. This would help ensure that similar situations are treated similarly under the amended tuna measure. However, a determination of regular and significant mortality[465] cannot be made in respect of purse seine fisheries outside the ETP, and a determination of regular and significant tuna-dolphin association[466] cannot be made in respect of non-purse seine fisheries. This means that, in some cases, fisheries other than the ETP large purse seine fishery may be treated differently, and less stringently, under the amended tuna measure even where the conditions in that fishery mirror those in the ETP large purse seine fishery, either in terms of the level of dolphin mortality or the degree of tuna-dolphin association. The United States has not provided sufficient explanation as to why this aspect of the amended tuna measure is structured in this way, or how it relates to the objectives pursued by the labelling regime. The Panel is therefore not convinced that this gap stems exclusively from a legitimate regulatory distinction.

7.5.2.4.2.3 Separate opinion of one panelist

7.264. One of the panelists is unable to agree with the reasoning and conclusions in paragraphs 7.233-7.246 above. This section reflects the views of that panelist.

7.265. While I agree with many of the intermediate factual findings made by the majority in respect of the different certification requirements, I do not agree with the legal reasoning or conclusions that my colleagues have developed on the basis of those findings. Most importantly, I do not agree that the different certification requirements lack even-handedness. On the contrary, in my opinion any detrimental treatment caused by the different certification requirements does stem exclusively from a legitimate regulatory distinction, and accordingly is not inconsistent with Article 2.1 of the TBT Agreement.

[465] Section 216.91(a)(4)(iii) of the Implementing Regulations.
[466] Section 216.91(a)(2)(i) of the Implementing Regulations.

7.266. I begin by noting my agreement with the majority that a central question in the assessment of even-handedness under Article 2.1 of the TBT Agreement is whether or not, and the extent to which, identified detrimental treatment is justifiable on the basis of the policy objective pursued by the technical regulation at issue. In the present case, this means it is necessary to consider whether the different certification requirements imposed by the amended tuna measure are fully in line with, or capable of achieving, the amended tuna measure's objectives.

7.267. In my view, the overall goal or objective of the amended tuna measure is to minimize the risk that consumers who prefer dolphin-safe tuna – that is, tuna caught in a manner not harmful to dolphins – will nevertheless end up consuming tuna that was, in fact, caught in sets or other gear deployments in which dolphins were killed or seriously injured. To achieve this goal, the amended tuna measure develops and implements mechanisms to enable detection of dolphin mortality and serious injury during fishing trips. Whenever these mechanisms detect that a dolphin was killed or seriously injured in a particular set or other gear deployment, all tuna caught in that set or gear deployment becomes ineligible to receive the United States dolphin-safe label.

7.268. Mexico argues that the detection mechanisms put in place outside the ETP large purse seine fishery are less sensitive, and so less accurate or reliable, than those in place for large purse seine vessels in the ETP. According to Mexico, the mechanisms in place outside the ETP large purse seine fishery are less likely to detect dolphin mortality and serious injury than are the mechanisms in place in the ETP large purse seine fishery. Accordingly, in Mexico's argument, there is a greater chance, or a higher likelihood, that tuna caught outside the ETP large purse seine fishery will be labelled dolphin-safe even if it was caught in a set in which, as a matter of fact, dolphins were killed or seriously injured. However, the risk or likelihood that tuna is labelled dolphin-safe even if it was caught in a set in which, as a matter of fact, dolphins were killed or seriously injured, depends not only on the sensitivity of the mechanism to detect dolphin mortality or injury, but also on the probability of such mortality or injury, i.e. the magnitude of the risk posed to dolphins either by a specific fishing method or because of the specific situation in a fishery such as close interaction between dolphins and tuna.

7.269. Mexico argues that the mechanisms in place outside the ETP large purse seine fishery are less accurate because (a) captains have financial incentives to under-report mortality and serious injury; and (b) captains may not have the same degree of expertise as independent observers, and accordingly may be less capable of detecting mortality and serious injury occurring during fishing operations.

7.270. I agree fully with the majority's factual finding on point (a): in my view, Mexico has not provided sufficient evidence to show that captains are inherently unreliable due to perverse financial incentives.

7.271. I also agree with the majority on point (b), that is, that captains may not have the same degree of expertise as independent observers. The evidence shows quite clearly that observers in the ETP undergo extensive training on a range of topics and activities related to dolphin-safety, and that captains may not always and necessarily have the same degree of specialized knowledge.[467] Accordingly, captains may be less capable than independent and specially-trained observers of detecting mortality and serious injury occurring during fishing operations.

7.272. In my view, however, this is not fatal, because captains are often called upon to certify the existence of facts of which they do not have direct knowledge. Captains are in many instances expected to certify the existence of facts on the basis of information provided to them by their crew. Similarly, it is reasonable to expect that many activities entrusted to captains under national, regional, and international fisheries regulations are in fact carried out by the crew, under the captain's overall or general supervision, even though it is the captain him or herself who ultimately bears responsibility for certifying that the activity in question was properly carried out. This suggests that the mere fact that captains may not themselves have expertise or specialised knowledge about dolphin biology and safety does not necessarily render unreliable their certifications that no dolphins were killed or seriously injured in a given set or other gear deployment. Even where the captain does not have such expertise, one of the crew members may,

[467] Indeed, in my opinion, the United States has not even claimed that captains always and necessarily have the same technical expertise as independent observers.

and there is no reason to think that a captain certification on the basis of information provided by that crew member would be necessarily or inherently inaccurate.

7.273. Additionally, and perhaps more importantly, I think that *even assuming* captains' certification is less likely to detect instances of mortality and serious injury, this fact does not lead to the conclusion that the different certification requirements lack even-handedness. This is so for the following reasons.

7.274. First, neither captain nor observer certification is capable of detecting *every* instance of dolphin mortality or serious injury. The language of the certification notwithstanding, all that can really be certified, by either a captain or an observer, is that no dolphin mortality or serious injury was *detected* – that is, observed - in a set or other gear deployment. The capacity for human error being what it is, it is simply impossible for even the most highly qualified observer to say with certainty that *no* dolphin was killed or seriously injured during a fishing operation. Both the observers' and captains' certificate should be seen as reliable indication of whether dolphin mortality or injury was detected or not. However, it is obvious that when there is no independent observer on board, the probability that dolphin mortality or serious injury is detected is less likely than in situations where a specially trained independent observer is on board.

7.275. The consequence of this is that, in respect of both captain and observer certification, a certain degree or margin of error is necessarily tolerated. The margin of error may be smaller in the case of observer certification than in the case of captain certification; but in both cases there is always some chance that a dolphin death or serious injury will go unobserved. Accordingly, we can talk of the difference between captain and observer certification not only in terms of *how accurate or sensitive* each one is, but also in terms of how *large a margin of error* each one allows.

7.276. Now, accepting that certification, whether by captain or observer, always allows a certain margin of error, the question is whether it is acceptable, under Article 2.1 of the TBT Agreement, for the United States to tolerate a greater margin of error in the mechanisms in place outside the ETP large purse seine fishery than inside it. In my view, it is. Put simply, my opinion is that where the probability of dolphin mortality or serious injury is smaller – because, for instance, the degree of tuna-dolphin association is less likely - the United States may accept a proportionately larger margin of error. Conversely, where the risks are higher, it may be appropriate to tolerate only a smaller margin of error. Provided that the tolerated margin of error is, to use a term from the original proceedings, "calibrated" to the risks faced by dolphins in a particular fishery, the mere fact that the detection mechanisms inside the ETP large purse seine fishery and outside of it are not the same does not deprive the amended tuna measure of even-handedness. Indeed, understood in this sense, "calibration" of the acceptable margin of error to the degree of risk in a particular fishery seems to me to be at the very heart of the even-handedness analysis in this case.

7.277. A hypothetical may help to clarify my view. Say a city imposes a speed limit of 80 km/h on all roads. Say also that to detect violations of this speed limit, the city has developed a system of police observation. Now, assume that suburb A has a higher incidence of speeding than does suburb B. As a result, the city requires police observation every day on major roads in suburb A with highly sensitive detectors, but only four days a week in suburb B with less sensitive machines. Could such a set-up be described as lacking even-handedness? In my view, it could not. As I see it, it is entirely reasonable for governments, in the course of enforcing regulations, to vary the intensity of their detection mechanisms in accordance with the historical incidence of and future potential for violations. Provided that there is a rational connection between the variation in intensity and the difference in risk, I would not find that the implementation of different detection mechanisms lacks even-handedness or is otherwise discriminatory.

7.278. As the Panel explained in its discussion of the eligibility criteria, both the panel and the Appellate Body in the original proceedings found that setting on dolphins is "particularly harmful" to dolphins. Setting on dolphins is the only tuna fishing method that deliberately targets dolphins, and so interacts with dolphins in a way that is uniquely intense, both in terms of the number of dolphins affected and the frequency of interaction. In my view, the United States has put forward evidence sufficient to show that the risks in fisheries other than the ETP large purse seine fishery are, as a general matter, significantly less serious than those posed in the ETP large purse seine

fishery.[468] This, of course, is not to say that other fishing methods do not cause mortality or serious injury. They do, and that is why the United States requires captains in such fisheries to certify that no dolphin was killed or seriously injured. However, given the higher degree of risk in the ETP large purse seine fishery, it is in my opinion entirely even-handed for the United States to tolerate a smaller margin of error in that latter fishery, and accordingly to require observers in that fishery but not in others.

7.279. As should be clear, my reasoning is based on the proposition that where the degree of risk is different, it is acceptable for the United States to tolerate different margins of error in their detection mechanisms. This corollary of this position is that it could not be said to be acting even-handedly if it tolerated a different margin of error in two (or more) fisheries whose risk profiles were the same. In such circumstance, even-handedness would necessitate that the same detection mechanisms be implemented.

7.280. In my view, the amended tuna measure responds to this necessity through sections 216.91(a)(4)(iii) and 216.91(a)(2)(i) (the "determination provisions"). These provisions allow the Assistant Administrator to make a determination that a particular fishery is causing "regular and significant dolphin mortality" or has a "regular and significant tuna-dolphin association" akin to that in the ETP. Where such a determination is made, independent observer certification will be required in those fisheries. In other words, the amended tuna measure contains sufficient flexibility to enable the United States to impose the same requirements in fisheries where the same degree of risk prevails. In my view, this flexibility is further evidence of the even-handedness of the different certification requirements as designed in the amended tuna measure.

7.281. Now, if it were shown that some other fishery is, as a matter of fact, causing "regular and significant mortality or serious injury", or that another fishery does, as a matter of fact, have "a regular and significant tuna-dolphin association" akin to that in the ETP, then it might be argued that the failure of the Assistant Administrator to make the relevant determination foreseen in sections 216.91(a)(4)(iii) and/or 216.91(a)(2)(i) itself gives rise to a lack of even-handedness. This would be so because the failure to make a determination would have the result that fisheries in which the same risks exist are being treated differently. However, Mexico has not asked the Panel to find that the Assistant Administrator's failure to make a determination is itself a violation of Article 2.1 of the TBT Agreement. Nor, in my view, has it put forward evidence sufficient to make out such an argument.

7.282. As such, in my view, the general rule that captains' certifications are sufficient outside the ETP large purse seine fishery while observers are required inside the ETP large purse seine fishery is even-handed. I think that this distinction represents a fair response to the different risk profiles existing in different fisheries, as established by the evidence.

7.283. Having said that, I agree fully with the majority's reasoning concerning the determination provisions, explained in paragraphs 7.247-7.263 above. In my view, the fact that a determination of regular and significant mortality cannot be made in respect of purse seine fisheries outside the ETP, and the fact that a determination of regular and significant tuna-dolphin association cannot be made in respect of non-purse seine fisheries, has not been explained or justified. This aspect of the different certification requirements is therefore inconsistent with Article 2.1 of the TBT Agreement.

7.5.2.5 The different tracking and verification requirements

7.284. The third instance of less favourable treatment raised by Mexico under Article 2.1 of the TBT Agreement concerns the different record keeping and verification requirements that apply to tuna caught by large purse seine vessels in the ETP on the one hand and all other tuna on the other hand.

[468] See section C of United States' first written submission and Table Summarizing Fishery-by-Fishery Evidence on Record (Exhibit US-127).

7.285. In its first written submission, Mexico describes the regulatory distinction as follows:

> The record-keeping and verification requirements for tuna caught in the ETP by setting on dolphins in accordance with the AIDCP and the different requirements for tuna caught outside the ETP using both the same and different fishing methods.[469]

7.286. In these findings, we will refer to this regulatory distinction as the "different tracking and verification requirements".

7.287. As we did in respect of the different certification requirements, we begin by considering whether the different tracking and verification requirements modify the conditions of competition in the United States' tuna market to the detriment of Mexican tuna and tuna products. If we find that they do, we will proceed to determine whether this detrimental impact stems exclusively from a legitimate regulatory distinction.

7.5.2.5.1 Whether the different tracking and verification requirements modify the conditions of competition in the United States' market to the detriment of like Mexican tuna and tuna products

7.5.2.5.1.1 Arguments of the parties

7.288. The content of Mexico's allegation that the different tracking and verification requirements have a detrimental impact on the competitive opportunities of Mexican tuna and tuna products is essentially the same as that of its claim concerning the different certification requirements. Mexico's argument is not that the different tracking and verification requirements in themselves block or hinder Mexican access to the dolphin-safe label. Rather, its complaint is that "the absence of sufficient … record-keeping [and] verification … requirements for tuna that is used to produce tuna products from the United States and other countries means that Mexican tuna products are losing competitive opportunities to tuna products that may be incorrectly labelled as dolphin-safe. This difference is what is creating the detrimental impact".[470] According to Mexico, the detrimental impact caused by the different tracking and verification requirements does not stem from the "denial of a competitive opportunity" – that is, beyond or additional to the denial inherent in the disqualification of tuna caught by setting on dolphins – but rather from the granting of "a competitive advantage" to tuna and tuna products from the United States and other WTO Members.[471]

7.289. The United States rejects Mexico's arguments for much the same reasons as it rejected Mexico's arguments on the different certification requirements. Its primary submission is that "the detrimental impact does not stem from" the different record-keeping and tracking and verification requirements.[472] Rather, "Mexico's first element [i.e. the eligibility criteria] *is* the detrimental impact", and since "Mexican tuna product containing tuna caught by setting on dolphins would still be ineligible for the 'dolphin safe' label" even if the different observer requirements did not exist, "Mexico simply cannot establish a causal connection between the detrimental impact" and the different record keeping and tracking and verification requirements".[473]

7.290. Additionally, as in the context of the different certification requirements, the United States notes that Mexico's claim against the different tracking and verification requirements is based on the notion that "producers are disadvantaged *vis-à-vis* their non-AIDCP competitors to the extent that the competitors are allowed to inaccurately designate their tuna products as 'dolphin safe' … whereas Mexican producers, due to the strict record-keeping requirements of AIDCP, are not able to commit this same level of fraud".[474] However, in the view of the United States, "Mexico puts forward *no* evidence to support the assertion that the US Government and its citizens have been defrauded on an industry-wide scale for over the past two decades".[475]

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[469] Mexico's first written submission, para. 236.
[470] Mexico's second written submission, para. 117.
[471] Mexico's second written submission, para. 117.
[472] United States' first written submission, para. 223.
[473] United States' first written submission, para. 223 (emphasis original).
[474] United States' first written submission, para. 246.
[475] United States' first written submission, para. 247 (emphasis original).

7.291. Further, and as it argued in the context of the different certification requirements, the United States argues that the distinction about which Mexico complains is "created by the AIDCP, not the US measure. Indeed, if the United States eliminated all references to the AIDCP (and its requirements) from the amended measure, the regulatory distinction that Mexico criticizes *would still exist*".[476] Accordingly, in the view of the United States, there is no "genuine connection" between the different tracking and verification requirements and any detrimental impact suffered by Mexican tuna and tuna products.

7.292. Finally, according to the United States, Mexico's position means that the United States is obliged to require of itself and all its trading partners whatever international commitments Mexico has made with respect to tracking and verification, "irrespective of the science or any other consideration". The United States asserts that this is inconsistent with principle that Members may choose their appropriate levels of protection with respect to legitimate objectives.[477]

7.5.2.5.1.2 Analysis by the Panel

7.293. As a preliminary matter, we recall again our finding above that Mexico has made a distinct claim in respect of the different tracking and verification requirements, and that it is appropriate for us to consider that claim.

7.294. We also recall that in the context of our analysis above of the different certification requirements, we explained why, in our opinion, the regulatory distinction about which Mexico complains is properly seen as stemming from the amended tuna measure itself, even though it incorporates requirements imposed by the AIDCP.[478] Without prejudice to the question whether the different tracking and verification requirements in fact have a detrimental impact on the competitive opportunities of imported Mexican tuna and tuna products – a question that we analyse in detail in the following paragraphs – we note that our analysis of the relationship between the AIDCP requirements and the amended tuna measure applies with equal force in respect of the different tracking and verification requirements. Although the tracking and verification requirements that the amended tuna measure imposes on tuna caught by large purse seine vessels in the ETP themselves stem from the AIDCP, the regulatory distinction about which Mexico complains, is the distinction made by the amended tuna measure itself in imposing different tracking and verification requirements on different tuna as a condition of accessing the United States' dolphin-safe label. Thus, while it is true that "[w]hat US law requires is that Mexican producers provide Form 370s that list the AIDCP-mandated tracking number", whereas "[t]he actual record-keeping and verification requirements Mexico complains of are contained in the AIDCP"[479], it is nevertheless the case that by incorporating these AIDCP requirements into the tuna measure, the tuna measure itself creates a regulatory distinction that conditions access to the United States dolphin-safe label on different criteria depending on where and how the tuna was caught.

7.295. The Panel now turns to the substance of the parties' arguments. Before carrying out our legal assessment, it is necessary to consider in some detail the rather complex factual situation with which we are confronted.

The Panel's understanding of the US system for tracking and verifying tuna caught other than by large purse seine vessel in the ETP

7.296. As Mexico puts it in its first written submission, "[c]ompliance with the AIDCP brings with it strict obligations to comply with the tuna tracking system of the AIDCP".[480] In its first submission, Mexico cites extensively from the AIDCP's Resolution to Adopt the Modified System for Tracking and Verification of Tuna, adopted in 20 June 2001[481], which describes in great detail the tracking and verification requirements that apply to tuna caught by large purse seine vessels in the ETP. We agree with Mexico that this detailed description is "crucial to understanding the steps that are

[476] United States' first written submission, para. 226 (emphasis original).
[477] United States' second written submission, para. 105.
[478] See paras. 7.171-7.179 above.
[479] United States' second written submission, para. 98.
[480] Mexico's first written submission, para. 89.
[481] Agreement on the International Dolphin Conservation Program, "Resolution to Adopt the Modified System for Tracking and Verification of Tuna" (20 June 2001) (Exhibit MEX-36).

necessary to ensure that a tuna product validly contains tuna that was caught without harm to dolphins"[482], and refer to the descriptive part of this Report where we describe this system in some detail.[483]

7.297. The various steps are implemented in Mexican law through a series of measures.[484] We need not, however, concern ourselves with the details of Mexico's domestic law.[485]

7.298. Mexico contrasts the detailed tracking and verification requirements that apply to large purse seine vessels in the ETP with the absence of similar requirements for tuna caught other than by large purse seine vessel in the ETP. As Mexico puts it, for such tuna "[t]here are no documentation requirements for any type of non-ETP tuna products other than the captain's self-certification. In particular, there is no requirement for a tuna tracking system at all".[486]

7.299. The United States concedes that these AIDCP requirements are incorporated, indirectly at least, in the tuna measure. It explains that Form 370 "requires that tuna harvested in the ETP by large purse seine vessels be accompanied by documentation from the appropriate IDCP-member country certifying that there was an IDCP observer on the vessel at all times and listing the numbers for the associated TTF(s)".[487]

7.300. However, the United States rejects Mexico's allegation that, contrary to the situation in the ETP large purse seine fishery, the amended tuna measure imposes no tracking and verification requirements on tuna caught other than by large purse seine vessels in the ETP. To the contrary, according to the United States, the amended tuna measure *does* impose at least two[488] tracking and verification requirements to "protect the integrity of the dolphin safe label for tuna harvested by vessels other than large purse vessels operating in the ETP".[489] According to the United States, both of "[t]hese requirements implement, and indeed go beyond, the record-keeping requirements of RFMOs governing tuna fisheries other than the ETP"[490] – that is, the record requirements developed in the context of the various international agreements that regulate fishing in particular oceanic regions.

7.301. First, the United States explains that:

> [E]very imported tuna product, regardless of where the tuna was caught and whether the dolphin safe label is used, must be accompanied by a NOAA Form 370 which designates the gear type with which the tuna was caught and, if the product is to be labelled dolphin safe, contains the necessary certifications. At the time of importation, one copy of this form is submitted to Customs and Border Protection and another is submitted, within 10 days of importation, to the Tuna Tracking and Verification Program (TTVP).[491]

7.302. Second, the United States contends that:

> [T]the amended measure requires that tuna, to be contained in a tuna product labelled dolphin safe, be segregated from non-dolphin safe tuna at the time it was caught through unloading and processing. Section 216.93(c)(1) implements this requirement for tuna caught by large purse seine vessels in the ETP, requiring that dolphin safe tuna be loaded into designated wells and offloaded to trucks, storage facilities, or carriers in such a way as to safeguard the distinction between dolphin safe and non-dolphin safe tuna. Sections 216.93(c)(2) and (3) apply the same

[482] Mexico's first written submission, para. 90.
[483] See paras. 3.47-3.52 above.
[484] Norma Oficial Mexicana de Emergencia NOM-EM-002-PESC-1999, Pesca responsable de túnidos. Especificaciones para la protección de delfines. Requisitos para la comercialización de túnidos en territorio nacional (Exhibit MEX-31) and Norma Oficial Mexicana NOM-001-SAG/PESC-2013, Pesca responsable de túnidos. Especificaciones para las operaciones de pesca con red de cerco (Exhibit MEX-32).
[485] See Mexico's first written submission, paras. 91-93.
[486] Mexico's first written submission, para. 94 (emphasis original).
[487] United States' first written submission, paras. 44-46.
[488] United States' first written submission, paras. 49 and 50.
[489] United States' first written submission, para. 48.
[490] United States' first written submission, para. 51.
[491] United States' first written submission, para. 49.

> requirement to tuna caught by purse seine vessels outside the ETP and to tuna caught in other fisheries. Any mixing in the affected wells or storage areas results in the tuna being designated non-dolphin safe.[492]

7.303. Additionally, the United States explains that certain US government agencies carry out various checks in US canneries[493], including spot checks[494], to ensure compliance with these requirements. Thus, whenever a US cannery receives a shipment of either domestic or imported tuna for processing, a representative from the National Marine Fisheries Service may be present to monitor delivery and verify the dolphin-safe designations.[495] Additionally, US canneries are required to submit monthly reports to the TTVP containing information about, *inter alia*, the species of tuna received by the cannery, its dolphin-safe status, condition (including weight), as well as the ocean of capture, the gear type used, the type of catcher vessel, trip dates, carrier name, unloading dates, place of unloading, and, if the tuna products are to be labelled dolphin-safe, the required certifications that no dolphins were killed or seriously injured in the sets in which the tuna was caught. To facilitate these checks, all exporters, trans-shippers[496], importers, processors, and distributors of tuna and tuna products must maintain records related to the tuna shipment(s) with which they are involved for at least two years.[497]

7.304. According to the United States, various sanctions may be applied if these requirements are not met. For instance, tuna products found to be incorrectly labelled are subject to forfeiture, re-exportation, or even, in some cases, destruction.[498] Additionally, the US importer of record for a particular batch or shipment of tuna is, under US domestic law, liable for the accuracy of the information contained in a Form 370. Persons who offer for sale or export tuna products falsely labelled as dolphin-safe – including producers, importers, exporters, distributors, and other sellers – may face civil sanctions or even criminal prosecutions under the DPCIA.[499]

7.305. In its second written submission, Mexico raises concerns about the utility of the United States' tracking and verification requirements for tuna caught other than by large purse seine vessels in the ETP. In particular, Mexico notes that "[w]hen US authorities perform their 'verification' of US canneries, they can only check whether a cannery maintains records of the documentation that it receives; there is no way to check the validity of the documentation".[500] Thus, according to Mexico, "the Amended Tuna Measure provides no requirements or procedures by which the dolphin-safe status of tuna caught by a vessel outside the ETP can be tracked or verified at any point while it is stored on board fishing vessels, consolidated with the tuna caught by other fishing vessels, unloaded at port, brokered through intermediaries, trans-shipped, partially processed into loins, processed into finished tuna products, or imported into the United States".[501] In Mexico's opinion, this is in stark contrast to the fact that "the Amended Tuna Measure requires a comprehensive and independently-verified record-keeping and tracking system for the dolphin-safe status of tuna caught within the ETP".[502]

7.306. In order to help it better understand the tracking and verification requirements imposed on tuna caught other than by large purse seine vessels, the Panel asked the parties a number of questions on this issue following the Panel's meeting with the parties.[503]

7.307. The Panel asked the United States to explain "[h]ow, if at all, is the United States able to verify that outside the ETP dolphin-safe and non-dolphin safe tuna has been kept separately, from the point of catch to the point of retail, as required under the amended tuna measure".[504] In

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[492] United States' first written submission, para. 50.

[493] The United States has conceded that it does not conduct checks in non-US canneries: United States' first written submission, para. 64.

[494] United States' first written submission, para. 53 ("NMFS regularly audits US tuna canneries and conducts "spot checks" of retail market tuna products").

[495] United States' first written submission, para. 52.

[496] On the complex issue of trans-shipment, see paras. 7.327-7.351 below.

[497] United States' first written submission, para. 52.

[498] United States' first written submission, para. 53.

[499] United States' first written submission, para. 53.

[500] Mexico's second written submission, para. 67.

[501] Mexico's second written submission, para. 145.

[502] Mexico's second written submission, para. 145.

[503] Panel questions Nos. 43, 44 and 45.

[504] Panel question No. 43.

response, the United States explained that "[t]here are several mechanisms by which the United States could verify whether dolphin safe and non-dolphin safe tuna caught outside the ETP had been kept separate from harvest, through processing, to retail sale".[505] These mechanisms include "inspections on the high seas or in US waters", during which "a captain's failure to segregate dolphin safe and non-dolphin safe tuna could be uncovered".[506] Additionally, the United States argues that "routine inspections of shipments of tuna unloaded at US ports or US canneries could disclose a captain's failure to segregate dolphin safe from non-dolphin safe tuna". Such disclosure may come about as a result of documentary audits, or "an officer might be able to observe tuna being offloaded to trucks, storage facilities, or carrier vessels in a way that does not maintain segregation of dolphin safe and non-dolphin safe tuna".[507] Government audits of US canneries "could disclose systemic failures to maintain adequate procedures for segregating dolphin safe and non-dolphin safe tuna" or "inadequate systems for ensuring that all tuna purchased as dolphin safe is accompanied by the required certifications and is tracked through processing".[508] And the NMFS is authorized to engage in "retail spot checks", in which it "uses the product code" of a randomly selected retail can or pouch of tuna "to trace the product back through the importer or manufacturer all the way to the harvesting vessel and vessel trip".[509] Finally, the United States argues that "the tuna canning industry imposes its own oversight on vessel captains". According to the United States, "it is possible that canneries themselves could and would verify whether vessels have maintained the segregation required by the US measure, and … they might refuse to purchase tuna from vessels that had not complied with the amended measure".[510]

7.308. In its response to another question from the Panel[511], the United States provided the Panel with additional details on these tracking and verification mechanisms. For present purposes, the most important part of the United States' response concerns cannery audits, because it is through these audits that United States authorities can "acquire all the documents that track particular lots received by the canneries from the vessel trip on which the tuna was caught".[512] In other words, as we understand it, it is primarily through cannery audits that the United States ensures that all tuna has been properly tracked and verified so as to ensure that non-dolphin-safe tuna is not incorrectly labelled.

7.309. **[[BCI[513] [514]]]**

7.310. **[[BCI[515] [516]]]**

7.311. **[[BCI[517]]]** In the view of the United States, audits can therefore "disclose discrepancies in documentation and procedural irregularities leading to inaccurate or fraudulent dolphin-safe certifications. Specifically, an audit could uncover missing Form 370s or captains' statements, inadequate record keeping linking captains' certifications to canned tuna lots, or mixing of dolphin-safe and non-dolphin-safe tuna".[518]

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[505] United States' response to Panel question No. 43, para. 229.
[506] United States' response to Panel question No. 43, para. 230.
[507] United States' response to Panel question No. 43, para. 231.
[508] United States' response to Panel question No. 43, para. 232.
[509] United States' response to Panel question No. 43, para. 233.
[510] United States' response to Panel question No. 43, para. 234.
[511] Panel question No. 44. The question read as follows: "To the United States: How can the United States determine whether an importer, processor, or captain has made a false dolphin-safe declaration?"
[512] United States' response to Panel question No. 44, para. 240.
[513] United States' response to Panel question No. 44, para. 241.
[514] United States' response to Panel question No. 44, para. 241.
[515] United States' response to Panel question No. 44, para. 242. The United States argues that, in some cases, the can code may also enable the authorities to trace back to an associated captain's statement. However, in the Panel's view the evidence relied upon by the US in support of this point is ambiguous. In particular, the Panel is puzzled by the fact that **[[BCI]]**. As such, the Panel declines to find that the evidence before it establishes that can codes enable US authorities to track tuna contained in a retail product back to its associated captain's statement.
[516] United States' response to Panel question No. 44, paras. 242 and 243.
[517] United States' response to Panel question No. 44, para. 243.
[518] United States' response to Panel question No. 44, para. 244.

7.312. It is important to note that the retail spot checks that the United States authorities may carry out work in essentially the same way as cannery audits. For US-processed tuna, the relevant authority will trace the can back to the cannery responsible for production, and that cannery will then be expected to provide the documentation mentioned in the preceding paragraphs in order to establish the identity of the tuna – that is, the vessel and trip on which it was caught, and its dolphin-safe certification. For non-US-processed tuna, the relevant authorities will use the can to identify the importer, who will then have to provide the relevant documentation. In such cases, the importer him/herself will be liable for any inaccuracy or fraud detected.[519] Thus, "[t]he same internal traceability systems that enable canneries to comply with cannery audits also allow canneries to comply with the requirements of retail spot checks".[520]

7.313. The United States' response to the Panel's question concludes in the following way: "Of course, NOAA does not verify the dolphin safe certification on every can of tuna imported to the United States. However, the detailed records kept by importers and canneries, and the fact that dolphin safe certifications have been translated into and provided in many languages by vessels of different nationalities, demonstrates that the US and foreign canneries and fishing vessels that supply tuna product for the US market are conscious of and take steps to comply with the US measure".[521]

7.314. Mexico provided the Panel with detailed comments on the United States' response. The thrust of these is that "[t]he United States' responses to Questions 43 and 44 are disingenuous".[522]

7.315. With respect to inspections on the high seas and at the dock-side, Mexico argues that "such inspections are incapable of detecting whether nets were set on dolphins or whether dolphins were killed or seriously injured during a set or gear deployment". According to Mexico, "the United States has submitted no evidence to show that any fishing vessel outside the ETP has a procedure for tracking tuna by the well in which it was stored". In Mexico's view, these shortcomings are exacerbated because "the United States does not conduct such inspections on vessels outside its jurisdiction".[523]

7.316. With respect to cannery audits, Mexico's view is that "[t]he United States' evidence of the Commerce Department's audits of canneries reveals significant flaws in the US system and confirms Mexico's argument".[524] Mexico begins by recalling that "the Commerce Department only conducts dolphin-safe compliance audits of US canneries. It does not audit foreign canneries, foreign loining processors, foreign carrier companies, or foreign fishing vessel operators". Additionally, Mexico notes that the United States' submissions on the possibility of auditing importers, trans-shippers, processors, and distributors are couched in terms of the Commerce Department's *authority*, and concludes on the basis of this language that "the Commerce Department does not periodically audit importers, trans-shippers, processors, or distributors".[525]

7.317. Mexico also rejects the reliability and the relevance of the United States' exhibits concerning cannery audits.

7.318. With respect to reliability, Mexico notes that in respect of all four exhibits, "the United States provided no explanation of these documents to verify their source, when they were prepared, and by whom".[526]

[519] See United States' response to Panel question No. 18, explaining the various "legal consequences" stemming from fraudulent or otherwise inaccurate import activity.
[520] United States' response to Panel question No. 44, para. 246.
[521] United States' response to Panel question No. 44, para. 248.
[522] Mexico's comments on the United States' response to Panel question No. 43, para. 152.
[523] Mexico's comments on the United States' response to Panel question No. 43, para. 153.
[524] Mexico's comments on the United States' response to Panel question No. 43, para. 154.
[525] Mexico's comments on the United States' response to Panel question No. 43, para. 155 (emphasis original).
[526] Mexico's comments on the United States' response to Panel question No. 43, para. 156.

7.319. As for relevance, Mexico notes first that **[[BCI**[527] [528] [529]**]].**

7.320. **[[BCI**[530] [531]**]]**

7.321. **[[BCI**[532]**]]**

7.322. **[[BCI**[533] [534]**]]**

7.323. As regards retail spot checks, Mexico argues that the process described by the United States "can only trace a can from a US retail store to a US cannery or US importer. Such checks can provide no additional information on the source and dolphin-safe status of tuna than the superficial audits of US canneries".[535]

7.324. Finally, Mexico takes issue with the United States' description of "industry oversight". According to Mexico:

> The key point is the following statement by the United States: "It is possible that canneries themselves could and would verify whether vessels have maintained the segregation required by the US measure, and that they might refuse to purchase tuna from vessels that had not complied with the amended measure". The United States therefore admits that it does not know whether canneries perform such verifications or purchase non-dolphin safe tuna.[536]

7.325. Mexico sums up its rebuttal in the following terms:

> In summary, the evidence establishes that the US tracking and verification system for non-ETP tuna is meaningless. US canneries can trace tuna once it arrives at their plants in the United States, but they have no method to verify that the information they receive from foreign exporters is accurate – both with regard to the truthfulness of the captain's statement, and with regard to whether a statement matches to a particular shipment of tuna.[537]

7.326. Thus, according to Mexico, while tuna caught by large vessels fishing in the ETP can be tracked "from the moment the tuna is captured and stored in a fishing vessel's well", the system applied by the amended tuna measure to tuna caught other than by large purse seine vessels in the ETP "is limited to checking whether US canneries have the correct paperwork in their files". In Mexico's view, such checks do "not provide any assurance to consumers that the labels on non-ETP tuna products are accurate".[538]

The Panel's understanding of the trans-shipping issue

7.327. Our analysis of the different tracking and verification requirements applicable to tuna and tuna products is further complicated by the complex practice known as "trans-shipping". "Trans-shipping" is defined in the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean as "the unloading of all or any of the fish on board a fishing vessel to another fishing vessel at sea or at port".[539] According to Mexico, the key

[527] Company Traceability Procedure (Exhibit US-190) (BCI).
[528] Cannery Reference Reports for National Marine Fisheries Service Periodic Audit (Exhibit US-191) (BCI).
[529] Mexico's comments on the United States' response to Panel question No. 43, para. 158.
[530] Cannery Slides on Tuna Trace Systems (Exhibit US-189) (BCI).
[531] Mexico's comments on the United States' response to Panel question No. 43, para. 159.
[532] Mexico's comments on the United States' response to Panel question No. 43, para. 159.
[533] Cannery Traceability Flowchart (Exhibit US-192) (BCI).
[534] Mexico's comments on the United States' response to Panel question No. 43, para. 163.
[535] Mexico's comments on the United States' response to Panel question No. 43, para. 164.
[536] Mexico's comments on the United States' response to Panel question No. 43, para. 165 (emphasis original; internal citations omitted).
[537] Mexico's comments on the United States' response to Panel question No. 43, para. 166.
[538] Mexico's comments on the United States' response to Panel question No. 43, para. 167.
[539] See Mark A. McCoy, *A Survey of Tuna Transshipment in Pacific Island Countries: Opportunities for Improving Benefits and Increasing Monitoring* (Gillet, Preston and Associates, 2012) (Exhibit MEX-75), p. 12.

problem of "trans-shipping" is that it is "particularly vulnerable to 'tuna laundering', where 'black boats' may conduct illegal, unauthorized and unrestricted (IUU) fishing and then transfer their catch to licensed vessels to trans-ship".[540]

7.328. In its first written submission, Mexico noted that some types of vessels, for instance purse seine vessels operating in the Western and Central Pacific Ocean, are prohibited from trans-shipping, subject to certain exceptions.[541] Mexico also acknowledged that "[s]ome reporting is required for unloading vessels and carriers, including a trans-shipment declaration".[542] Nevertheless, Mexico submits that "[i]n any event … observers likely cannot detect IUU fishing and fish laundering", and "the reporting required for transshipments does not address the US dolphin-safe requirements. There are no authorities with responsibility to monitor whether captains' certifications match to particular lots of tuna, or whether tuna has been mixed with uncertified tuna in a storage well".[543]

7.329. According to Mexico, the risks associated with trans-shipping, including "tuna laundering", are much greater in the context of tuna fishing industries that are not vertically integrated – that is to say, where producers of tuna products do not have their own fishing fleets that deliver tuna directly to their processing plants, than where the "chain of ownership over the tuna caught … is maintained from the time of harvesting through the processing of the tuna and the eventual marketing of the tuna products".[544] In Mexico's view, in the context of a vertically integrated industry, "the chain of ownership over the tuna caught … is maintained from the time of harvesting through the processing of the tuna into tuna products and the eventual marketing of the tuna products". Consequently, the likelihood of "tuna laundering" is greatly reduced.[545] Mexico explains that while "the major Mexican producers are vertically integrated", "most major tuna products companies in other countries are not vertically integrated. They purchase tuna from third-party companies, and in many cases the tuna has passed through at least two parties before it is processed". The consequence of this, says Mexico, is that tuna products produced by non-Mexican producers are more likely to be made from tuna that cannot properly be tracked, and therefore cannot be reliably shown to be dolphin-safe. Where multiple catches are consolidated at sea, it is far harder to ensure that captains' certificates match particular batches of tuna (and that they are not incorrectly assigned to non-dolphin-safe tuna), and that dolphin-safe tuna and non-dolphin-safe tuna are properly segregated.[546]

7.330. Mexico's allegations raise serious questions concerning the possibility of meaningfully tracking tuna caught other than by large purse seine vessels in the ETP where such tuna is trans-shipped rather than being unloaded and transferred to a cannery directly from the fishing vessel. To explore this issue in more detail, the Panel asked the parties a number of questions concerning trans-shipping and its possible consequences.

7.331. In question 18(b), the Panel asked the United States to comment on Mexico's description of the trans-shipping problem, and to identify "[w]hat instruments enable the United States to identify and respond to the risk of tuna laundering".

7.332. The United States responded to this question in detail. According to the United States, "Mexico's argument ignores the interlocking international and national requirements regarding trans-shipments". Indeed, in the view of the United States, "[t]rans-shipment is one of the activities most highly regulated by RFMOs and port states".[547]

7.333. With respect to international regulation, the United States notes that different RFMOs require various kinds of declarations and advance notice of trans-shipment. In the Western and Central Pacific Fisheries Commission (WCPFC), for instance, all incidents of trans-shipping in port must be documented through a "Trans-shipment Declaration", which must contain information including the identity of the fish being trans-shipped, the carrier vessels, the quantity and state

[540] Mexico's first written submission, para. 166.
[541] Mexico's first written submission, para. 167.
[542] Mexico's first written submission, para. 168.
[543] Mexico's first written submission, paras. 169 and 170.
[544] Mexico's first written submission, para. 159.
[545] Mexico's first written submission, para. 159.
[546] Mexico's first written submission, para. 170.
[547] United States' response to Panel question No. 18(b), para. 103.

(i.e. frozen or fresh) of the fish to be trans-shipped, the date and location of the trans-shipment, and the quantity of product already on board the receiving vessel.[548] In the Indian Ocean Tuna Commission (IOTC), prior notification of intent to trans-ship at port must be provided to the relevant port state authorities before trans-shipment may occur. This notification must include information concerning the fishing and carrier vessels, the tonnage of the product, the major fishing grounds of the catch, and the date and location of the intended trans-shipment.[549]

7.334. The United States explains that, in addition to these treaty-based requirements, port states where trans-shipment occurs impose additional requirements to protect the integrity of the process. In the WCPFC, for example, trans-shipping may be undertaken at one of five designated ports, and "the procedures for clearing arriving fishing and carrier vessels are standard across" the ports. The United States explains the process as follows:

> A boarding party of representatives from relevant government offices boards the vessels, checks the vessel documents, conducts customs inspections, and collects the documents relevant to trans-shipment including the well plan showing the stowage of fish, the voyage memorandum showing previous ports visited, and a sheet of general information on the vessel and the catch. When the vessel has been cleared, trans—shipment may begin, and is subject to monitoring by the government fisheries department and, periodically, by other monitoring or enforcement agencies. Government authorities collect the required documentation and monitor part or all of the trans-shipment, which takes place 12-14 hours per day for several days.[550]

7.335. With respect to trans-shipment at sea, the United States observes that this is "subject to even more stringent regulation than trans-shipment at port". Trans-shipment at sea is prohibited for purse seine vessels, and is permitted for large long line vessels only where such vessels have been authorized by their flag country. Under both the WCPFC and the IOTC regimes, trans-shipment at sea must be overseen by an observer, whose responsibility it is to confirm that the quantities of transferred fish are consistent with the Trans-shipment Declaration, the relevant log book(s), and other available information.[551] Vessels involved in trans-shipping are also required to submit a declaration immediately following the trans-shipment to their flag state and the relevant international fisheries management organization.[552]

7.336. The United States also argues that, in addition to the extensive national and international regulation of trans-shipping, fishing and carrier vessels themselves have strong economic incentives to properly monitor trans-shipments and to ensure that all trans-shipped tuna can be properly tracked. According to the United States, "[c]anneries may reject tuna on various grounds (e.g. spoiling, smashed fish, or small size). Consequently, any tuna broker or carrier vessel has an incentive to track the harvest of each vessel, including during trans-shipment, to ensure that the cannery is not left paying for fish that they cannot use".[553] Additionally, in the view of the United States, port states have an economic incentive to carefully monitor trans-shipment that takes place in their territorial waters because "fee calculations are often based on volumes of trans-shipped fish, giving them an incentive (even apart from complying with RMFOs) to monitor trans-shipments in port".[554]

7.337. Finally, the United States also rejects Mexico's argument that the risks of tuna laundering arise only in the context of tuna industries that are not vertically integrated. In the view of the United States, "Mexico's argument provides no basis for its assumption that a vertically integrated cannery would be less likely to launder tuna than one that is independently owned. The motivation

[548] Western and Central Pacific Fisheries Commission, "Conservation and Management Measure on the Regulation of Transhipment" (CMM 2009-06, 7-11 December 2009) (Exhibit US-152); see also United States' response to Panel question No. 18(b), para. 103.

[549] Indian Ocean Tuna Commission, "Resolution 12/05 Establishing a Programme for Transhipment by Large-Scale Fishing Vessels (2012) (Exhibit US-138); see also United States' response to Panel question No. 18(b), para. 104.

[550] United States' response to Panel question No. 18(b), para. 105 (internal citations omitted).

[551] United States' response to Panel question No. 18(b), para. 106.

[552] United States' response to Panel question No. 18(b), para. 106.

[553] United States' response to Panel question No. 18(b), para. 108.

[554] United States' response to Panel question No. 18(b), para. 107.

to act inconsistent [*sic*] with national or international requirements is not impacted by ownership structure".[555]

7.338. In light of all this, the United States urges the Panel to find that there is "no evidence to suggest that [tuna] laundering … is occurring on a widespread basis in a way that impacts the US tuna product market".[556]

7.339. Mexico commented extensively on the United States' response to this question.

7.340. Mexico begins by recalling that the problem of illegal, unreported, and unregulated (IIU) fishing is real and serious, and has in fact been recognized even by President Obama, who in 2014 released a memorandum indicating, *inter alia*, that "IUU fishing continues to undermine the economic and environmental sustainability of fisheries and fish stocks" and warning that "[g]lobal losses attributable to the black market from IUU fishing are estimated to be [US]$10-23 billion annually, weakening profitability for legally caught sea food, fuelling illegal trafficking operations, and undermining economic opportunity for legitimate fishermen".[557] Mexico notes that "[t]he United States has avoided responding to this point".[558]

7.341. Mexico also takes issue with the use made by the United States of Exhibit MEX-75 in the course of its response to the Panel's question. According to Mexico, the United States has quoted this document selectively, and in particular has ignored the following key conclusion contained in the report:

> The legal framework for the regulation of trans-shipment is still evolving … If, as some expect, detailed reporting of high seas longline trans-shipment by flag states is poor and observer coverage does not result in significantly better understanding of the catches in the fishery, efforts will likely be made to ban high seas longline trans-shipment and require all trans-shipping to be done in [exclusive economic zones] or in port.[559]

7.342. Mexico next submits that there are "reasons to question the United States' claim that there is comprehensive monitoring of trans-shipments".[560] For instance, a 2014 IOTC report suggests that in 2013 over twenty-six per cent of trans-shipments on the high seas were not monitored by an observer.[561] Moreover, Mexico suggests that even when observers are present, the extent of their monitoring may be minimal. Thus, a 2013 IOTC report observed that:

> [O]ther than asking the fishing masters directly, there appears to be no other way to determine if transfers have taken place, as detailed examination of the log books are not possible in the time allocated. This would require a more detailed analysis of the data to determine the average catch rates of vessels, the frequency a vessel trans-ships and the amount trans-shipped each time.[562]

7.343. The reliability of observer monitoring of trans-shipment is further undermined, in Mexico's view, by the fact that in 2013 many discrepancies were reported between information provided by observers and information obtained through subsequent verification[563], as well as by the fact

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[555] United States' response to Panel question No. 18(b), para. 109.

[556] United States' response to Panel question No. 18(b), para. 110.

[557] Mexico's comments on the United States' response to Panel question No. 18(b), para. 79. See also Mexico's second written submission, para. 62.

[558] Mexico's comments on the United States' response to Panel question No. 18(b), para. 79.

[559] Mexico's comments on the United States' response to Panel question No. 18(b), para. 81 (citing Mark A. McCoy, *A Survey of Tuna Transshipment in Pacific Island Countries: Opportunities for Improving Benefits and Increasing Monitoring* (Gillet, Preston and Associates, 2012) (Exhibit MEX-75), p. 60).

[560] Mexico's comments on the United States' response to Panel question No. 18(b), para. 82.

[561] Mexico's comments on the United States' response to Panel question No. 18(b), para. 82 (citing Indian Ocean Tuna Commission, "A Summary of the IOTC Regional Observer Programme During 2013" (IOTC-2014-CoC11-04bE, March 2014) (Exhibit MEX-139), p. 8).

[562] Mexico's comments on the United States' response to Panel question No. 18(b), para. 83 (citing Indian Ocean Tuna Commission, "Summary of Regional Observer Programme During 2012" (March 2013) (Exhibit US-137, p. 10).

[563] Mexico's comments on the United States' response to Panel question No. 18(b), para. 84.

monitoring procedures for certain species of tuna appear to be less stringent than those that apply to other species.[564]

7.344. Finally, and most importantly, Mexico argues that:

> [T]he evidence submitted by both the United States and Mexico confirms that, even when trans-shipments are properly monitored, the observers have no responsibility to keep track of dolphin-safe and non-dolphin-safe tuna, and there are no procedures for carriers to maintain records regarding from which well of a fishing vessel tuna was transferred. Tuna of any particular species is fungible and can be mingled for storage and shipment … [so] for non-ETP tuna products there is no way to verify or validate that a captain's certificate actually matches to the tuna with which it has been associated.[565]

7.345. To help us better understand how dolphin-safe certifications are kept together with particular batches of tuna during trans-shipment, we asked the parties to explain whether "dolphin-safe certifications always follow or stay with the tuna catch that they describe", or whether such certifications are or can be "assigned at a later point (i.e. sometime after catch) to other batches of tuna that may not have been caught in a dolphin-safe manner".[566]

7.346. Mexico submitted that although it is not aware of any specific instances of dolphin-safe certifications being sold so as to accompany a batch of non-dolphin-safe tuna, nevertheless "the US system allows for certifications to be assigned to batches of tuna that may not have been caught in a dolphin-safe manner".[567] In particular, Mexico argues that "the unreliability of the … tracking and verification procedures, make it simple to assign a captain's certificate to any shipment of tuna products".[568]

7.347. In support of these allegations, Mexico cites an article published in 2014 in the Journal of Marine Policy, according to which "[i]llegal and unreported catches represented 20-32% of wild-caught seafood imported to the USA in 2011, as determined from robust estimates, including uncertainty, of illegal and unreported fishing activities". According to this study, "illegal fish products are often mixed into supply chains at the processing stage"; and, crucially:

> Illegal tuna fishing in the Indian and Pacific Oceans is facilitated by the lack of seafood traceability when supplies are consolidated during trans-shipping at sea. In particular, the frozen tuna market tends to trans-ship and re-supply at sea. Strong demand for tuna encourages brokers to amalgamate supplies from different origins to make orders. Because there is scant transparency at sea, even products carrying a traceability claim on the package could well derive from mixed shipments … Illegal activity by small and medium scale longliners and falsification of tuna documentation is also a concern.[569]

7.348. The study states that, with respect to the:

> [H]ighly internationalized seafood supply chain feeding imports into the United States and other major markets … there is a lack of monitoring, transparency and accountability as to the sources of the seafood. There are no trace-back procedures to help companies avoid handling the products of poaching and illegal fish products enter [*sic*] the supply chain at multiple points.[570]

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[564] Mexico's comments on the United States' response to Panel question No. 18(b), para. 85.
[565] Mexico's comments on the United States' response to Panel question No. 18(b), para. 87.
[566] Panel question No. 42.
[567] Mexico's response to Panel question No. 42, para. 120.
[568] Mexico's response to Panel question No. 42, para. 121.
[569] Ganapathiraju Pramod et al, "Estimates of Illegal and Unreported Fish in Seafood Imports to the USA", 48 *Marine* Policy 102 (2014) (Exhibit MEX-131), p. 110.
[570] Ganapathiraju Pramod et al, "Estimates of Illegal and Unreported Fish in Seafood Imports to the USA", 48 *Marine* Policy 102 (2014) (Exhibit MEX-131), p. 106.

7.349. It also notes that:

> [A] significant amount of fish is imported into the USA by first passing through one or more intermediary countries for post-harvest processing and subsequent re-export. These additional steps introduce additional challenges to traceability and allow for the mixing of legally and illegally-sourced fish, where illegal fish may be essentially "laundered" in the processing countries, and subsequently enter international trade as a legal product of the exporting nation.[571]

7.350. In its own response to this question, the United States argues that Mexico has provided no evidence that any tuna and tuna products entering its market are the result of "tuna laundering".[572] In particular, the United States submits that "[t]here is no market – legal or otherwise – for dolphin-safe certifications. Dolphin-safe certifications are not alienable or transferable. Labels are specifically associated with the particular tuna caught. The United States has no reason to believe that there is a black market for such certifications".[573] As such, according to the United States, "the documentation attesting to whether the tuna is dolphin safe or not stays with the tuna". Canneries keep track of this documentation and, as explained above, "use comprehensive tracking systems … that allow all the information related to [a] particular lot of fish … to be retrieved quickly in case of a NMFS audit".[574]

7.351. The United States elaborated on this issue in its comments on Mexico's response. There, it expresses the view that "the global problem of illegal, unreported, and unregulated fishing" is not "relevant" to this dispute.[575] Additionally, with respect to the journal article cited by Mexico, the United States explains that "[w]hile … IUU fishing is a global problem … the United States does not agree with the statistics that are being highlighted in the study, which are based on suspect, unverifiable data".[576]

Legal assessment

7.352. We begin by recognizing the complex and contested nature of the facts before us. The structure and operation of the international tuna industry is characterized by an overlapping series of domestic and international regulatory regimes, as well as more or less consistent practices across vessels, oceans, and domestic and international waters. As one peer-reviewed study submitted by Mexico says:

> The highly internationalized seafood supply chain feeding imports into the United States and other major markets is one of the most complex and opaque of all natural commodities. It involves many actors between the fisherman and the consumer, including brokers, traders, wholesalers, and other middlemen, often distant from the consumer markets they supply.[577]

7.353. Our task is to determine, in light of all of the factual issues discussed above, whether the tracking and verification systems applied by the amended tuna measure to different fisheries modify the conditions of competition to the detriment of Mexican tuna and tuna products.

7.354. In the Panel's view, Mexico's evidence suggests that there are three crucial differences between the tracking and verification system that applies to tuna caught by large purse seine vessels inside the ETP and that which applies to other tuna. In the Panel's understanding, these differences can be said to relate broadly to the depth, accuracy, and degree *of government oversight* of the tracking and verification systems.

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[571] Ganapathiraju Pramod et al, "Estimates of Illegal and Unreported Fish in Seafood Imports to the USA", 48 *Marine* Policy 102 (2014) (Exhibit MEX-131), pp. 106 and 107.

[572] United States' comments on Mexico's response to Panel question No. 42, para. 99; United States' response to Panel question No. 42, para. 227.

[573] United States' response to Panel question No. 42, para. 227.

[574] United States' response to Panel question No. 42, para. 228.

[575] United States' comments on Mexico's response to Panel question No. 42, para. 99.

[576] United States' comments on Mexico's response to Panel question No. 42, para. 103.

[577] Ganapathiraju Pramod et al, "Estimates of Illegal and Unreported Fish in Seafood Imports to the USA", 48 *Marine* Policy 102 (2014) (Exhibit MEX-131), p. 106.

7.355. By *depth*, we mean to refer to the point to which tuna can be traced back. Mexico has shown that tuna caught by large purse seine vessels in the ETP can, pursuant to the record-keeping requirements embedded in the AIDCP and incorporated into the amended tuna measure, be tracked back all the way to *the particular set* in which the tuna was caught and *the particular well in which it was stored*.[578]

7.356. In contrast, on the basis of the evidence submitted to us by the United States, it appears that outside the ETP, tuna can be traced back to the *vessel* and trip on which it was caught.[579] For instance, **[[BCI[580]]]**.

7.357. **[[BCI]]**

7.358. **[[BCI[581] [582]]]**

7.359. **[[BCI]]**

7.360. By *accuracy,* we mean the degree of confidence that a particular captain (or, where applicable, observer) statement properly describes the lot of tuna to which it is assigned. Mexico's evidence suggests that the tuna tracking forms required for tuna caught by large purse seine vessels in the ETP accompany particular catches of tuna throughout the fishing and production process, from the point of catch right through to the point of retail.[583] The form must accompany a particular batch of tuna at each production stage, and accordingly the identity of a particular batch of tuna can, in principle, always be established.

7.361. In contrast, and crucially, **[[BCI]]**. It is not clear to the Panel how particular certificates are kept with particular lots of tuna up until the tuna reaches the canning plant. The United States asserts that "[t]he documentation attesting to whether the tuna is dolphin safe or not stays with the tuna"[584], but the Panel has not been provided with evidence showing how this is ensured in practice. At one point in its responses to the Panel's questions the United States appears to suggest that canneries could or should have "adequate record keeping linking captains' certifications to canned tuna lots"[585], but the nature of this record keeping, or whether canneries actually implement sufficient systems, does not emerge clearly from the United States' explanations. The United States has said that "it is possible that canneries … could and would verify whether vessels have maintained the segregation required by the US measure, and that they might refuse to purchase tuna from vessels that had not complied with the amended measure";[586] but, judging by the United States' use of the words "might" and "could", this appears to be speculation, and the United States has submitted no evidence showing that canneries actually do ensure that the tuna they receive matches a particular captains' statement.

7.362. The difficulty of ensuring that a particular certification matches an identified batch of tuna is compounded, in the Panel's view, by the fact that in many cases tuna appears to pass through a number of parties before it reaches a US cannery. **[[BCI]]**. Additionally, as noted above, a recent study published in the *Journal of Marine Policy* found that "a significant amount of fish is imported into the USA by first passing through one or more intermediary countries for post-harvest

[578] See AIDCP, "Resolution to Adopt the Modified System for Tracking and Verification of Tuna (20 June 2001) (Exhibit MEX-36).

[579] We note again the United States' has stated that in some cases, the can code may also enable the authorities to trace back to an associated captain's statement. As we have explained above, in the Panel's view the evidence relied upon by the US in support of this point is ambiguous. In particular, the Panel is puzzled by the fact that **[[BCI]]**. As such, the Panel declines to find that the evidence before it establishes that can codes enable US authorities to track tuna contained in a retail product back to its associated captain's statement.

[580] United States' response to Panel question No.44, para. 241.

[581] United States' response to Panel question No. 42, para. 228.

[582] Appellate Body Report, *US – Gambling*, para. 140.

[583] Mexico's first written submission, paras. 80-93; AIDCP, "Resolution to Adopt the Modified System for Tracking and Verification of Tuna" (20 June 2001) (Exhibit MEX-36); Norma Oficial Mexicana NOM-001-SAG/PESC-2013 (Exhibit MEX-32); Statement of Mario G. Aguilar, Commissioner of Fisheries and Aquaculture (CONAPESCA) (Exhibit MEX-37); Statement of Mexican Industry (Exhibit MEX-73).

[584] United States' response to Panel question No. 42, para. 228.

[585] United States' response to Panel question No.44, para. 244.

[586] United States' response to Panel question No. 43, para. 234.

processing and subsequent re-export".[587] The United States has not provided any evidence explaining how canneries are able to ensure that captains' certifications remain with the tuna batches they identify throughout this process.

7.363. Moreover, it does not appear that there is any additional or explicit *legal requirement* in the amended tuna measure that US canneries ensure or otherwise satisfy themselves, at the time they receive a batch of tuna, of either the validity of a dolphin-safe certificate or whether such certificate in fact describes the batch of tuna with which it is associated. 50 FCR § 216.93(g)(1) requires canneries to "maintain records", but there does not appear to be any legal requirement that the canneries verify the accuracy of the records, or that the records in fact correctly describe the particular batches of tuna to which they are assigned.

7.364. Finally, by *government oversight*, we mean the extent to which a national, regional, or international authority is involved in the tracking and verification process. Mexico's evidence shows that, in respect of tuna caught by large purse seine vessels in the ETP, information concerning every stage of the tuna catch and canning process is made available to national and regional authorities, which must be sent copies of tuna tracking forms and are thus able to verify at any stage of the catch and canning process whether a particular batch of tuna is dolphin-safe. Various national and regional authorities are also required to be notified whenever ownership of tuna changes.

7.365. For tuna caught other than by large purse seine vessels in the ETP, however, US authorities receive information concerning the origin and history of tuna only from US tuna canneries themselves, through the monthly reports that such canneries are required to submit[588], and when they (the authorities) carry out an audit or spot check; and even then it seems that they are only able to verify that proper tracking mechanisms were implemented from the time the cannery received the tuna.[589] It appears, then, that the United States must rely on the canneries for information about the movement of the tuna prior to arrival at the cannery, and is not able to go "behind the documents", as it were, to verify that a particular dolphin-safe certification describes the batch of tuna with which it is associated. The US authorities are not, it seems, able to ensure that they receive information that would enable them to track the movement and dolphin-safe status of tuna from the time of catch up to the point of delivery to a US cannery.

7.366. Similarly, where tuna products are imported from non-US canneries, it appears that the United States relies on US importers of tuna products for information about the movement of tuna prior to arrival at a US port. As in the case of US canneries, it appears that the United States is not able to directly track the movement and dolphin-safe status of tuna from the time of catch up the point of delivery to a non-US cannery and subsequent shipment to the United States, but must rely on documentation provided by the importer.

7.367. The issue of government oversight and control is in fact broader than identified in the previous paragraphs, and it goes to the very design of the different tracking and verification systems. As we understand it, every step of the catch and canning process for tuna caught by large purse seine vessels in the ETP is prescribed and can be monitored by national and regional agencies. In contrast, in respect of tuna caught in all other fisheries, it appears to us that the United States has, as it were, delegated responsibility for developing tracking and verification systems to the tuna industry itself, including canneries and importers, and has decided to involve itself only on a supervisory and *ad hoc* basis through the review of monthly reports and the conduct of audits and spot checks.

7.368. In the Panel's view, there is nothing inherently problematic, from the perspective of WTO law, about governments delegating functions to private entities, including industry. However, delegation to industry (or to other entities) must not have the result of modifying the conditions of competition to the detriment of imported products, and such delegation must provide certainty and legal security. In the present case, while we do not fault the United States for leaving the tuna

[587] Ganapathiraju Pramod et al, "Estimates of Illegal and Unreported Fish in Seafood Imports to the USA", 48 *Marine* Policy 102 (2014) (Exhibit MEX-131), pp. 106 and 107.

[588] Dolphin Safe Tuna Labelling Regulations, 50 C.F.R § 216.93(d) (Exhibit US-2).

[589] National Marine Fisheries Service, "TTVP Verification Components" (March 20 2014) (Exhibit US-222) ("examination of documents and records of internal flows of specific shipments from receipt to cold storage to production and to finished goods at a US cannery").

industry to develop the tracking and verification systems necessary to ensure compliance with the amended tuna measure, it appears to us that in doing so the United States has created a situation in which, as Mexico alleges, the system in place outside the ETP large purse seine fishery is less burdensome than the system inside the ETP large purse seine fishery, and therefore modifies the conditions of competition to Mexico's detriment. In particular, we see some merit in Mexico's argument that the system in place outside the ETP large purse seine fishery may contribute to inaccurate labelling of tuna caught in sets or other gear deployments in which dolphins were killed or seriously injured. As we understand it, the United States essentially relies upon the canneries themselves and other importers to ensure that the requirements of the amended tuna measure, including that dolphin-safe tuna and non-dolphin-safe tuna be segregated, are properly observed from the time of catch through to delivery to the cannery. However, as we explained above,[590] we have seen no evidence suggesting that canneries and other importers in fact do this, and, as we understand the measure, canneries and other importers are not *legally required* to conduct such checks.

7.369. The result of this systemic architecture is that, while every step of the catch and canning process for tuna caught by large purse seine vessels in the ETP is subject to some sort of governmental (including regional and international) oversight, there appears to be, as Mexico demonstrated, "major gaps in coverage"[591] in the system that applies to tuna caught other than by large purse seine vessels in the ETP. The existence of these gaps strongly suggests to the Panel that the tracking and verification system imposed on fisheries other than the ETP large purse seine fishery is significantly less burdensome than that imposed in the ETP large purse seine fishery.

7.370. In the Panel's view, these three differences show that the different tracking and verification requirements modify the conditions of competition. They clearly show that the system imposed outside the ETP large purse seine fishery is significantly less burdensome than the system imposed inside the ETP large purse seine fishery. In particular, the fact that outside the ETP large purse seine fishery tuna need only be traceable back to the vessel and trip on which it was caught, rather than to the particular well in which it was stored, **[[BCI[592]]]** suggest to us that compliance with the system outside the ETP large purse seine fishery is less demanding than the system imposed on the ETP large purse seine fishery.

7.371. In the Panel's view, the fact that the United States carries out inspections on the high seas, at the dock-side, and in US canneries is not sufficient to rebut Mexico's showing that the tracking and verification requirements imposed on tuna caught outside the ETP large purse seine fishery are less burdensome than those imposed on tuna caught inside that fishery.

7.372. We also see some merit in Mexico's argument that the different tracking and verification requirements may make it more likely that tuna caught other than by large purse seine vessels in the ETP could be incorrectly labelled. Ultimately, however, in order for the Panel to reach a definite conclusion as to whether the system outside the ETP large purse seine fishery actually allows for incorrect labelling, the Panel would need to undertake a detailed technical analysis of the system's effective operation. In the Panel's view, such analysis is not necessary in order to conclude that the different tracking and verification requirements modify the conditions of competition to the detriment of Mexican tuna and tuna products. The fact that the system in place outside the ETP large purse seine fishery is less onerous than that inside is sufficient grounds for finding that this aspect of the amended tuna measure has a detrimental impact.

7.373. We turn now to the issue of trans-shipping because the parties have argued about this practice in great detail. The Panel accepts that, as the United States and Mexico argue, trans-shipping is a highly regulated practice.

7.374. For instance, the Conservation and Management Measure on the Regulation of Trans-shipment[593], which appears to establish the trans-shipping system for the WCPFC, makes no

[590] See para. 7.363 above.

[591] Mexico's comments on the United States' response to Panel question No. 43, para. 172.

[592] United States' response to Panel queston No. 44, para. 141; Cannery Slides on Tuna Trace Systems (Exhibit US-189), pp. 1 and 2 (BCI).

[593] Western and Central Pacific Fisheries Commission, "Conservation and Management Measure on the Regulation of Transhipment" (CMM 2009-06, 7-11 December 2009) (Exhibit US-152).

mention of the dolphin-safe status of tuna being trans-shipped. Its Annex I lists the following as information that must be contained in all trans-shipment declarations:

1. A unique document identifier

2. The name of the fishing vessel and its WIN

3. The name of the carrier vessel and its WIN

4. The fishing gear used to take the fish

5. The quantity of product (including species and its processed state) to be trans-shipped

6. The state of fish (fresh or frozen)

7. The quantity of by-product to be trans-shipped

8. The geographic location of the highly migratory fish stock catches

9. The date and location of the trans-shipment

10. If applicable, the name and signature of the WCPFC observer

11. The quantity of product already on board the receiving vessel and the geographic origin of that product.

7.375. And its Annex II, which lists information to be reported annually by contracting parties, lists the following:

1. the total quantities, by weight, of highly migratory fish stocks covered by this measure that were transhipped by fishing vessels the CCM is responsible for reporting against, with those quantities broken down by:

   a. offloaded and received;

   b. transhipped in port, transhipped at sea in areas of national jurisdiction, and transhipped beyond areas of national jurisdiction;

   c. transhipped inside the Convention Area and transhipped outside the Convention Area;

   d. caught inside the Convention Area and caught outside the Convention Area;

   e. species;

   f. product form; and

   g. fishing gear used.

2. the number of transhipments involving highly migratory fish stocks covered by this measure by fishing vessels that is responsible for reporting against, broken down by [*sic*]:

   a. offloaded and received;

   b. trans-shipped in port, transhipped at sea in areas of national jurisdiction, and transhipped beyond areas of national jurisdiction;

c. trans-shipped inside the Convention Area and transhipped outside the Convention Area;

d. caught inside the Convention Area and caught outside the Convention Area; and

e. fishing gear.

7.376. In our view, none of this information is relevant to the question whether tuna is dolphin-safe or whether tuna identified as dolphin-safe is kept segregated from tuna that is not dolphin-safe. As might be expected on the basis of this instruction, the WCPFC Trans-shipment Declaration[594] does not appear to contain any reference to the dolphin-safe status of tuna being trans-shipped. Neither does it appear to allow the contents of specific wells to be tracked as they are moved from the fishing vessel to the carrier vessel.

7.377. The same is true of the IOTC's Resolution 12/05 on Establishing a Programme for Trans-shipment by Large Scale Fishing Vessels.[595] Section 4 includes a subsection entitled "Notification Obligations". It provides:

Fishing vessel

12. To receive the prior authorisation mentioned in paragraph 11 above, the master and/or owner of the LSTLV must notify the following information to its flag State authorities at least 24 hours in advance of an intended transhipment:

a) The name of the LSTLV and its number in the IOTC Record of Vessels;

b) The name of the carrier vessel and its number in the IOTC Record of Carrier Vessels authorised to receive transhipments in the IOTC area of competence, and the product to be transhipped;

c) The tonnage by product to be transhipped;

d) The date and location of transhipment;

e) The geographic location of the catches.

...

Receiving carrier vessel

14. Before starting transhipment, the master of the receiving carrier vessel shall confirm that the LSTLV concerned is participating in the IOTC programme to monitor transhipment at sea (which includes payment of the fee in paragraph 13 of Annex III) and has obtained the prior authorisation from their flag State referred to in paragraph 11. The master of the receiving carrier vessel shall not start such transhipment without such confirmation.

15. The master of the receiving carrier vessel shall complete and transmit the IOTC transhipment declaration to the IOTC Secretariat and the flag CPC of the LSTLV, along with its number in the IOTC Record of Carrier Vessels authorised to receive transhipment in the IOTC area of competence, within 24 hours of the completion of the transhipment.

16. The master of the receiving carrier vessel shall, 48 hours before landing, transmit an IOTC transhipment declaration, along with its number in the IOTC Record

[594] Western and Central Pacific Fisheries Commission, "WCPFC Transshipment Declaration" (Exhibit US-157).

[595] Indian Ocean Tuna Commission, "Resolution 12/05 Establishing a Programme for Transhipment by Large-Scale Fishing Vessels" (2012) (Exhibit US-138).

> of Carrier Vessels authorised to receive transhipment in the IOTC area of competence, to the competent authorities of the State where the landing takes place.[596]

7.378. As the United States notes in its argument, the IOTC Resolution also establishes an observer program. However, even assuming that such program is effective, the observer's obligations do not include checking the dolphin-safe status of tuna being trans-shipped, ensuring that dolphin-safe certifications stay with the tuna they describe, or verifying that dolphin-safe and non-dolphin-safe tuna is kept segregated.[597]

7.379. The Panel has closely examined the other three international trans-shipping regulations submitted in evidence by the United States – that of the Inter-American Tropical Tuna Committee[598], the International Commission for the Conservation of Atlantic Tunas[599], and the Commission for the Conservation of Southern Bluefin Tuna.[600] The obligations therein concerning declarations and observers are essentially the same as those discussed above. Nowhere is the dolphin-safe status of tuna being transferred even mentioned.

7.380. As such, while trans-shipping is clearly an issue of some international concern, in its current state the regulation of trans-shipping does not extend to requiring that the dolphin-safe status of tuna be verified or tracked.

7.381. The Panel acknowledges that it is not the sole responsibility of the United States either to regulate or to reform, if necessary, the current regimes governing trans-shipping. Nevertheless, we accept Mexico's argument that the practice of trans-shipping may increase the likelihood that tuna caught outside the ETP large purse seine fishery could be incorrectly labelled.[601]

7.382. We conclude, therefore, that Mexico has established a *prima facie* case that the different tracking and verification requirements modify the conditions of competition in the United States' tuna market to the detriment of like Mexican tuna and tuna products. The system in place outside the ETP large purse seine fishery is less burdensome than that inside the ETP, and may contribute to inaccurate labelling of tuna caught outside the ETP large purse seine fishery, although we make no definitive finding on this specific point, because it would require consideration of other factors that may result in tuna being incorrectly labelled. We want to be clear that this conclusion does not entail the finding that the tracking and verification system for tuna caught by large purse seine vessels in the ETP is itself *infallible* or that tuna tracked under that system could *never* be incorrectly labelled as dolphin-safe.

7.383. The Panel turns now to consider whether the differential treatment identified nevertheless stems exclusively from a legitimate regulatory distinction.

7.5.2.5.2 Whether the detrimental impact caused by the different tracking and verification requirements stem exclusively from a legitimate regulatory distinction

7.384. Having found above that the different tracking and verification requirements modify the conditions of competition in the United States tuna market to the detriment of Mexican tuna and tuna products, the Panel now turns to consider whether this detrimental impact stems exclusively from a legitimate regulatory distinction.

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[596] These notification requirements apply to trans-shipment at sea. The notification requirements for trans-shipment at port are listed in Annex II, and are identical in all relevant respects, except that 48 hours' notice must be given, instead of the 24 required for trans-shipping at sea.

[597] See Indian Ocean Tuna Commission, "Resolution 12/05 Establishing a Programme for Transhipment by Large-Scale Fishing Vessels (2012) (Exhibit US-138), Annex III.

[598] Inter-American Tropical Tuna Commission, "Resolution on Establishing a Program for Transshipments by Large-Scale Fishing Vessels" (Res. C-08-02, 2008) (Exhibit US-153).

[599] International Commission for the Conservation of Atlantic Tunas, "Recommendation by ICCAT on a Programme for Transshipment" (Rec. 1206, 2012) (Exhibit US-154).

[600] Commission for the Conservation of Southern Bluefin Tuna, "Resolution for Establishing a Program for Transshipment by Large-Scale Fishing Vessels" (Adopted at the 15th Annual Meeting, 14-17 October 2008) (Exhibit US-155).

[601] As we explained above, we do not here make a definitive finding that tuna caught outside the ETP large purse seine fishery would in fact be incorrectly labelled.

7.5.2.5.2.1 Arguments of the parties

7.385. As was the case in the context of the different certification requirements, Mexico's central argument on the different tracking and verification requirements is that:[602]

> [T]he record-keeping and verification requirements for tuna caught inside the ETP are comprehensive and accurate. However, the requirements and procedures for tracking and verifying tuna caught outside the ETP are unreliable and do not provide accurate information on the dolphin-safe status of the tuna products comprising this tuna. Thus, US consumers are not receiving accurate information on such tuna products and could be misled or deceived … In this light, the difference in record-keeping and verification requirements for tuna caught inside and outside the ETP does not bear a rational connection to the objectives of the Amended Tuna Measure.

7.386. Thus, according to Mexico, because "[a]ccurate information is being provided on tuna caught in the ETP but not on tuna caught in other fisheries … the measure is clearly not even-handed".[603]

7.387. The United States urges the Panel to reject Mexico's arguments. According to the United States:

> [T]he record-keeping and verification requirements imposed by the challenged measure are entirely even-handed as to Mexican producers *vis-à-vis* tuna producers from the United States and other Members. These requirements are, in fact, entirely neutral as to the nationality of the vessel and origin of the tuna product … To the extent that the regulations draw other distinctions, they do so not between Members, or even the fishing methods of Members, but rather between tuna caught by AIDCP-covered large purse seine vessels and tuna caught by all other vessels.[604]

7.388. In the opinion of the United States, "[t]he mere fact that the US measure acknowledges the AIDCP requirements cannot be considered legally problematic".[605] Indeed, as the United States sees it, "a Member does not act inconsistently with its WTO obligations by applying domestic measures that reflect the international agreements (or lack thereof) of different Members".[606] Moreover, "[t]he fact that Mexico may consider that the US law imposes insufficient requirements and procedures for non-AIDCP-covered large purse seine vessels is entirely beside the point". In the view of the United States:

> The Appellate Body's legitimate regulatory distinction analysis is not meant to be a vehicle for any and all criticisms of the challenged measure that the complainant sees fit to make. Indeed, the sixth preambular recital of the TBT Agreement recognizes that a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives *at the levels it considers appropriate* … The fact that Mexico considers the level of record-keeping and verification the amended measure provides to be insufficient is simply irrelevant to Mexico's claim of discrimination.[607]

7.5.2.5.2.2 Analysis by the Panel

7.389. As we have done previously, we begin our present analysis by recalling that, according to the allocation of the burden of proof advanced by the parties and accepted by the Panel, it is for Mexico to show, *prima facie* and in the first instance, that the different tracking and verification requirements are *not* even-handed, because, for example, they reflect discrimination. Only if Mexico makes this showing will the burden shift to the United States to show that the different tracking and verification requirements in fact stem exclusively from a legitimate regulatory distinction.

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[602] Mexico's first written submission, para. 275.
[603] Mexico's first written submission, para. 280. See also Mexico's second written submission, para. 147.
[604] United States' first written submission, para. 243.
[605] United States' first written submission, para. 245.
[606] United States' first written submission, para. 251.
[607] United States' first written submission, para. 249 (emphasis original).

7.390. We also recall again that, in our understanding of the legal test under Article 2.1 of the TBT Agreement, the extent to which a particular instance of detrimental treatment is reconcilable with or explicable by reference to the objectives pursued by a challenged measure may be a relevant consideration in the assessment whether that detrimental treatment stems exclusively from a legitimate regulatory distinction.

7.391. In the preceding section of this Report, the Panel dealt in some detail with the evidence submitted by both parties concerning the tracking and verification systems imposed by the amended tuna measure on tuna caught other than by large purse seine vessels in the ETP. We concluded that the different tracking and verification requirements have a detrimental impact on Mexican tuna and tuna products, including because they may make it more likely that tuna caught other than by large purse seine vessel will be incorrectly labelled as dolphin-safe. This incorrect labelling would accord a competitive advantage to non-Mexican tuna products.

7.392. With respect to the second tier of Article 2.1 of the TBT Agreement, the Panel finds that Mexico has shown *prima facie* that there is no rational connection between the different burden created by the tracking and verification requirements and the objectives of the amended tuna measure. We accept, *prima facie*, Mexico's argument that there is no obvious connection between the imposition of a lighter burden on tuna caught outside the ETP large purse seine fishery and the goals of the amended tuna measure. Accordingly, Mexico has shown, *prima facie*, that the detrimental treatment does not stem exclusively from a legitimate regulatory distinction.

7.393. The United States attempts to rebut this showing in three ways: first, by pointing out that the different tracking and verification requirements are origin neutral; second, by arguing that the amended tuna measure simply reflects international commitments undertaken by Mexico and the United States; and third, by submitting that Members have the right to achieve their legitimate objectives "at levels they consider appropriate". We consider each of these arguments in turn.

7.394. The Panel begins by noting that it has dealt with the question of origin neutrality in the preceding section of its Report.[608] In the Panel's view, the fact that the measure is origin neutral on its face does not respond to Mexico's core allegation that the different tracking and verification requirements lack even-handedness because the detrimental impact they cause is not reconcilable with the objectives of the amended tuna measure. That the measure does not distinguish, at least on its face, between tuna caught by different Members does not explain or otherwise justify why the different tracking and verification requirements impose a lighter compliance burden on tuna caught other than in the ETP large purse seine fishery. It does not shed light on any possible connection between the detrimental impact caused by the different tracking and verification requirements and the measure's objectives.

7.395. Quite simply, the origin neutrality of the measure is not responsive to the point that the different tracking and verification requirements are inconsistent with the objectives pursued by the amended tuna measure. A technical regulation may very well be origin neutral; but where, under Article 2.1 of the TBT Agreement, it is found to *de facto* modify the conditions of competition to the detriment of imported products, that detrimental treatment must stem exclusively from a legitimate regulatory distinction. And where a complainant has shown *prima facie* that the detrimental treatment is not reconcilable with or explicable on the basis of one or more of the objectives pursed by the challenged technical regulation, the mere fact that the regulation is origin neutral cannot preclude a finding of violation of Article 2.1.

7.396. We turn next to the United States' justification that the different tracking and verification requirements simply reflect international commitments undertaken by the United States and Mexico. We have addressed this issue above in the context of the question whether there is a "genuine connection" between the amended tuna measure and the various instances of detrimental impact complained of by Mexico.[609]

7.397. In the Panel's view, the United States' arguments on this point must be rejected. There is, of course, nothing wrong with the United States legislating or regulating to give effect to its various international obligations. The question before us, however, is not whether the amended tuna measure accurately reflects or implements the United States' international obligations, but

[608] See para. 7.75 above.
[609] See paras. 7.171-7.179 above.

rather whether the detrimental impact identified by Mexico stems exclusively from a legitimate regulatory distinction. In answering this question, the fact that the United States may or may not have international obligations *vis-à-vis* Mexico or any other Member is, in our view, not relevant. This is because it is not responsive to Mexico's key allegation, namely, that the different tracking and verification requirements are not justifiable on the basis of the amended tuna measure's own objectives. That the United States is not required under any international agreement other than the AIDCP to enforce any particular system of tracking and verification is not an explanation or justification of why the amended tuna measure contains a regulatory distinction whose effect is to impose a significantly lighter compliance burden on tuna caught in one fishery than on tuna caught in others. The existence of the AIDCP may explain why tuna caught by large purse seine vessels in the ETP is subject to a certain tracking and verification regime, but it does not explain why the system imposed by the United States *outside* of that fishery is less burdensome.

7.398. The Panel also does not accept the United States' claim that the tracking and verification requirements embodied in the AIDCP and incorporated into the amended tuna measure are different because of the higher degree of risk to dolphins in the ETP. In our view, the higher risk posed to dolphins by setting on dolphins in the ETP does not explain why the tracking and verification requirements, which by their very nature concern the movement of fish *subsequent to the time of catch*, differ between fisheries to the detriment of like Mexican tuna and tuna products. The different risk profiles of different fisheries may, as we found above, explain regulatory differences concerning the eligibility criteria for fishing methods, as well as the need for an independent observer to monitor and certify *during and immediately following the fishing activity itself*. But tracking and verification is about what happens to tuna *after it has already been caught*, as it moves from the fishing vessel all the way to retail sale. In other words, in the Panel's view, the special risk profile of the ETP large purse seine fishery simply does not explain or otherwise justify the fact that the post-catch tracking and verification mechanisms applied to tuna caught other than by large purse seine vessels in the ETP are significantly less burdensome.

7.399. Finally, the Panel recognizes that every WTO Member has the right to achieve its legitimate objectives at the levels it considers appropriate.[610] But this right cannot be exercised in a way that "would constitute a means of arbitrary or unjustifiable discrimination".[611] Thus, while the United States is of course free to set its own level of protection, or to pursue its objectives at a level or to a degree that it considers appropriate, this is not a licence to modify the conditions of competition in a market to the detriment of imported products where such modification does not stem exclusively from a legitimate regulatory distinction. In the Panel's view, the principle that Members may set their own appropriate levels of protection is therefore not, in itself, a complete response to a claim that a particular measure is inconsistent with Article 2.1 of the TBT Agreement because it accords less favourable treatment to imported products than to like domestic products or like products from other Members. Neither can this principle be used to preclude scrutiny of a measure claimed to be WTO-inconsistent.[612]

7.400. In light of the above, we find the United States has not rebutted Mexico's *prima facie* showing that the different tracking and verification requirements do not stem exclusively from a legitimate regulatory distinction. The United States has failed to explain sufficiently *why* it imposes different tracking and verification requirements on tuna depending on the fishery in which and the method by which it was caught. None of the explanations provided by the United States suggests a connection between the detrimental treatment and the policy objectives pursed by the amended tuna measure. Accordingly, we find that the different tracking and verification requirements accord less favourable treatment to Mexican tuna products than to like tuna products from the United States and other WTO Members in contravention of Article 2.1 of the TBT Agreement.

7.401. The Panel emphasizes that in making the above finding, it is not suggesting that there *could not be* a reason why the United States might impose different tracking and verification requirements on different tuna and tuna products. An even-handed tracking and verification

[610] Cf United States' first written submission, para. 249.

[611] TBT Agreement, sixth preambular recital.

[612] Additionally, and without wishing to make any express findings on this issue, the Panel notes that, in the context of the TBT Agreement, the concept of "appropriate level of protection" has only been referred to by the Appellate Body in the course of analysis under Article 2.2. The Appellate Body has not, to date, made reference to the concept in an analysis under Article 2.1. The extent to which this concept is directly relevant to the Article 2.1 analysis remains, therefore, an open question, but one on which we do not need to rule in the present proceedings.

system may well take into account the different circumstances that different tuna faces as it moves from the shipping vessel to the point of retail. In the present case, the Panel's point is simply that, in the absence of a sufficient explanation as to how the United States is able to verify the various movements of tuna from the point of catch to the point of receiving the label, the United States has not rebutted Mexico's showing that the system currently in place under the amended tuna measure is not even-handed, and therefore does not stem exclusively from a legitimate regulatory distinction.

7.402. Before concluding, we note that if the burden of proof were to be allocated as suggested by some of the third-parties, our finding would be the same. Having found that the different tracking and verification requirements modify the conditions of competition to the detriment of Mexican tuna and tuna products, we would proceed to find, for the reasons explained above that the United States has not made a *prima facie* case that the different tracking and verification requirements stem exclusively from a legitimate regulatory distinction.

7.6 Claims under the GATT 1994

7.403. The Panel now turns to consider Mexico's claims under the GATT 1994.

7.6.1 Article I:1 of the GATT 1994

7.6.1.1 Legal test

7.404. Article I:1 of the GATT 1994 relevantly provides:

> With respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

7.405. The following elements must be demonstrated to establish an inconsistency with Article I:1:

> (i) that the measure at issue falls within the scope of application of Article I:1; (ii) that the imported products at issue are "like" products within the meaning of Article I:1; (iii) that the measure at issue confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country; and (iv) that the advantage so accorded is not extended "immediately" and "unconditionally" to "like" products originating in the territory of all Members.[613]

7.406. There has been little debate in WTO disputes about the types of measures that fall within the ambit of Article I:1. Both panels and the Appellate Body have held that Article I:1 covers a broad range of measures.

7.407. With respect to the meaning of "like products", the Panel notes that this concept is not defined in the GATT 1994, and case law on the meaning of "like products" in the context of Article I:1 is not extensive. The concept has been discussed more often in the context of Article III of the GATT 1994. In the context of the first sentence of Article III:2 of the GATT 1994 and of Article III:4 of the GATT 1994, the Appellate Body has explained that the determination of whether products are "like products", is fundamentally, a determination about the nature and extent of a competitive relationship between and among products.[614]

7.408. Furthermore, the Appellate Body has explained that in determining whether products are "like", a panel must examine on a case-by-case basis all relevant characteristics of the products at issue, including (i) the products' properties, nature and quality, i.e. their physical characteristics;

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[613] Appellate Body Reports, *EC – Seal Products*, para. 5.86.

[614] Appellate Body Report, *EC- Asbestos*, para. 99. See also Appellate Body Reports, *Philippines – Distilled Spirits*, para. 170.

(ii) the products' end-uses; (iii) consumers' tastes and habits, also referred to as consumers' perceptions and behaviour, in respect of the products; and (iv) the products' tariff classification.[615]

7.409. The Panel believes that it is not unreasonable to consider that previous interpretations of the concept of "like products" under Article III of the GATT 1994 should inform our interpretation of the concept of "like products" in the context of Article I:1 of the GATT 1994.

7.410. With respect to third element - that is, whether the measure at issue confers an "advantage, favour, privilege or immunity" - the Panel notes that relevant case law has given a broad interpretation to the term "advantage[s]". In *EC — Bananas III*, the Panel considered that "advantage[s]" in the sense of Article I:1 of the GATT 1994 are those advantages that create "more favourable import opportunities" or affect the commercial relationship between like products of different origins.[616]

7.411. In *Canada – Autos*, the Appellate Body also clarified that the words of Article I:1 refer not to some advantages granted "with respect to" the subjects that fall within the defined scope of the Article, but to "any advantage"; not to some products, but to "any product"; and not to like products from some other Members, but to like products originating in or destined for "all other Members".[617]

7.412. As for the fourth and final element, namely the question whether an advantage is accorded "immediately" and "unconditionally" to all like products originating in the territory of all Members, the Panel notes that there has been little debate in past disputes on the meaning of the term "immediately". The Panel understands the term to mean "without delay", "at once" and "instantly".[618]

7.413. The Panel notes that in past disputes, panels have interpreted the term "unconditionally" in different ways. For instance, the panel in *Indonesia – Autos* ruled that "unconditionally" means that the advantage cannot be made conditional on any criteria that are not related to the imported product itself.[619] The panel in *Canada – Autos* held that whether conditions attached to an advantage granted in connection with the importation of a product offend Article I:1 depends upon whether such conditions discriminate with respect to the origin of products.[620] In *EC – Tariff Preferences*, the panel concluded that the term should be given its ordinary meaning under Article I:1, that is, "not limited by or subject to any conditions".[621] In *Columbia – Ports of Entry*, the panel reverted to the interpretation developed by the Appellate Body in *Canada – Autos*, that is, that conditions attached to an advantage granted in connection with the importation of a product will violate Article I:1 when such conditions discriminate with respect to the origin of products.[622]

7.414. In *EC – Seal Products*, the Appellate Body had occasion to clarify the meaning of the terms "immediately" and "unconditionally":

> Under Article I:1, a Member is proscribed from granting an "advantage" to imported products that is not "immediately" and "unconditionally" extended to like imported products from all Members. This means, in our view that any advantage granted by a Member to imported products must be made available "unconditionally", or *without conditions*, to like imported products from all Members. However, as Article I:1 is concerned, fundamentally, with protecting expectations of equal competitive opportunities for like imported products from all Members, it does not follow that Article I:1 prohibits a Member from attaching *any* conditions to the granting of an "advantage" within the meaning of Article I:1. Instead, it prohibits those conditions that have a detrimental impact on the competitive opportunities for like imported products from *any* Member. Conversely, Article I:1 permits regulatory distinctions to

[615] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 20, DSR 1996:I, p. 97 at 113.
[616] Panel Report, *EC – Bananas III*, para. 7.239.
[617] Appellate Body Report, *Canada – Autos*, para. 79.
[618] *Shorter Oxford Dictionary*, 6th edn (Oxford University Press, 2007), Vol. 1, p. 1330.
[619] Panel Report, *Indonesia – Autos*, paras. 14.145–14.147.
[620] Panel Report, *Canada – Autos*, para. 10.29.
[621] Panel Report, *EC – Tariff Preferences*, para. 7.59.
[622] Panel Report, *Columbia – Ports of Entry*, para. 7.366.

> be drawn between like imported products, provided that such distinctions do not result in a detrimental impact on the competitive opportunities for like imported products from any Member.[623]

7.415. In the Panel's view, this passage clearly indicates that benefits accruing under a measure must be accorded straight away, and without conditions, to all WTO Members, except where the conditions imposed do not modify the competitive opportunities of imported products in the relevant market. Where, however, the conditions *do* modify the conditions of competition to the detriment of imported products, the mere fact that those conditions do not directly target the origin of imported products cannot prevent a finding of violation under Article I:1 (although that fact may be relevant in the context of assessing a defence under Article XX).

7.416. Thus, in determining whether the amended tuna measure extends any benefit it offers "immediately and unconditionally" to all Members, the Panel will first consider what benefit, if any, is accorded by the amended tuna measure. It will then proceed to determine whether the benefit(s) (if any) is or are accorded to all Members without condition, or, if conditions are imposed, whether these conditions modify the competitive opportunities in the United States' market to the detriment of like Mexican tuna and tuna products.

7.6.1.2 Application

7.6.1.2.1 Arguments of the parties

7.417. Mexico argues that the amended tuna measure is inconsistent with Article I:1 of the GATT 1994. Specifically, Mexico argues that access to the dolphin-safe label is an advantage, and that this advantage is not accorded immediately and unconditionally to the like tuna products originating in the territories of all other WTO Members, including Mexico.[624]

7.418. Mexico argues that in the context of its "treatment no less favourable" analysis under Article 2.1 of the TBT Agreement, it has demonstrated that the conditions and requirements set forth in the amended tuna measure result in *de facto* detrimental impact on the competitive opportunities for like Mexican tuna products in the United States market *vis-à-vis* like imported tuna products originating in other countries, by effectively denying the advantage of access to the dolphin-safe label to tuna products of Mexican origin.[625]

7.419. Mexico also notes that, in the original proceedings, the Appellate Body found that the lack of access to the advantage of the dolphin-safe label for tuna products containing tuna caught by setting on dolphins had a detrimental impact on the competitive opportunities of Mexican tuna products in the US market because it had the effect of denying eligibility to most Mexican tuna products while granting eligibility to most tuna products from the United States and other Members. In Mexico's view, these findings apply equally to the amended tuna measure. Mexico argues that nothing in the amended tuna measure has reduced or minimized the detrimental impact on imported Mexican tuna products caused by the regulatory distinction created in the original tuna measure; rather, the regulatory distinction remains substantially the same, and, as a consequence, tuna products of Mexican origin continue to be effectively excluded from the US market.[626]

7.420. The United States argues that Mexico fails to establish that the amended tuna measure is inconsistent with Article I:1 of that GATT 1994.[627]

7.421. The United States also argues that Mexico's claim under Article I:1 of the GATT 1994 relates only to the eligibility criteria, and that Mexico makes no claim in respect of any other

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[623] Appellate Body Reports, *EC – Seal Products*, para. 5.88 (emphasis original) (internal citations omitted).

[624] Mexico's first written submission, para. 315.

[625] Mexico's first written submission, para. 315, referring to Section IV. B.3.a (2) of the submission; Mexico's second written submission, para. 202.

[626] Mexico's second written submission, para. 203.

[627] United States' first written submission, para. 277.

requirements of the amended measure, including those related to certification and tracking and verification.[628]

7.422. The United States emphasizes that, with regard to the access to the dolphin-safe label, no tuna product of a Member has *a right* to the label. The United States elaborates that no product (whether of US, Mexican, or any other origin) is *entitled* to be labelled dolphin-safe under US law; rather, the advantage is subject to eligibility requirements that all tuna products must meet in order to access the label. These conditions are: (1) that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip in which the tuna was caught; and (2) that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught.[629]

7.423. Furthermore, the United States stresses that the original panel made no findings under Article I:1 of the GATT 1994, and that therefore "one should now undertake an objective assessment of the matter, namely the facts of the dispute and the relevant provisions" in the context of that provision.[630]

7.6.1.2.2 Analysis by the Panel

7.424. The Panel notes that the parties agree that the amended tuna measure satisfies the first three elements for finding an inconsistency under Article I:1 of the GATT 1994, i.e. that the amended tuna measure falls within the scope of application of Article I:1; that Mexican tuna products and tuna products originating in other countries are like imported products within the meaning of Article I:1; and that access to the dolphin-safe label is an "advantage, favour, privilege, or immunity" conferred by the amended tuna measure on the US market. The parties disagree, however, in respect of the application of the fourth and final element of the legal test, that is, as to whether the advantage of access to the dolphin-safe label is accorded "immediately and unconditionally" to like products originating in the territories of all WTO Members. [631]

7.425. Before proceeding, the Panel recalls that it is for Mexico, as the complaining party, to make a *prima facie* case that the amended tuna measure is inconsistent with Article I:1 of the GATT 1994.

7.426. As mentioned above, the fourth element of the legal test of Article I:1 of the GATT 1994 requires a panel to determine whether any conditions are imposed on the access of some Members to an advantage accorded by a measure. If access is conditioned, the panel must proceed to consider whether those conditions modify the competitive opportunities of the complaining Members in the relevant market. We will therefore review whether, as Mexico alleges, access to the dolphin-safe label is subject to conditions, and if so, whether these conditions result in a detrimental impact on competitive opportunities for like Mexican tuna and tuna products.

7.427. At the outset, the Panel considers it is necessary to clarify the scope of the elements of the amended tuna measure that should be examined in the context of Article I:1 of the GATT 1994. As the Panel noted above, the United States argues that Mexico's claim relates only to what we have called the eligibility criteria – that is, the *per se* disqualification of tuna caught by setting on dolphins from accessing the label, and the in-principle qualification of tuna caught by all other fishing methods subject to certain requirements. In the view of the United States, Mexico has made no claim in respect of any other requirements of the amended measure, including those related to certification and tracking and verification.[632]

7.428. In its responses to a question from the Panel, Mexico clarified that its claims under Articles I and III of the GATT 1994 relate to both the eligibility criteria and the different certification and tracking and verification requirements imposed on the ETP large purse seine fishery. Mexico argues that the amended tuna measure in its totality is inconsistent with Articles I:1 and III:4 of the GATT 1994, and explains that this inconsistency arises from the

[628] United States' first written submission, para. 277.
[629] United States' first written submission, para. 280.
[630] United States' second written submission, para. 133.
[631] Mexico's first written submission, paras. 310–314, referring to Appellate Body Report, *US – Tuna II (Mexico)*, paras. 233 -235; United States' first written submission, para. 279.
[632] United States' first written submission, para. 277.

detrimental impact on the competitive opportunities of Mexican tuna products caused by the relevant regulatory distinction under the amended tuna measure.[633]

7.429. In its comments on Mexico's response, the United States contends that Mexico initially argued that the amended tuna measure violates Article I:1 of the GATT 1994 only with respect to the eligibility criteria, and not with respect to the different certification or tracking and verification requirements. In the view of the United States, Mexico's response to the Panel's question alters its argument by alleging that its claim is not limited to "access" to the label, but rather encompasses the alleged differing requirements for certification and tracking and verification imposed in the ETP large purse seine fishery. The United States argues that despite broadening its claim, Mexico has not made a similar adjustment to its evidence, and accordingly fails to prove its allegations.[634]

7.430. The Panel notes that in its first written submission, Mexico explains that its claim under Article I:1 relates to the "differences in the labelling conditions and requirements".[635] The Panel considers that Mexico's response to the Panel's question clarifies the scope of its claim under Article I:1 of the GATT 1994 by *confirming* that it relates not only to the ineligibility of tuna caught by setting on dolphins to access the label, but also to the different certification and tracking and verification requirements, which, in Mexico's view, are additional "conditions" whose application to tuna caught by large purse seine vessels in the ETP means that the benefit of access to the label is not extended "unconditionally" to Mexican tuna products, as required under Article I:1 of the GATT 1994.[636] Therefore, similar to the Panel's approach in its analysis above under Article 2.1 of the TBT Agreement, the Panel will examine all three of the regulatory differences in the labelling conditions and requirements identified by Mexico: first, the eligibility criteria; second, the different certification requirements; and third, the different tracking and verification requirements.

7.431. The United States stresses that Article 2.1 of the TBT Agreement has different language from that of Article I:1 of the GATT 1994, and that it requires a distinct inquiry.[637] For the Panel, this raises the question whether it is appropriate for the Panel to rely on factual findings made under Article 2.1 of TBT Agreement in the context of analysing Mexico's claims under Article I:1 of the GATT 1994.

7.432. The Appellate Body has determined that Article 2.1 of the TBT Agreement and Article I:1 of the GATT 1994 embody different legal standards.[638] As the Panel understands it, however, the key difference between these two provisions is that, whereas Article I:1 requires *only* an analysis of whether the conditions attached to an advantage detrimentally impact the competitive opportunities of imported products in the relevant market, Article 2.1 of the TBT Agreement requires an *additional* consideration of whether any detrimental impact nevertheless stems exclusively from a legitimate regulatory distinction.[639] This second element is not present in the legal test under Article I:1, and accordingly, as the Appellate Body has said, it is not appropriate to conflate the two provisions.

7.433. Having said that, we note that the focus under Article I:1 on the question whether conditions imposed on access to an advantage modify the conditions of competition to the detriment of imported like products is similar to the first part of the analysis under Article 2.1 of the TBT Agreement, which similarly looks to the effect of a measure on the competitive opportunities of imported products. In light of this similarity, the Panel thinks it is appropriate to have regard to the factual findings we made in the context of the first part of our analysis under Article 2.1 of the TBT Agreement when considering Mexico's claims under Article I:1 of the GATT 1994.

7.434. The Panel also notes that Mexico refers to its factual allegations under Article 2.1 of the TBT Agreement in support of its argument under Article I:1 of the GATT 1994.[640] We see no reason why factual findings made under Article 2.1 of the TBT Agreement could not be relevant under

[633] Mexico's response to Panel question No. 9, paras. 35-36.
[634] Comments by the United States to Mexico's responses, paras. 25-26.
[635] Mexico's first written submission, para. 313; Mexico's second written submission, para. 203.
[636] Mexico's response to Panel question No. 10, paras. 37-39.
[637] United States' second written submission, para. 133.
[638] Appellate Body Reports, *EC – Seal Products*, para. 5.94.
[639] Appellate Body Reports, *EC – Seal Products*, para. 5.93.
[640] See Mexico's second written submission, para. 202.

Article I:1 of the GATT 1994 where, as is the case here, the factual allegations relied upon to establish a violation of both provisions are essentially the same. While the legal import of those factual findings may change depending on the terms of the particular provision being considered, there is no reason why the factual findings themselves should change. Indeed, in our view, a panel that reached different factual conclusions in different parts of its report on the basis of the same factual allegations may not be making an "objective assessment" of the matter as required under Article 11 of the DSU.

7.6.1.2.2.1 Whether the eligibility criteria and the different certification and tracking and verification requirements are "conditions" for the purposes of the Article I:1 of the GATT 1994

7.435. The first question that the Panel must address is whether the eligibility criteria and the different certification and tracking and verification requirements are "conditions" within the meaning of Article I:1 of the GATT 1994. Put another way, we need to determine whether these criteria and requirements "condition" Mexico's access to the benefit of the dolphin-safe label, which, as we have found above, has a commercial advantage on the US tuna market. This is so because, as the Appellate Body made clear in *EC – Seal Products*, Article I:1 of the GATT 1994 is not concerned with the question whether a *measure* as a whole modifies the conditions of competition; rather, "the legal standard under Article I:1 … is expressed through an obligation to extend *any* 'advantage' granted by a Member to *any* product originating in or destined for *any* other country 'immediately and unconditionally' to the 'like product' originating in or destined for all other Members".[641] The focus of our analysis is thus on the existence of *conditions* that limit or otherwise affect the access of imported products from some Members to a benefit accorded by a measure.

7.436. We begin by noting that the parties appear to have different views as to the *type* of condition that is relevant under Article I:1 of the GATT 1994. Mexico seems to believe that Article I:1 concerns the imposition of *any* conditions on access to a benefit, even if these conditions are applied to all WTO Members in a facially non-discriminatory manner. For Mexico, the sole question for the Panel is whether the conditions actually imposed on access to a benefit "have a detrimental impact on the competitive opportunities for like imported products from *any* Member".[642]

7.437. In contrast, the United States' position seems to be that Article I:1 is not directed towards conditions that are uniform and impartial, and that do not apply on the basis of nationality.[643] Thus, in the context of the present dispute, the United States argues that while the amended tuna measure lays down conditions which must be satisfied before access to the dolphin-safe label is granted, "[t]he eligibility criteria – and therefore *the opportunity* for the label – are the same for everyone".[644] Accordingly, the conditions in no way upset the "equality of competitive opportunities for like imported products".[645]

7.438. In the Panel's view, it is clear that Article I:1 of the GATT 1994 allows, at least in principle, advantages to be conditioned on the satisfaction of certain criteria. One such criterion is the likeness of products: extending a particular advantage only to "like" products clearly would not violate the provision. Moreover, because only those conditions that upset the equality of competitive opportunities are proscribed under Article I:1 of the GATT 1994, the imposition of neutral conditions applicable equally to all like products may be consistent with Article I:1. To find that *any* condition on access to a benefit necessarily and automatically falls foul of Article I:1 would not be consistent with the provision's overarching aim, which is "prohibiting *discriminatory* measures".[646]

7.439. Nevertheless, in our view, the fact that conditions on accessing an advantage are facially non-discriminatory is not a complete response to an allegation that certain conditions upset the competitive opportunities of imported products, since such conditions may nevertheless have a

[641] Appellate Body Reports, *EC – Seal Products*, para. 5.81 (emphasis original).
[642] Mexico's second written submission, para. 200 (emphasis original) (internal citations omitted).
[643] United States' first written submission, para. 283.
[644] United States' first written submission, para. 288.
[645] United States' first written submission, para. 281.
[646] Appellate Body Reports, *EC – Seal Products*, para. 5.82 (emphasis added).

de facto impact on competitive equality. Thus, while the mere existence of neutral conditions applicable to all like products does not *in itself* give rise to an automatic violation of Article I:1, neither does it prevent a panel from carefully scrutinizing the conditions and other relevant circumstances to determine whether the conditions detrimentally impact the competitive opportunities of some imported like products *de facto*.

7.440. Thus, the mere fact that "the eligibility criteria … are the same for everyone" does not mean that they are automatically consistent with Article I:1 of the GATT 1994. Rather, we must consider whether, even despite their general application, they modify the equality of competitive opportunities to the detriment of some like imported products.

7.441. The Panel also notes that, while the eligibility criteria apply to all imported (and, we would add, domestic) tuna products, the different tracking and verification requirements explicitly impose different conditions on tuna caught by large purse seine vessels in the ETP. Such tuna must meet additional documentary (that is, certification and tracking and verification) requirements before being able to access to the dolphin-safe label. These conditions *do not* apply "to everyone". As such, while they may not fall foul of Article I:1 if they "do not result in a detrimental impact on the competitive opportunities for like imported products" from Mexico,[647] they seem to us clearly to be the type of "condition" that must be assessed under Article I:1.

7.442. As such, the Panel finds that the eligibility criteria and the different certification and tracking and verification requirements are "conditions" imposed on accessing the dolphin-safe label. The advantage of accessing the label is thus not accorded "unconditionally". That, however, is not the end of our inquiry. Rather, we now proceed to consider whether the conditions modify the equality of competitive opportunities for like products from any Member.

7.6.1.2.2.2 Whether the eligibility criteria modify the conditions of competition in the US tuna market to the detriment of Mexican tuna and tuna products

7.443. The Panel recalls that in the original proceedings, the panel found that because there is "limited demand for non-dolphin-safe tuna products" in the United States market[648], and because "the only means through which dolphin-safe status can be claimed" is via the dolphin-safe label regulated by the tuna measure[649], "[a]n advantage is … afforded to products eligible for the label".[650] The panel concluded that access to the label "has a significant commercial value on the US market for tuna"[651], and that denial of such access could "place Mexican tuna products at a disadvantage on the US market".[652] The United States did not contest this finding on appeal.[653] Although the original panel found that the detrimental commercial impact of the disqualification of tuna caught by setting on dolphins was "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"[654] and so not attributable to the tuna measure, the Appellate Body reversed this, and held that "it is the governmental action in the form of adoption and application of the US 'dolphin-safe' labelling provisions that has modified the conditions of competition in the market to the detriment of Mexican tuna products".[655] The Appellate Body accordingly concluded that "the lack of access to the 'dolphin-safe' label of tuna products containing tuna caught by setting on dolphins has a detrimental impact on the competitive opportunities of Mexican tuna products in the

[647] Appellate Body Reports, *EC – Seal Products*, para. 5.88.
[648] Panel Report, *US – Tuna II (Mexico)*, para. 7.286.
[649] Panel Report, *US – Tuna II (Mexico)*, para. 7.289.
[650] Panel Report, *US – Tuna II (Mexico)*, para. 7.287.
[651] Panel Report, *US – Tuna II (Mexico)*, para. 7.289.
[652] Panel Report, *US – Tuna II (Mexico)*, para. 7.284.
[653] Appellate Body Report, *US – Tuna II (Mexico)*, para. 233.
[654] Panel Report, *US – Tuna II (Mexico)*, para. 7.378. The Panel had earlier found in para. 7.377 "that the measures 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".
[655] Appellate Body Report, *US – Tuna II (Mexico)*, para. 239.

US market".[656] The Appellate Body further concluded that "it is the measure at issue that modifies the competitive conditions in the US market to the detriment of Mexican tuna products".[657]

7.444. In the context of its claim under 2.1 of the TBT Agreement, Mexico argues that "[t]he features of the relevant market remain unchanged" from those prevailing at the time the original case was decided.[658] According to Mexico, "virtually all of Mexico's purse seine tuna fleet continues to fish in the ETP by setting on dolphins and is therefore fishing for tuna that would not be eligible to be contained in a dolphin-safe tuna product under the Amended Tuna Measure".[659] And because "US retailers and consumers are sensitive to the dolphin-safe issue, and tuna products labelled 'dolphin-safe' have an advantage in the marketplace"[660], Mexico contends that its tuna products "continue to be effectively excluded from the US market"[661], which "has a detrimental impact on the competitive opportunities of Mexican tuna products in the US market".[662]

7.445. Mexico contrasts the situation facing its own tuna and tuna products with that facing tuna products made with tuna caught by the United States and other WTO Members. Mexico explains that "[t]he US tuna fleet continues not to fish in the ETP", and that the fishing fleets of other WTO Members are operating in different (i.e. non-ETP) oceans or within the ETP but using fishing methods other than setting on dolphins. Mexico accordingly concludes that "virtually all tuna caught by US vessels"[663] and "most tuna products from other countries"[664] are potentially eligible for the label"[665], while "most tuna caught by Mexican vessels … would not be eligible for inclusion in a dolphin-safe product under the US dolphin-safe labelling provisions".[666]

7.446. The Panel also recalls that in the context of Mexico's claim under Article 2.1 of the TBT Agreement, the United States did not deny that the disqualification of tuna caught by setting on dolphins from accessing the dolphin-safe label resulted in *de facto* detrimental treatment of Mexican tuna and tuna products, and neither did it submit any evidence that might cast doubt on this finding. [667]

7.447. In the Panel's view, in denying access to the dolphin-safe label to tuna caught by setting on dolphins, the amended tuna measure has the effect of denying to certain tuna and tuna products a valuable market advantage (that is, access to the dolphin-safe label). And because, as both parties agree and the Appellate Body found in the original proceedings, tuna and products made from tuna caught by large purse seine vessel in the ETP and in other fisheries are "like", the clear and necessary consequence of this finding is that the amended tuna measure *does not* accord immediately and unconditionally to all like products the benefit embodied in the US dolphin-safe labelling regime. Accordingly, it is inconsistent with Article I:1 of the GATT 1994.

7.448. Before concluding, the Panel must deal with the United States' argument that with regard to the access to the dolphin-safe label, no tuna product of a Member has *a right* to the label. The United States contends that no product (whether of US, Mexican, or any other origin) is *entitled* to be labelled dolphin-safe under US law; rather, the advantage is subject to origin-neutral eligibility requirements that all tuna products must meet in order to be labelled consistent with US law.[668]

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[656] Appellate Body Report, *US – Tuna II (Mexico)*, para. 235.

[657] Appellate Body Report, *US – Tuna II (Mexico)*, para. 240. The Appellate Body explained that "[t]he fact that the detrimental impact on Mexican tuna products may involve some element of private choice does not, in our view, relieve the United States of responsibility under the *TBT Agreement,* where the measure it adopts modifies the conditions of competition to the detriment of Mexican tuna products": para. 239 (citing Appellate Body Report, *Korea – Various Measures on Beef*, para. 146).

[658] Mexico's first written submission, para. 224.

[659] Mexico's first written submission, para. 227.

[660] Mexico's first written submission, para. 225.

[661] Mexico's first written submission, para. 231.

[662] Mexico's first written submission, para. 226. In support of these assertions, Mexico has provided statements from Mexican tuna producers testifying to the effects of the tuna measure on the competitive opportunities of Mexican tuna in the US market: Statements on Behalf of Mexican Producers (Exhibits MEX-89-A, MEX-89-B, and MEX-89-C) (BCI).

[663] Mexico's first written submission, para. 227.

[664] Mexico's first written submission, para. 232.

[665] Mexico's first written submission, para. 227.

[666] Mexico's first written submission, para. 227.

[667] United States' first written submission, para. 215 (citing Appellate Body Report, *US – Tuna II (Mexico)*, paras. 234-235).

[668] United States' first written submission, para. 280.

According to the United States, nothing prevents Mexican canneries or Mexican vessels from producing tuna product that would be eligible for the dolphin-safe label. Indeed, other countries that fish in the ETP, and that were in the same position as Mexico when the DPCIA was passed, have chosen to do so.[669]

7.449. The Panel is not persuaded by the United States' argument. The Panel notes that the Appellate Body found in the original proceedings, in the context of its analysis under Article 2.1 of the TBT Agreement, that whether a measure comports with the "treatment no less favourable" requirement in Article 2.1 does not hinge on whether the imported products could somehow get access to an advantage, for example, by complying with all applicable conditions. Rather, a determination of whether imported products are accorded "less favourable treatment" within the meaning of Article 2.1 of the TBT Agreement calls for an analysis of whether the contested measure modifies the conditions of competition to the detriment of imported products. The Appellate Body further explained that the fact that a complainant could comply or could have complied with the conditions imposed by a contested measure does not mean that the challenged measure is therefore consistent with Article 2.1 of the TBT Agreement.[670]

7.450. In our view, the same reasoning applies with equal force in the context of Article I:1 of the GATT 1994. Where a condition attached to an advantage is found to detrimentally modify the competitive opportunities of imported like products, the fact that that the disadvantaged Member could modify its practices so as to conform to the condition in question in no way changes the fact that the condition has upset the competitive equality that Article I:1 protects. As we understand it, Article I:1 of the GATT 1994, like Article 2.1 of the TBT Agreement, is concerned with the conditions of competition as they exist, and not as they might exist if the Member whose like products have suffered a detrimental impact were to somehow modify its practices. Accordingly, the fact that a Member could modify its practices to ensure that its like products conform to the relevant conditions and thus gain access to the benefit does not mitigate the responsibility of a Member for maintaining a measure that is inconsistent with Article I:1 of the GATT 1994.

7.451. In light of the foregoing, the Panel concludes that the eligibility criteria modify the conditions of competition in the US tuna market to the detriment of Mexican like tuna and tuna products, in violation of Article I:1 of the GATT 1994.

7.452. Whereas in an analysis under Article 2.1 of the TBT Agreement, a Panel is required go one step further and assess and determine whether the detrimental impact stems exclusively from a legitimate regulatory distinction, such additional step is not necessary in the context of Article I:1 of the GATT 1994.[671]

7.6.1.2.2.3 Whether the different certification requirements modify the conditions of competition in the United States' market to the detriment of Mexican tuna and tuna products

7.453. Mexico essentially relies on its argumentation in the context of Article 2.1 of the TBT Agreement to establish that, insofar as it imposes different certification requirements on tuna caught in the ETP large purse seine fishery on the one hand, and in other fisheries on the other hand, the amended tuna measure is inconsistent with Article I:1 of the GATT 1994.[672]

7.454. In its analysis under Article 2.1 of the TBT Agreement, the Panel found that the different certification requirements modify the conditions of competition to the detriment of Mexican tuna and tuna products. The different conditions impose a lighter burden, in terms of proving compliance with the relevant conditions and thus accessing the dolphin-safe label, on tuna and tuna products made from tuna caught by large purse seine vessels outside the ETP large purse seine fishery than by those within it. The Panel also found merit in Mexico's allegation that the different certification requirements may make it easier for tuna and tuna products made from tuna

[669] United States' second written submission, para. 132.
[670] See Appellate Body Report, *US – Tuna (II) Mexico*, para. 221.
[671] See Appellate Body Reports, *EC – Seal Products*, para. 5.117.
[672] See Mexico's second written submission, paras. 202 and 204.

caught outside the ETP large purse seine fishery to be inaccurately labelled[673], although it did not think it necessary to make a definitive finding on that point.

7.455. In the context of the present analysis, the Panel considers that the fact that tuna caught by large purse seine vessels in the ETP must be accompanied by two certifications, including one from an observer, whereas fish caught by other methods need only be accompanied by one certification (by a captain), in itself strongly suggests that the amended tuna measure imposes certain conditions on access to the dolphin-safe label on only *some* tuna products in contravention of Article I:1. Indeed, it is difficult to conceive how a measure that imposes a certain condition on some like products and additional, heavier or more burdensome conditions on other like products could be considered to be non-discriminatory within the meaning of Article I:1. Bearing in mind the significant expenditure associated with observer certification, it seems clear to us that the observer certification requirement represents an additional "condition" that detrimentally modifies the competitive opportunities of like tuna and tuna products. To the extent that the absence of observer certification outside the ETP large purse seine fishery may also make it easier for tuna caught in those fisheries to be incorrectly labelled – a point we do not rule on definitively – the additional observer certification condition would further upset the equality of competitive opportunities between like tuna and tuna products.

7.456. In sum, we find that, insofar as it requires observer coverage for purse seine vessels in the ETP and does not require the same for other vessels in the ETP and other fisheries, the amended tuna measure is inconsistent with Article I:1.

7.6.1.2.2.4 Whether the different tracking and verification requirements modify the conditions of competition in the United States' market to the detriment of Mexican tuna and tuna products

7.457. Mexico essentially relies on its argumentation in the context of Article 2.1 of the TBT Agreement to establish that, insofar as it imposes different tracking and verification requirements on tuna caught by large purse seine vessels in the ETP and tuna not so caught, the amended tuna measure is inconsistent with Article I:1 of the GATT 1994.[674]

7.458. The Panel recalls that, in the context of its claim under Article 2.1 of the TBT Agreement, Mexico did not argue that the difference in the tracking and verification requirements in themselves prevents Mexican tuna from accessing the dolphin-safe label. Rather, in Mexico's view, because of "the absence of sufficient … record-keeping [and] verification … requirements for tuna that is used to produce tuna products from the United States and other countries means that Mexican tuna products are losing competitive opportunities to tuna products that may be inaccurately labelled as dolphin-safe".[675]

7.459. In response, the United States argued that there is no causal connection between the detrimental impact and the different record keeping and tracking and verification requirements.[676]

7.460. The United States also alleged that while Mexico's claim is based on the proposition that "producers are disadvantaged *vis-à-vis* their non-AIDCP competitors to the extent that the competitors are allowed to inaccurately designate their tuna products as 'dolphin safe' … whereas Mexican producers, due to the strict record-keeping requirements of AIDCP, are not able to commit this same level of fraud", Mexico had put forward *no* evidence to support the assertion that the US Government and its citizens have been defrauded on an industry-wide scale for over the past two decades.[677]

7.461. Finally, the United States argued that the distinction about which Mexico complains is "created by the AIDCP, not the US measure. Indeed, if the United States eliminated all references

[673] See paras. 7.168–7.170 above.
[674] See Mexico's second written submission, paras. 202 and 204.
[675] Mexico's second written submission, para. 117.
[676] United States' first written submission, para. 223.
[677] United States' first written submission, para. 247; United States' second written submission, para. 96.

to the AIDCP (and its requirements) from the amended measure, the regulatory distinction that Mexico criticizes would still exist".[678]

7.462. In its Article 2.1 analysis, the Panel rejected the United States' arguments. It found that while it is true that "[w]hat US law requires is that Mexican producers provide Form 370s that list the AIDCP-mandated tracking number", whereas "[t]he actual record-keeping and verification requirements Mexico complains of are contained in the AIDCP"[679], it is nevertheless the case that by incorporating these AIDCP requirements into the tuna measure, the tuna measure itself creates a regulatory distinction that conditions access to the United States dolphin-safe label on different criteria depending on where and how the tuna was caught.[680]

7.463. After reviewing all the evidence before it, the Panel ultimately concluded that the system in place outside the ETP large purse seine fishery is less burdensome than the system inside that fishery, and therefore modifies the conditions of competition to the detriment of Mexican tuna and tuna products. The Panel also saw merit in Mexico's argument that the system in place outside the ETP large purse seine fishery may contribute to inaccurate labelling of tuna caught in sets or other gear deployments in which dolphins were killed or seriously injured[681], although it did not find it necessary to make a definitive finding on that point.

7.464. In the Panel's view, these factual findings lead to the conclusion that the amended tuna measure is inconsistent with Article I:1 of the GATT 1994. Insofar as the different tracking and verification requirements impose less burdensome tracking and verification requirements outside the ETP large purse seine fishery, the amended tuna measure grants a benefit to tuna caught other than by large purse seine vessels in the ETP that is not immediately and unconditionally granted to tuna caught by large purse seine vessels. The different tracking and verification requirements essentially subject tuna caught by large purse seine vessel in the ETP to additional conditions in order to access the dolphin-safe label, and insofar as the system in place outside the ETP large purse seine fishery is less burdensome, the additional conditions imposed in the ETP large purse seine fishery upset the equality of competitive opportunities that Article I:1 of the GATT 1994 protects.

7.465. Accordingly, we find that the different tracking and verification requirements contained in the amended tuna measure are inconsistent with Article I:1 of the GATT 1994.

7.466. Before concluding, we note that in its second written submission, Mexico argues that what it considers to be the United States' unilateral action in designing and applying the dolphin-safe labelling conditions and requirements of the amended tuna measure provides further support its claim that the measure is inconsistent with Article I:1 of the GATT 1994. Specifically, according to Mexico, the amended tuna measure's unilateral dolphin-safe regime has the intentional effect of exerting pressure on Mexico to change its tuna fishing practices, even though these practices are already fully compliant with the highly successful AIDCP dolphin-safe labelling regime, as agreed through multinational negotiations between the United States, Mexico, and the other members of the IATTC. Mexico argues that to the extent that Mexico refuses to acquiesce to the unilateral extraterritorial pressure imposed by the United States, the vast majority of its tuna products are denied the advantage of access to the dolphin-safe label in the US market even while they are entirely qualified for the AIDCP dolphin-safe label elsewhere.[682]

7.467. In response, the United States advanced three arguments. First, the United States argues that the DSB recommendations and rulings did not find that the detrimental impact caused by the US measure was a factor of "unilateral" application and, thus, it is unclear what finding Mexico asks the Panel to make or what the proposed factual basis would be. Second, according to the United States, the argument lacks merit because measures of Members are, by definition,

[678] United States' first written submission, para. 244.
[679] United States' second written submission, para. 98.
[680] See paras. 7.171-7.179 above.
[681] See para. 7.382 above. As the Panel noted above, it need not make a final determination of whether the system in place outside the ETP large purse seine fishery does, in every instance, contribute to inaccurate labelling. Such a determination would require a detailed examination of the several factors that may also contribute to the possibility of inaccurate labelling. In the Panel's view, such analysis is unnecessary in the present case. The mere fact that the burden imposed outside the ETP large purse seine fishery is lesser than that imposed inside is sufficient to justify a finding of violation under Article I:1.
[682] Mexico's second written submission, para. 208.

unilateral, and the Appellate Body found in the original proceedings that the objective of the tuna measure is not to "coerce" Mexico. Finally, the United States asserts that Mexico's argument ignores that setting on dolphins, which under the AIDCP is qualified to catch dolphin-safe tuna, harms dolphins even if no dolphin is observed killed or seriously injured in a particular set, and that consequently the AIDCP regime does not meet the United States' chosen level of protection with respect to dolphin protection.[683]

7.468. The Panel does not need to decide on this point, since it has already found for different reasons that the amended tuna measure is inconsistent with Article I:1.

7.6.2 Article III:4 of the GATT 1994

7.6.2.1 Legal test

7.469. Article III:4 relevantly provides:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

7.470. There are three elements that must be demonstrated to establish that a measure is inconsistent with Article III:4:

> (i) that the imported and domestic products are "like products"; (ii) that the measure at issue is a "law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use" of the products at issue; and (iii) that the treatment accorded to imported products is "less favourable" than that accorded to like domestic products. [684]

7.471. The Panel notes that the parties agree on the legal test to be applied in respect of the first and second of these steps.[685]

7.472. With respect to the first element, the Appellate Body has explained that in making a determination of whether products are like, a panel should examine, on a case-by-case basis, all relevant criteria, including (i) the products' properties, nature and quality, i.e. their physical characteristics; (ii) the products' end-uses; (iii) consumers' tastes and habits, also referred to as consumers' perceptions and behaviour, in respect of the products; and (iv) the products' tariff classification.[686]

7.473. The Appellate Body has also clarified, however, that the aforementioned criteria are "neither a treaty-mandated nor a closed list of criteria that will determine the legal characterisation of products".[687] The Appellate Body has explained that in each case, all pertinent evidence, whether related to one of those criteria or not, must be examined and considered by panels to determine whether products are – or could be – in a competitive relationship in the marketplace, i.e. are "like". The Appellate Body explained that when all the relevant evidence has been examined, panels must determine whether that evidence, as a whole, indicates that the products in question are "like" in terms of the legal provision at issue.[688]

7.474. With respect to the second element, the Panel notes that previous panels and the Appellate Body have interpreted broadly what falls within the ambit of "laws and regulations" in the context of Article III:4.

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[683] United States' second written submission, para. 77, footnote 141.
[684] Appellate Body Reports, *EC – Seal Products*, para. 5.99.
[685] Mexico's first written submission, paras. 317-319; United States' first written submission, paras. 292-293.
[686] Appellate Body Report, *EC – Asbestos,* para. 101.
[687] Appellate Body Report, *EC – Asbestos*, para. 101.
[688] Appellate Body Report, *EC – Asbestos*, para. 103.

7.475. With respect to the third element, Mexico recalls the Appellate Body's findings in past disputes and stresses that (i) "what is relevant is whether such regulatory differences distort the conditions of competition to the detriment of imported products"; (ii) under Article III:4, a panel is not required to examine whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction; and (iii) whether the detrimental impact of a measure is unrelated to the foreign origin of the imported products is irrelevant to the analysis of a claim under Article III:4, and hence, no "additional inquiry" in this respect is necessary.[689]

7.476. The United States stresses that the Article III:4 non-discrimination obligation is "concerned, fundamentally, with prohibiting discriminatory measures," and that what it requires is "effective equality of opportunities for imported products to compete with like domestic products." In the United States' view, a measure cannot violate Article III:4 of the GATT 1994 unless there is a "genuine relationship between the measure at issue and the adverse impact on competitive opportunities for imported products."[690]

7.477. The Panel recalls that the Appellate Body has established the following propositions in respect of Article III:4 of the GATT 1994. First, the term "treatment no less favourable" requires effective equality of opportunities for imported products to compete with like domestic products. Second, a formal difference in treatment between imported and domestic like products is neither necessary, nor sufficient, to establish that imported products are accorded less favourable treatment than that accorded to like domestic products. Third, because Article III:4 is concerned with ensuring effective equality of competitive opportunities for imported products, a determination of whether imported products are treated less favourably than like domestic products involves an assessment of the implications of the contested measure for the equality of competitive conditions between imported and like domestic products; if the outcome of this assessment is that the measure has a detrimental impact on the conditions of competition for like imported products, then such detrimental impact will amount to treatment that is "less favourable" within the meaning of Article III:4. Finally, for a measure to be found to modify the conditions of competition in the relevant market to the detriment of imported products, there must be a "genuine relationship" between the measure at issue and the adverse impact on competitive opportunities for imported products.[691]

7.478. The Appellate Body has clarified that in determining whether the detrimental impact on competitive opportunities for like imported products is attributable to, or has a genuine relationship with, the measure at issue, the relevant question is "whether it is the governmental measure at issue that 'affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory'".[692]

7.479. Importantly, the Appellate Body has also stated that for the purposes of an analysis under Article III:4, a panel is not required to examine whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction.[693]

7.480. Thus, in assessing the third element of the legal test, i.e. whether the treatment accorded to imported products by the amended tuna measure is "less favourable" than that accorded to like domestic products, the Panel will examine whether the measure at issue has a detrimental impact on competitive opportunities for like imported products, or whether the adverse impact on competitive opportunities for imported products is attributable to, or has a genuine relationship with, the measure at issue.

7.481. Before proceeding, the Panel notes that the "less favourable treatment" test in Article III:4 of the GATT 1994 is very similar to the first element of the "less favourable treatment" test in Article 2.1 of the TBT Agreement. Indeed, the Appellate Body itself has recognised that although the legal test under the two provisions is not the same, nevertheless there is a close connection

[689] Mexico's second written submission, paras. 216-219 (citing Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 128 and Appellate Body Reports, *EC –Seal Products*, paras. 5.117 and 5.104).
[690] United States' first written submission, para. 295.
[691] Appellate Body Reports, *EC –Seal Products*, para. 5.101.
[692] Appellate Body Reports, *EC –Seal Products*, para. 5.105.
[693] Appellate Body Reports, *EC –Seal Products*, para. 5.117.

between the test under Article III:4 and the detrimental impact analysis that must be carried out under the first tier of Article 2.1 of the TBT Agreement.[694] As the Panel understands it, the key difference between the two provisions is that while a showing of detrimental impact is in itself sufficient to establish a violation of Article III:4 of the GATT 1994, a further analysis of whether detrimental treatment stems exclusively from a legitimate regulatory distinction may be required under Article 2.1 of the TBT Agreement, at least where the detrimental treatment identified is *de facto*.

7.6.2.2 Application

7.6.2.2.1 Arguments of the parties

7.482. Mexico argues that the three challenged features of the amended tuna measure (the eligibility criteria and the different certification and tracking and verification requirements) accord like Mexican tuna and tuna products treatment less favourable than that accorded to US tuna products, and are therefore inconsistent with Article III:4 of the GATT 1994.[695]

7.483. Mexico recalls that in the original proceedings, the Appellate Body found that access to the dolphin-safe label constituted an "advantage" on the US market; that lack of access to the dolphin-safe label has a detrimental impact on the competitive opportunities of Mexican tuna and tuna products in the US market; and that government intervention, in the form of adoption and application of the US dolphin-safe labelling provisions, affects the conditions under which like tuna and tuna products, domestic and imported, compete in the market within the United States' market. Moreover, the panel and Appellate Body found that most tuna caught by Mexican vessels, being caught in the ETP by setting on dolphins, would not be eligible for inclusion in a dolphin-safe product under the US dolphin-safe labelling provisions, while most tuna caught by US vessels, not being caught by setting on dolphins, is potentially eligible for the label.

7.484. Mexico argues that this continues to be the case.[696] According to Mexico, the findings of the panel and the Appellate Body apply equally in respect of the amended tuna measure, because none of the amendments to the amended tuna measure have reduced or eliminated the detrimental impact on imported Mexican tuna products caused by the differences in the dolphin-safe labelling conditions and requirements. In Mexico's view, the amended tuna measure accords to imported Mexican tuna products treatment that is "less favourable" than that accorded to like domestic products in the US market.[697]

7.485. The United States argues that Mexico fails to establish that the amended tuna measure is inconsistent with Article III:4 of the GATT 1994.[698]

7.486. In the first place, the United States considers that Mexico's claim under Article III:4 of the GATT 1994 is limited to the different eligibility requirements that disqualify tuna caught by setting on dolphins from accessing the dolphin-safe label. The United States stresses that Mexico neither claims nor proves that any other aspects of the amended measure, certification and tracking and verification requirements, are inconsistent with Article III:4 of the GATT 1994.[699]

7.487. Additionally, the United States argues that Mexico fails to establish that the challenged measure accords different treatment to like US and Mexican tuna products. The United States stresses that the measure sets the *same* eligibility requirements for all tuna products sold in the United States – to be eligible for the dolphin-safe label, no tuna may be caught by setting on dolphins and no tuna may be caught where a dolphin was killed or seriously injured. The United States reiterates that the requirements set by the amended tuna measure do not differ based on the nationality of the vessel or processor, the fishery where the tuna was caught, or the fishing gear used to catch the tuna.[700]

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[694] See e.g. Appellate Body Report, *US – Clove Cigarettes*, paras. 179 and 180.
[695] Mexico's first written submission, para. 317.
[696] Mexico's first written submission, para. 329.
[697] Mexico's second written submission, para. 221.
[698] United States' first written submission, para. 295.
[699] United States' second written submission, para. 139.
[700] United States' first written submission, para. 297.

7.488. The United States recalls the original panel's findings and argues, *inter alia*, that the adverse impact felt by Mexican tuna products on the US market is not a consequence of the measure itself putting Mexican producers at a disadvantage *vis-à-vis* producers in the United States, Thailand, the Philippines, etc. Rather, it is a consequence of the "fishing and purchasing practices, geographical location, relative integration of different segments of production, and economic and marketing choices" of the different tuna producers.[701]

7.489. The United States also criticizes what it sees as Mexico's *sole* reliance on the effects of the amended tuna measure in its argumentation under Article III:4. In the view of the United States, this approach entails the absurd consequence that measures could *become* inconsistent with Article III:4 based entirely on the private choices made by different Members' industries.[702] For the United States, as a consequence of Mexico's approach, the basis of the regulatory requirements becomes wholly immaterial to the national treatment analysis under Article III:4 of the GATT 1994. The United States argues that Mexico's approach would greatly undermine a Member's ability to regulate in the public interest.[703]

7.6.2.2.2 Analysis by the Panel

7.490. The Panel's task in this part of its Report is to review whether Mexico has established, *prima facie*, that the amended tuna measure has a detrimental impact on competitive opportunities for like Mexican tuna products.

7.491. At the outset, the Panel considers it is necessary to clarify the scope of the elements of the amended tuna measure that should be examined in the context of Article III:4 of the GATT 1994. As noted above, the United States argues that Mexico's claim under Article III:4 relates only to the eligibility criteria, and does not concern either the different certification or the different tracking and verification requirements.[704]

7.492. As was the case in respect of Mexico's claim under Article I:1 of the GATT 1994, we note that Mexico has articulated its claim under Article III:4 of the GATT 1994 in terms of "the difference in labelling conditions".[705] It is *this* "difference" that Mexico is challenging.[706] In our view, the term "difference in labelling conditions" clearly encompasses more than just the eligibility criteria; the use of the plural "conditions" indicates that Mexico's challenge relates also to other aspects or features of the amended tuna measure that, in Mexico's view, treat Mexican tuna and tuna products differently from like domestic tuna and tuna products. As such, we will consider whether any of the three features of the measure identified by Mexico – the eligibility criteria, the different certification requirements, and the different tracking and verification requirements – modify the conditions of competition to the detriment of Mexican tuna and tuna products, in violation of Article III:4.

7.493. The Panel now proceeds to consider the substance of the parties' arguments. We begin by noting that Mexico appears to rely on the argumentation it developed in the context of Article 2.1 of the TBT Agreement to support its claim that the amended tuna measure is inconsistent with the requirements of Article III:4 of the GATT 1994.[707]

7.494. As we noted above in the context of our analysis under Article I:1 of the GATT 1994, we think it is appropriate for us to make reference to factual and legal findings arrived at in the course of our analysis under Article 2.1 of the TBT Agreement, because, as we have explained, the Appellate Body has made clear that even though the "less favourable treatment" tests under Article 2.1 of the TBT Agreement and III:4 of the GATT 1994 are not identical, both include the question whether the measure at issue "modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products *vis-à-vis* the group of like

[701] United States' first written submission, para. 299.
[702] United States' second written submission, para. 142.
[703] United States' first written submission, paras. 302-314; United States' second written submission, para. 142.
[704] United States' first written submission, para. 277.
[705] Mexico's second written submission, para. 220.
[706] Mexico's second written submission, para. 221.
[707] E.g. Mexico's second written submission, paras. 220 and 221.

domestic products".[708] Indeed, we think it would be rare for a panel that had found that a measure detrimentally modifies the conditions of competition within the meaning of the first tier of Article 2.1 of the TBT Agreement to find that the same measure nevertheless does not accord less favourable treatment within the meaning of Article III:4 of the GATT 1994.

7.495. As the Panel's discussion of the legal test under Article III:4 suggests, the inquiry required under Article III:4 is very similar to the inquiry required under first tier of Article 2.1 of the TBT Agreement. In fact, as the Panel understands it, the essential legal question that must be answered under both Article III:4 of the GATT 1994 and the first tier of Article 2.1 of the TBT Agreement is, for all intents and purposes, the same: namely, whether or not the measure at issue "modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products *vis-à-vis* the group of like domestic products".[709] The Appellate Body has consistently used this formulation to describe both the first step of the inquiry under Article 2.1 of the TBT Agreement and the question at issue in Article III:4 of the GATT 1994.[710] In the Panel's opinion, therefore, it is appropriate to apply our findings made in the context of the first step of the analysis under Article 2.1 of the TBT Agreement in the context of Article III:4 of the GATT 1994.

7.496. The Panel begins by recalling its findings in the context of Article 2.1 of the TBT Agreement and Article I:1 of the GATT 1994 that, as the parties agree, the tuna and tuna products concerned in this dispute are "like". This factual finding applies equally in the context of Article III:4 of the GATT 1994, which similarly concerns the treatment of "like products". Accordingly, the Panel finds that for the purpose of Article III:4 of the GATT 1994, all tuna and tuna products are "like".

7.497. The Panel now proceeds to consider whether the three features of the amended tuna measure identified by Mexico modify the conditions of competition to the detriment of like Mexican tuna and tuna products, contrary to Article III:4 of the GATT 1994.

7.498. With respect to the eligibility criteria, the Panel recalls its findings on this aspect of the amended tuna measure under Article 2.1 of the TBT Agreement and Article I:1 of the GATT 1994. The Panel has found in this respect, following a separate detrimental impact analysis under Article I:1 of the GATT 1994, that the eligibility criteria modify the conditions of competition in the US tuna market to the detriment of Mexican tuna and tuna products because they deprive certain tuna products of access to the dolphin-safe label, which is a valuable economic benefit on the US market.

7.499. Applying this finding in the context of Article III:4 of the GATT 1994, the Panel finds that the eligibility criteria in the amended tuna measure modify the conditions of competition to the detriment of like Mexican tuna and tuna products.

7.500. With respect to the different certification requirements, the Panel similarly found in the context of the first part of its analysis under Article 2.1 of the TBT Agreement that this feature of the amended tuna measure modifies the conditions of competition in the US tuna market to the detriment of like Mexican tuna and tuna products. This is so because they impose a lighter burden on tuna caught outside the ETP large purse seine fishery than inside it, and may contribute to inaccurate labelling.

7.501. Applying this finding in the context of Article III:4 of the GATT 1994, the Panel finds that the different certification requirements in the amended tuna measure modify the conditions of competition to the detriment of like Mexican tuna and tuna products.

7.502. Finally, with respect to the different tracking and verification requirements, the Panel found in the context of the first part of its analysis under Article 2.1 of the TBT Agreement that this feature of the amended tuna measure modifies the conditions of competition in the US tuna market to the detriment of like Mexican tuna and tuna products. This is so because they impose a

[708] Appellate Body Report, *US – Clove Cigarettes*, para. 180.
[709] Appellate Body Report, *US – Clove Cigarettes*, para. 180.
[710] See, most recently, Appellate Body Reports, *EC – Seal Products*, para. 5.101 (finding that a measure will violate Article III:4 where it "has a detrimental impact on the conditions of competition for like imported products").

lighter burden on tuna caught outside the ETP large purse seine fishery than on tuna caught inside that fishery, and they may also contribute to inaccurate labelling.[711]

7.503. Applying this finding in the context of Article III:4 of the GATT 1994, the Panel finds that the different tracking and verification requirements in the amended tuna measure modify the conditions of competition to the detriment of like Mexican tuna and tuna products.

7.504. In light of these findings, the Panel concludes that the amended tuna measure, including the three regulatory distinctions identified by Mexico, is therefore inconsistent with Article III:4 of the GATT 1994.

7.7 The United States' defence under Article XX of the GATT 1994

7.505. The United States submits that if the amended tuna measure is inconsistent with Articles I and/or III of the GATT 1994, it is nevertheless justified under Article XX of that Agreement. Article XX provides for certain exceptions to the substantive obligations set forth in the GATT 1994.[712] The burden of establishing that an otherwise GATT-inconsistent measure satisfies the requirements of one of the exceptions in Article XX lies with the party invoking it, in this case the United States.[713]

7.506. Article XX of the GATT 1994 sets forth requirements both in its subparagraphs and in its chapeau. As noted by the Appellate Body in *US – Gasoline*, the analysis under Article XX is "two-tiered: first, provisional justification by reason of characterization of the measure under [one or more subparagraphs]; second, further appraisal of the same measure under the introductory clauses of Article XX."[714]

7.507. In this dispute, the United States argues that if the tuna amended measure is found to be inconsistent with Articles I and/or III of the GATT 1994, it is nevertheless justified under Article XX(b), as a measure necessary to protect the health of dolphins, and under Article XX(g), as a measure relating to the conservation of natural resources.[715]

7.508. Mexico rejects the United States' defence. Accord to Mexico, considering its objectives - (i) ensuring that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins, and (ii) 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[716] - the amended tuna measure does not "fit" into the general exceptions provided in either subparagraph (b) or subparagraph (g) of Article XX of the GATT 1994. Mexico also argues that the various components and requirements of the amended tuna measure do not comply with the prescriptions of the chapeau of Article XX.[717]

7.509. The Panel will first discuss the United States' invocation of Article XX(g) of the GATT 1994 to justify the inconsistencies of the amended tuna measure with Articles I and III.

7.7.1 Article XX(g)

7.7.1.1 Legal test under Article XX(g)

7.510. The Panel begins by noting that, as a general matter, the parties agree that it is the requirements that are found to cause the inconsistency with the particular GATT provision that

[711] As the Panel noted above, it need not make a final determination of whether the system in place outside the ETP large purse seine fishery does, in every instance, contribute to inaccurate labelling. Such a determination would require a detailed examination of the several factors that may also contribute to the possibility of inaccurate labelling. In the Panel's view, such analysis is unnecessary in the present case. The mere fact that the burden imposed outside the ETP large purse seine fishery is lesser than that imposed inside is sufficient to justify a finding of violation under Article I:1.

[712] Appellate Body Report, *US – Shrimp*, para. 157.

[713] Appellate Body Report, *US – Gasoline*, pp. 22-23, DSR 1996:I, p. 3 at 20.

[714] Appellate Body Report, *US – Gasoline*, pp. 22-23, DSR 1996:I, p. 3 at 20.

[715] United States' first written submission, para. 317.

[716] United States' first written submission, para. 14.

[717] Mexico's second written submission, paras. 230-240; 311-340.

need to be justified under the subparagraphs of Article XX. We think that this is correct as a matter of law.[718] Therefore, in the present context, the Panel needs to determine whether the requirements of the amended tuna measure, including its eligibility criteria and different certification and tracking and verification requirements, are justified under Article XX(g).[719]

7.511. Article XX(g) concerns measures relating to the conservation of exhaustible natural resources. To determine if the amended tuna measure is justified under Article XX(g), the United States bears the burden of demonstrating that its measure: (i) relates to the conservation of (ii) an exhaustible natural resource, and (iii) is made effective in conjunction with restrictions on domestic production or consumption. Although it includes different components, Article XX(g) ultimately lays down a single test, and a measure's compliance with Article XX(g) can be determined only on the basis of a holistic assessment.[720]

7.512. With respect to the first clause of Article XX(g), "relating to the conservation of exhaustible natural resources", the Appellate Body has emphasized, referring to the preamble of the Marrakesh Agreement, that the term "natural resources" in Article XX(g) is not "static" in its content or reference, but is rather, "by definition, evolutionary".[721] The word "conservation", in turn, means "the preservation of the environment, especially of natural resources".[722] The Appellate Body in *China - Rare Earths* explained that

> [F]or the purposes of Article XX(g), the precise contours of the word conservation can only be fully understood in the context of the exhaustible natural resource at issue in a given dispute. In respect of the "conservation" of a living natural resource, such as a species facing the threat of extinction, the word may encompass not only limiting or halting the activities creating the danger of extinction, but also facilitating the replenishment of that endangered species.[723]

7.513. The Appellate Body has also explained that for a measure to "relate" to conservation in the sense of Article XX(g), there must be "a close and genuine relationship of ends and means"[724] between that measure and the conservation objective. In this sense, we agree with Mexico that the challenged measure must maintain a certain "nexus" with the legitimate policy goal of conservation of exhaustible natural resources.

7.514. Moreover, Article XX(g) requires the regulating Member to show that its measure is "made effective in conjunction with restrictions on domestic production or consumption," which has been interpreted as a requirement that the challenged measure and the related domestic restrictions "work together".[725] As the Appellate Body explained in *China – Rare Earths*:

> [T]he phrase "made effective in conjunction with" requires that, when international trade is restricted, effective restrictions are also imposed on domestic production or consumption. Just as GATT-inconsistent measures impose limitations on international trade, domestic restrictions must impose limitations on domestic production or consumption. In other words, to comply with the "made effective" element of the second clause of Article XX(g), a Member must impose "real" restrictions on domestic production or consumption that reinforce and complement the restriction on

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[718] Appellate Body Report, *US – Gasoline*, p. 16, DSR 1996:I, p. 3 at 15.

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

[720] Appellate Body Reports, *China – Rare Earths*, para. 5.94.

[721] Appellate Body Report, *US – Shrimp*, para. 130.

[722] Appellate Body Reports, *China – Raw Materials*, para. 355.

[723] Appellate Body Reports, *China – Rare Earths*, para. 5.89.

[724] Appellate Body Reports, *US – Shrimp*, para. 136; *China – Raw Materials*, para. 355.

[725] Appellate Body Reports, *China-Rare Earths*, paras. 5.88 and 5.94.

> international trade, and particularly so in circumstances where domestic consumption accounts for a major part of the exhaustible natural resource to be conserved.[726]

7.515. In this dispute, the parties generally agree on the elements of the legal test but disagree as to its application.

7.7.1.2 Application

7.7.1.2.1 Arguments of the parties

7.516. The United States argues that dolphins are an exhaustible natural resource,[727] and that the amended measure clearly "relates to" the conservation of dolphins. The United States points out that the original panel found, and the Appellate Body affirmed, that one of the tuna labelling regime's objectives is the protection of dolphins. In the view of the United States, that finding clearly establishes that the required "substantial relationship" between the amended tuna measure and the objective of conservation exists.[728] The United States recalls the original panel and the Appellate Body's finding that the original measure was capable of achieving its dolphin protection objective completely within the ETP and partially outside the ETP. According to the United States, by maintaining the disqualification of tuna caught by the "particularly harmful"[729] fishing method of setting on dolphins, whether inside or outside the ETP, from accessing the dolphin-safe label, and in expanding the certification system outside the ETP to require a statement that no dolphins were killed or seriously injured in the set or other gear deployment in which tuna was caught, the amended measure "fully addresses" the risks caused by different tuna fishing methods in different oceans, and as such clearly contributes to the conservation of dolphins.[730]

7.517. The United States emphasizes that, under the amended measure, all tuna products containing tuna caught by setting on dolphins are ineligible for the label, regardless of the fishery, nationality of the vessel, or nationality of the processor, and the same is true of all tuna products containing tuna caught in a set or gear deployment where a dolphin was killed or seriously injured.[731] The United States argues that the amended tuna measure goes even further than the original tuna measure in protecting dolphins by applying a certification mechanism (captain's' certification) that the original panel found was "capable of achieving" the US objective in the context of setting on dolphins outside the ETP.[732] The United States argues, therefore, that the amended tuna measure makes a contribution to the protection of dolphins (inside and outside the ETP) that satisfies the "relating to conservation" standard. Additionally, the United States submits that the measure's origin neutrality indicates that the amended tuna measure imposes the same conservation-related burden on US tuna producers as it does on foreign tuna producers.

7.518. Mexico does not dispute that dolphins are an exhaustible natural resource. However, Mexico argues that the amended tuna measure does not relate to the conservation of exhaustible natural resources. For Mexico, the amended tuna measure is not intended to conserve dolphin stocks in the course of tuna fishing operations in the ETP or to promote recovery of dolphin stocks. Mexico asserts that the amended measure's connection to dolphin protection is so tenuous that it does not even "relate to" the conservation of dolphins. For Mexico, conserving dolphin populations is only an "indirect objective" of the measure,[733] as there is no "effective protection" outside the ETP.[734] Therefore, for Mexico, dolphins are not being "conserved" in any way outside the ETP.[735] In Mexico's view, the lack of protection afforded by the amended tuna measure to dolphins outside the ETP shows that the amended tuna measure does not have a substantial, close, and real relationship to the conservation or preservation of dolphins.[736]

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[726] Appellate Body Reports, *China – Rare Earths*, para. 5.132 (internal citations omitted).
[727] United States' first written submission, para. 325.
[728] United States' first written submission, para. 327.
[729] United States' first written submission, para. 327.
[730] United States' second written submission, para. 190.
[731] United States' first written submission, para. 328.
[732] United States' second written submission, para. 187.
[733] Mexico's second written submission, para. 303.
[734] Mexico's second written submission, para. 299.
[735] Mexico's second written submission, para. 299.
[736] Mexico's second written submission, para. 303.

7.519. Mexico also argues that the amended tuna measure is not made effective in conjunction with restrictions on domestic production or consumption. According to Mexico, the United States has not sufficiently explained what kind of restriction on domestic production or consumption is imposed by the amended tuna measure. Mexico argues that the amended tuna measure maintains insufficient tracking and verification requirements in relation to tuna caught outside the ETP and tuna products containing same. Furthermore, the dolphin-safe certification requirements for tuna products containing tuna caught other than by large purse seine vessel in the ETP are themselves inherently unverifiable, unreliable, inaccurate, unenforceable and, thus, meaningless.[737]

7.7.1.2.2 Analysis by the Panel

7.520. The Panel now examines whether the United States has demonstrated that the amended tuna measure (and in particular the three aspects of the measure challenged by Mexico: the eligibility criteria, the different certification requirements, and the different tracking and verification requirements) complies with subparagraph (g) of Article XX of the GATT 1994.

7.521. As we noted above, both parties agree that dolphins are an "exhaustible natural resource". We agree.

7.522. Mexico argues, however, that the amended tuna measure, including the three conditions and requirements identified by Mexico, does not "*relate to*" the "*conservation*" of dolphins; it also adds that the amended tuna measure does not include any relevant domestic restrictions. Mexico's main argument is that the measure as a whole, and in particular its less-stringent requirements with respect to observers and tracking and verification for tuna caught other than by large purse seine vessel in the ETP, does not have a *sufficient nexus* with the goal of conserving dolphins.

7.523. The parties agree[738] that the general objectives of the amended tuna measure are the same as the objectives pursued by the original measure, namely: (i) ensuring that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins; and (ii) ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins.

7.524. As we understand it, the original panel found, and the Appellate Body affirmed, that one of the original measure's objectives was to contribute to the "protection" of dolphins.[739] The Appellate Body noted that:

> [T]he Panel accepted these objectives as legitimate within the meaning of Article 2.2 of the *TBT Agreement*.[740] The Panel further noted that "as described by the United States itself, its measures seek to address a range of adverse effects of fishing techniques on dolphins", including "situations in which dolphins are killed or seriously injured".[741]

7.525. In our view, this statement confirms that one of the goals of the US dolphin-safe labelling regime is to contribute to the protection of dolphins. In this dispute, while the Panel accepts that the conservation of dolphins is a policy objective falling within the scope of subparagraph (g) of Article XX, the United States must nevertheless demonstrate that its measure pursues or otherwise "relates to" the conservation of dolphins.

7.526. According to Mexico, the amended tuna measure cannot be said to relate to conservation, even if it makes a marginal contribution to the protection of dolphins. In Mexico's view, the amended tuna measure is not intended to conserve dolphin stocks in the course of tuna fishing operations in the ETP or to promote recovery of dolphin stocks, and since there is no "effective

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[737] Mexico's second written submission, para. 308.

[738] Mexico's first written submission, para. 297; United States' first written submission, para. 319.

[739] Appellate Body Report, *United States – Tuna II (Mexico)*, para. 242 (citing the Panel Report, *US – Tuna II* (para. 7.401).

[740] (footnote original) Panel Report, *US – Tuna II (Mexico)*, para. 7.444. As we explain in the following section of our Report, a panel adjudicating a claim under Article 2.2 of the *TBT Agreement* is required to objectively ascertain a measure's objective. A panel must also determine whether the objective of the measure is "legitimate".

[741] (footnote original) Panel Report, *US – Tuna II (Mexico)*, para. 7.550.

protection" for tuna caught other than by large purse seine vessel in the ETP, the measure cannot and does not conserve dolphins.[742]

7.527. We recall the Appellate Body's clarification that the term "conservation" in subparagraph (g) is broad, and includes "not only limiting or halting the activities creating the danger of extinction, but also facilitating the replenishment of that endangered species."[743] We agree with the United States that the word conservation also includes "the action of keeping from harm, decay, or loss; careful preservation,"[744] and that this is not limited to preserving species or populations but also encompasses the protection of individual members of a species or population. In our view, nothing in either the ordinary meaning of the term "conservation" or Appellate Body jurisprudence indicates that conservation under subparagraph (g) of Article XX covers only measures that have as their primary goal the conservation of dolphins on a population-wide scale. To the contrary, we think that the preservation of individual dolphin lives is just as much an act of conservation as is a program to encourage recovery of a particular population. Indeed, in our view, there is an essential and inextricable link between the protection of dolphins on an individual scale and the "replenishment of [an] endangered species", for it is only through protecting individual dolphins that a population itself can be protected, replenished, and maintained. Accordingly, in our view, the fact that the amended tuna measure is more concerned with the effects of tuna fishing on the well-being of individual dolphins rather than on the state of a particular dolphin population, considered globally or statistically, does not in itself negate the nexus between the measure and the goal of conserving exhaustible natural resources.

7.528. We note in this context that the original panel recognized that "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. In addition … to the extent that addressing such adverse effects 'might also be considered as seeking to conserve dolphin populations', the US objectives also incorporate, at least indirectly, considerations regarding the conservation of dolphin stocks."[745]

7.529. We believe that measures designed to reduce the harm done to dolphins in commercial fishing practices concern the protection of dolphins, and as such can properly be said to relate to the conservation of dolphins. Accordingly, to the extent that the goal of the amended tuna measure is to contribute to the protection of dolphins, even on an individual scale, that measure can be said to relate to the conservation of dolphins.

7.530. As we understand it, Mexico's argument is not only that the goal of the amended tuna measure is not the conservation of dolphins, but moreover that the measure does not function or operate in a way that effectively contributes to the protection of dolphins. In other words, for Mexico the link or nexus between the goal of conservation and the effective impact of the amended tuna measure on the conservation of dolphins is too remote.

7.531. In *US – Gasoline*, the Appellate Body stated that for a measure to "relate to" conservation there must be a "substantial relationship" between the challenged measure and the goal of conservation.[746] The Appellate Body repeated in *China – Rare Earths* that in order for a measure to relate to conservation, there must exist "a close and genuine relationship of ends and means"[747] between the challenged measure and the conservation objective.

7.532. The original panel found that the US dolphin-safe labelling regime was capable of protecting dolphins by ensuring that the US market is not used to encourage fishing practices that may kill or seriously injure dolphins, but that the measure was doing so only within the ETP. The Appellate Body, in confirming the original panel's determination that one of the two goals of the labelling measure was indeed to contribute to the protection of dolphins[748], in effect also accepted that the original tuna measure "related" to the conservation of dolphins. In particular, in

[742] Mexico's second written submission, para. 299.
[743] Panel Reports, *China – Rare Earths*, para. 7.258.
[744] See *Oxford English Dictionary* (Clarendon Press, 1993), p. 485 (Exhibit US-119).
[745] Panel Report, *US – Tuna II (Mexico)*, paras. 7.485-7.486.
[746] Appellate Body Report*, US – Gasoline*, p. 19, DSR 1996:I, p. 3 at 18.
[747] Appellate Body Report, *US – Shrimp*, para. 136; Appellate Body Reports*, China – Raw Materials*, para. 355.
[748] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 342-343.

concluding that the tuna measure "fully addresse[d]" the risks caused by the "particularly" harmful practice of setting on dolphins, the Appellate Body confirmed that the tuna measure related to the conservation and protection of dolphins. The Appellate Body concluded that the measure did so effectively in respect of the harms caused by setting on dolphins, but it concluded that the US measure was not doing enough for the protection of dolphins harmed by tuna fishing methods other than setting on dolphins.[749]

7.533. In this context, we note that the amended tuna measure disqualifies from the dolphin-safe label all tuna caught in a set or other gear deployment in which dolphins were killed or seriously injured, regardless of the fishing method used or the location in which the tuna was caught. Notwithstanding the possible merits of Mexico's arguments concerning the shortcomings of the certification and tracking and verification requirements imposed on tuna caught other than by large purse seine vessel in the ETP, it seems to us that the amended tuna measure remains centrally concerned with the pain caused to dolphins in the context of commercial fishing practices both inside and outside the ETP, and caused by both setting on dolphins and other methods of tuna fishing. Whatever may be the shortcoming of one system of certification or tracking and verification *vis-à-vis* another, it seems clear to us that, considered in themselves, systems designed to identify, track, and, indirectly, to reduce dolphin mortality and injury, clearly "relate" to conservation. Thus, we do not believe that the differences in the certification and tracking verification requirements that apply inside the ETP large purse seine fishery on the one hand and in other fisheries on the other hand undermine or otherwise cast doubt on the fact that the amended tuna measure "relates" to conservation.

7.534. At this juncture, we would recall that our task under subparagraph (g) of Article XX is to examine the features of the measure giving rise to discrimination under Articles I and III of the GATT 1994, and not the discrimination itself. Accordingly, the question before us is not whether the discrimination we identified above relates to conservation, but rather whether the features of the measure that cause that discrimination *in themselves* – the eligibility criteria, certification and tracking and verification requirements – relate to conservation. Accordingly, at this point of our analysis, we do not need to decide whether *the differences* in certification and tracking verification requirements relate to conservation. Rather, our task is only to determine whether the eligibility criteria, and the certification and tracking and verification requirements that are applied, considered in themselves, relate to conservation.

7.535. To put this another way, we think there is a difference between the question whether the amended tuna measure "relates to" the conservation of dolphins and the question whether the measure deals with or responds to harms caused to dolphins by different tuna fishing methods in a way that does not arbitrarily or unjustifiably discriminate between like products. The former question arises under subparagraph (g), whereas the latter question is properly dealt with under the chapeau of Article XX, which we address below. In the present context, we think it is clear that requirements relating to the eligibility, certification and tracking of tuna that have as their goal the provision of accurate information to consumers concerning the dolphin-safe status of tuna can properly be said to "relate to" the goal of conserving dolphins, since, as the United States argues, they help to ensure that the US tuna market does not operate in a way that encourages dolphin unsafe fishing techniques. Thus, we think that the eligibility, tracking and verification, and certification requirements "relate to" the conservation of dolphins regardless of the level at which they are applied, and regardless also of whether that level is uniform across all fisheries.

7.536. In conclusion, we find that the amended tuna measure "relates" to the conservation of dolphins.

7.537. Mexico also claims that the amended tuna measure does not itself impose any real restrictions on the tuna that is harvested by the US fleet outside the ETP, and that the United States has not demonstrated that it imposes any kind of restriction on domestic production or consumption, as required by the second limb of subparagraph (g) of Article XX.[750]

7.538. We understand that the amended tuna measure conditions access to the dolphin-safe label on the same requirements for both US vessels and foreign vessels: all tuna products containing tuna caught by setting on dolphins is ineligible for the label, regardless of the fishery, nationality of

[749] Appellate Body Report, *US – Tuna II (Mexico),* paras. 289 and 297.
[750] Mexico's second written submission, para. 308.

the vessel, or nationality of the processor. Moreover, all tuna products containing tuna caught in a set or gear deployment in which a dolphin was killed or seriously injured is ineligible for the label, regardless of the fishery, gear type, nationality of the vessel, or nationality of the processor.[751] Additionally, all tuna caught in large-scale driftnets on the high seas is ineligible for the label, regardless of the fishery and nationality of the vessel.[752] Accordingly, we find that the amended tuna measure does impose real and effective restrictions on the US tuna industry within the meaning of subparagraph (g) of Article XX.

7.539. Mexico argues that the requirements of the amended tuna measure do not "distribute the burden of conservation between foreign and domestic consumers in an even-handed or balanced manner."[753] In *US – Gasoline*, the Appellate Body said that identical treatment of domestic and imported products is not required by subparagraph (g), which is rather a requirement of even-handedness. The Appellate Body in *China – Rare Earths* clarified the meaning of even-handedness under subparagraph (g), stating that that in no prior dispute had it ever "assessed whether the burden of conservation was evenly distributed between foreign producers, on the one hand, and domestic producers or consumers, on the other hand, nor suggested that such an assessment was required. … In other words, the Appellate Body's reasoning does not suggest that Article XX(g) contains a requirement that the burden of conservation be evenly distributed."[754] For the Appellate Body, the relative impact of restrictions imposed on domestic and foreign production is rather to be assessed under the chapeau of Article XX:[755]

> In order to comply with Article XX, a measure needs to fulfil cumulatively the conditions specified both in subparagraph (g) and in the chapeau. If, however, subparagraph (g) itself required an analysis of whether the burden of conservation is evenly distributed, this could entail duplication of the analysis to be conducted under the chapeau, in particular in cases involving discriminatory measures. This would not comport with the principle of effective treaty interpretation.

7.540. Therefore, we will examine under the chapeau Mexico's claim that the impact of different restrictions imposed on domestic and foreign products is unbalanced.

7.541. In sum, the Panel finds that the features of the amended tuna measure that give rise to violations of Articles I and III of the GATT 1994 are nevertheless provisionally justified under subparagraph (g) of Article XX the GATT 1994. In our view, these features clearly "relate to" the goal of conserving dolphins, and are also made effective in conjunction with restrictions on domestic production of tuna products.

7.7.2 Article XX(b)

7.542. In addition to its defence under Article XX(g), the United States also claims that the amended tuna measure is justified under Article XX(b). That provision provides an exception for GATT-inconsistent measures that are "necessary to protect human, animal or plant life or health".

7.543. Having found that all three aspects of the amended tuna measure challenged by Mexico are provisionally justified under subparagraph (g) of Article XX, the Panel is of the view that it need not decide whether the amended tuna measure is justified under subparagraph (b) of Article XX. It is a well-established principle of WTO law that "panels may exercise judicial economy and refrain from addressing claims beyond those necessary to resolve the dispute".[756] The Appellate Body has on numerous occasions stated that "[p]rovided it complies with its duty to assess a matter objectively, a panel enjoys the freedom to decide which legal issues it must address in order to resolve a dispute".[757] Thus, where decision on a particular legal claim is not "necessary to secure a 'positive solution' to the dispute or a 'satisfactory settlement of the

[751] United States' second written submission, para. 328.
[752] See para. 3.37 above.
[753] Mexico's second written submission, para. 309.
[754] Appellate Body Reports, *China – Rare Earths*, paras. 5.133-5.134.
[755] Appellate Body Reports, *China – Rare Earths*, para. 5.135.
[756] Appellate Body Report, *US – Upland Cotton*, para. 718.
[757] Appellate Body Report, *US – Gambling*, para. 344.

matter'"[758], a Panel may, in the exercise of its own discretion[759], "exercise … restraint" and "refrain from addressing" one or more issues raised by the parties.[760]

7.544. In our view, the findings we have made with respect to Article XX(g) are sufficient to resolve the legal question before us. Moreover, in the context of the present dispute, we do not believe that there is a meaningful difference between the goal of "conserving" dolphins under Article XX(g) and the goal of "protecting the life or health" of dolphins under Article XX(b). Nor has any party suggested otherwise. In the present case, the purported goal of the challenged measure is to reduce the harm suffered by dolphins during tuna fishing operations. Whether phrased in terms of "conservation of exhaustible natural resources" or "protecting animal life or health", the substance of the goal remains essentially the same, and as such we do not believe that a finding under both subparagraphs is necessary here. Our conclusion under subparagraph (g) suffices for a finding that, subject to meeting the test under the chapeau of GATT Article XX, the amended measure is provisionally justified under Article XX, allowing us to move to an analysis of the amended measure under the chapeau.

7.545. Therefore, the Panel chooses to exercise judicial economy in respect of the United States' defence under Article XX(b).

7.7.3 The chapeau of Article XX

7.546. Having found that the amended tuna measure is provisionally justified under Article XX(g), the Panel needs to determine whether it complies with the requirements of the chapeau of Article XX of the GATT 1994.

7.7.3.1 Legal test under the chapeau of Article XX

7.547. The chapeau of Article XX contains additional requirements for measures that have been found to violate an obligation under the GATT 1994, but that have also been found to be provisionally justified pursuant to one of the exceptions set forth in the subparagraphs of Article XX. The chapeau does so by requiring that such measures not be "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".[761] Whether a measure is *applied* in a particular manner "can most often be discerned from the design, the architecture, and the revealing structure of a measure", which involves a consideration of "both substantive and procedural requirements" imposed by the measure at issue.[762]

7.548. It is well established that the burden of demonstrating that a measure provisionally justified pursuant to one of the exceptions of Article XX is consistent with the chapeau rests with the party invoking the exception.[763]

7.549. For a measure to be applied in a manner that would constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", three elements must exist:

> First, the application of the measure must result in *discrimination*. Second, the discrimination must be *arbitrary* or *unjustifiable* in character. Third, this discrimination must occur *between countries where the same conditions prevail*.[764]

7.550. The type, nature, and quality of the discrimination addressed under the chapeau are different from the discrimination in the treatment of products found to be inconsistent with one of the substantive obligations of the GATT 1994. The Appellate Body has emphasized that a finding that a measure is inconsistent with one of the non-discrimination obligations of the GATT 1994, such as those contained in Articles I and III, is not dispositive of the question whether the measure gives rise to "arbitrary or unjustifiable discrimination between countries where the same

[758] Appellate Body Report, *US – Zeroing (EC)*, para. 250.
[759] Appellate Body Report, *India – Patents (US)*, para. 87.
[760] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133.
[761] Appellate Body Reports, *EC – Seal Products*, para. 5.296.
[762] Appellate Body Reports, *EC – Seal Products*, para. 5.302.
[763] Appellate Body Reports, *EC – Seal Products*, para. 5.297.
[764] Appellate Body Report, *US – Shrimp*, para. 150 (emphasis original).

conditions prevail" under the chapeau of Article XX of the GATT 1994. This does not mean, however, that the circumstances, including relevant facts, which bring about the discrimination that is to be examined under the chapeau cannot be the same as those that led to the finding of a violation of a substantive provision of the GATT 1994.[765]

7.551. The Appellate Body has indicated that, when assessing a measure under the chapeau of Article XX, a panel should begin by determining whether the design of the measure causes discrimination. In answering this question, a panel should consider whether "countries in which the same conditions prevail are differently treated".[766] Where this is the case, a panel should proceed to analyse whether the resulting discrimination is "arbitrary or unjustifiable".

7.552. The Appellate Body has held that in examining whether the conditions prevailing in the countries between which the measure allegedly discriminates are the same, only conditions that are *relevant* for the purpose of establishing arbitrary or unjustifiable discrimination in the light of the specific character of the measure at issue and the circumstances of a particular case should be considered under the chapeau.[767] The Appellate Body has explained that, in determining which conditions prevailing in different countries are relevant in the context of the chapeau, the objective pursued by the measure at issue may provide pertinent context.[768] In other words, conditions relating to the particular policy objective pursued by the measure at issue are relevant for the analysis under the chapeau. Subject to the particular nature of the measure and the specific circumstances of the case, the provisions of the GATT 1994 with which a measure has been found to be inconsistent may also provide useful guidance on the question of which conditions prevailing in different countries are relevant in the context of the chapeau. In particular, the type or cause of the violation that has been found to exist may inform the determination of which countries should be compared with respect to the conditions that prevail in them.[769]

7.553. One of the most important factors in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX. The Appellate Body has explained that this analysis "should focus on the cause of the discrimination, or the rationale put forward to explain its existence".[770]

7.554. The parties agree generally on the elements of the legal test under the chapeau, but they disagree as to its application to the facts of this dispute. Before we consider the parties' arguments, we recall that this dispute involves discrimination claims and arguments made pursuant to both the GATT 1994 and the TBT Agreement. The Panel has already made various findings pursuant to Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994. Some of them (whether factual or legal findings) - in particular those relating to whether the detrimental impact caused by the amended tuna measure is even-handed and so stems exclusively from a legitimate regulatory distinction - are relevant to the assessment this Panel is required to make under the chapeau of Article XX of the GATT 1994. In this context the Panel makes the following general observations on the relationship between the analysis under Article XX of the GATT 1994 and Article 2.1 of the TBT Agreement on the basis of recent jurisprudence of the Appellate Body on this matter.

7.7.3.2 Relationship between the chapeau of Article XX of the GATT 1994 and Article 2.1 of the TBT Agreement

7.555. As we explained in our discussion of the legal test under Article 2.1 of the TBT Agreement, the Appellate Body has said that in assessing whether detrimental impact stems exclusively from a legitimate regulatory distinction within the meaning of Article 2.1 of the TBT Agreement, panels should *take account* of whether the technical regulation at issue is "applied in manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same

[765] Appellate Body Reports, *EC – Seal Products*, para. 5.298.
[766] Appellate Body Report, *US – Shrimp*, para. 165.
[767] Appellate Body Reports, *EC – Seal Products*, para. 5.299.
[768] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227.
[769] Appellate Body Reports, *EC – Seal Products*, para. 5.300.
[770] Appellate Body Reports, *EC – Seal Products*, para. 5.303.

conditions prevail or a disguised restriction on international trade".[771] We noted that this language is identical to the language found in the chapeau of Article XX of the GATT 1994. We explained, however, that in our view, the question whether detrimental impact stems exclusively from a legitimate regulatory distinction, and the associated question of whether the technical regulation is "even-handed", is *broader* than the question whether the technical regulation is designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on trade. The latter is *one way* in which the former may be shown, but a measure may be uneven-handed for the purposes of Article 2.1 of the TBT Agreement even if it is *not* designed or applied in a manner that is arbitrarily or unjustifiably discriminatory or a disguised restriction on international trade.

7.556. As the concept of "even-handedness" under Article 2.1 of the TBT Agreement is broader than the concept of arbitrary and unjustifiable discrimination and disguised restriction on trade under the chapeau of Article XX, a panel may not assume that a finding of violation under Article 2.1 necessarily or automatically implies or requires a finding of violation of the chapeau. For instance, where a panel has found that a measure is not even-handed for some reason *other than* that the measure is designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on trade, it will be necessary for that panel, if presented with a defence under Article XX of the GATT 1994, to conduct an independent analysis to determine whether the measure is arbitrarily or unjustifiably discriminatory, *in addition* to being uneven-handed for the reason(s) given in the context of Article 2.1 of the TBT Agreement.

7.557. However, we tend to think that where a panel has analysed even-handedness under Article 2.1 of the TBT Agreement through the lens of, or using the analytical framework provided by, the phrase "applied in manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade", it may be appropriate to rely on that reasoning in the context of assessing a measure's consistency with the chapeau of Article XX of the GATT 1994. Put another way, where a panel has found, in the context of Article 2.1 of the TBT Agreement, that a measure is not even-handed *precisely because* it is "applied in manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade", it will generally be appropriate for that panel to use the reasoning underlying that finding in its analysis under the chapeau.

7.558. In *EC – Seal Products*, the Appellate Body faulted the panel for automatically importing its analysis under Article 2.1 of the TBT Agreement into its analysis under the chapeau of Article XX.[772] In our opinion, however, the Appellate Body's ruling does not stand for the proposition that a panel can *never* rely on its findings under Article 2.1 of the TBT Agreement in the context of the Article XX chapeau. Rather, as we understand it, the error of the *EC – Seal Products* panel was in assuming that a violation of Article 2.1 of the TBT Agreement, which may involve analysis of factors that are not germane to the analysis under Article XX (since it may involve analysis of factors other than or beyond whether the measure is arbitrarily or unjustifiably discriminatory or a disguised restriction on trade), automatically gives rise to a violation of that latter provision. What the Appellate Body required was that panels should *justify* their use of findings made under Article 2.1 of the TBT Agreement in the context of the chapeau, by showing, for example, that their Article 2.1 analysis was based entirely on the question whether the measure was applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. Where it is, we see nothing in the Appellate Body reasoning to suggest that a panel may not apply relevant aspects of its reasoning developed in the context of Article 2.1 of the TBT Agreement to its analysis under the chapeau of Article XX of the GATT 1994.

7.559. It will be recalled that in the present proceedings, Mexico's arguments concerning the amended tuna measure's lack of even-handedness were premised entirely on the basis that various aspects of that measure arbitrarily and unjustifiably discriminate against Mexican tuna products. Moreover, the Panel's findings that the different certification and tracking and verification requirements did not stem exclusively from a legitimate regulatory distinction were all based on the conclusion that those aspects are arbitrarily discriminatory because they are not reconcilable

[771] Appellate Body Report, *US – Clove Cigarettes*, para. 94; Appellate Body Report, *US – Tuna II (Mexico)*, para. 213.

[772] Appellate Body Reports, *EC – Seal Products*, para. 5.310.

with the goal of the amended tuna measure. Similarly, our finding that the eligibility criteria *did* stem exclusively from a legitimate regulatory distinction was based on the fact that distinction was fully justifiable on the basis of the measure's objectives.

7.560. As such, we think it is appropriate for us to rely on the reasoning we developed in the context of Article 2.1 in the course of our analysis under the chapeau of Article XX of the GATT 1994. It is to that latter analysis that we now turn.

7.7.3.3 Application

7.7.3.3.1 Arguments of the parties

7.561. The United States argues that the amended tuna measure is applied consistently with the chapeau of Article XX. According to the United States, the eligibility conditions under the amended tuna measure are the same for all tuna – that is, they are neutral as to nationality. Any tuna product containing tuna caught by setting on dolphins is ineligible for the label – the nationality of the vessel (or processor) is irrelevant.[773] The United States stresses that whether a tuna product is eligible for the dolphin-safe label depends on the choices made by vessel owners, operators, and captains.[774]

7.562. The United States also argues that, in any event, the eligibility conditions regarding setting on dolphins are neither arbitrary nor unjustified. For the United States, it is without question that the two relevant eligibility conditions (i.e. that the tuna was not caught by setting on dolphins and that the tuna was not caught in a set or other gear deployment in which dolphins were killed or seriously injured) are rationally related to the policy objective of conserving dolphins, because they provide consumers with the information necessary to ensure that the US tuna market does not operate in a way that encourages fishing methods that harm dolphins.[775]

7.563. According to the United States, "[i]t could hardly be questioned whether the first eligibility condition [i.e. the disqualification of tuna caught by setting on dolphins] is rationally related to the objective" of protecting dolphins.[776] Moreover, the United States argues that because other fishing methods that produce tuna for the US market do not cause the same level of harm to dolphins that setting on dolphins does, treating them differently is not inconsistent with the chapeau of Article XX. Therefore, in the United States' view, the eligibility condition of not setting on dolphins is rationally related to the objective of the measure.[777]

7.564. The United States also argues that the amended tuna measure is not applied so as to constitute a disguised restriction on trade. The United States argues that it has demonstrated that setting on dolphins is a "particularly harmful" fishing method, and other fishing methods do not cause the same level of harm to dolphins that setting on dolphins does.[778] The United States notes that when the original tuna measure was adopted, it greatly affected the US industry – it was not, therefore, a measure that could have or in fact did protect US tuna production. Moreover, the amended tuna measure applies to tuna from all Members, including the United States, regardless of origin or nationality. Accordingly, the amended tuna measure is clearly not a disguised restriction on international trade.[779]

7.565. In response to Mexico's argument that the United States has discriminated arbitrarily and unjustifiably by not working through the AIDCP to "address[] its remaining concerns about dolphins and tuna fishing"[780], the United States emphasizes that a Member may take measures "at the levels that it considers appropriate," and nothing in the covered agreements requires a

[773] United States' first written submission, para. 332.
[774] United States' first written submission, para. 333.
[775] United States' first written submission, para. 336.
[776] United States' first written submission, para. 337.
[777] United States' first written submission, paras. 339-340.
[778] United States' second written submission, para. 213.
[779] United States' first written submission, para. 342.
[780] Mexico's second written submission, para. 338.

Member to adhere to an international agreement, a point that Article 2.4 of the TBT Agreement confirms.[781]

7.566. In its second written submission, the United States argues that the alleged differences in the certification and tracking and verification requirements raised by Mexico are not relevant to the Panel's Article XX analysis. The United States argues that, first, Mexico has not alleged, much less proven, that those requirements result in a detrimental impact on Mexican tuna products. Second, these requirements *stem from the AIDCP*, not US law, and as such, no genuine relationship exists between the amended measure and any disadvantage that Mexico claims to be suffering *vis-à-vis* other Members that are selling tuna or tuna product in the US tuna market. Third, the "conditions prevailing" as they relate to the requirements are not the same, i.e. the ETP large purse seine fishery is different from other fisheries.[782]

7.567. Mexico rejects the United States' arguments. It submits that the United States has not demonstrated that the amended tuna measure respects the requirements of the chapeau of Article XX.

7.568. Mexico argues that the chapeau of Article XX requires that Members in whose territory the same conditions prevail must be treated similarly. In Mexico's view, the conditions prevailing in the ETP are the same, in terms of risks to dolphins, as those in all other fisheries. In Mexico's view, dolphins are killed and seriously injured in all tuna fisheries, and the risk that tuna may be caught in a way that has detrimental effects on dolphins exists equally in all oceans and in respect of all fishing methods. Accordingly, in Mexico's opinion, the amended tuna measure treats the same situation differently, in violation of the chapeau.[783]

7.569. Mexico submits that the amended tuna measure is designed and applied in a manner that results in discrimination. According to Mexico, the application of the amended tuna measure continues to *de facto* discriminate against Mexican tuna products in that the lack of access to the advantage of the dolphin-safe label for tuna products containing tuna caught by setting on dolphins has a detrimental impact on the competitive opportunities of Mexican tuna products in the US market. In Mexico's view, nothing in the amended tuna measure has reduced or minimized the detrimental impact on imported Mexican tuna products caused by the regulatory distinction imposed in the original tuna measure. Rather, the differences in labelling conditions and requirements remain substantially the same, and, as a consequence, tuna products of Mexican origin continue to be effectively excluded from the US market.[784]

7.570. Mexico also argues that this discrimination is clearly demonstrated in the three labelling conditions and requirements of the amended tuna measure that Mexico previously identified in relation to the relevant regulatory distinction under Article 2.1 of the TBT Agreement, namely: disqualification of setting on dolphins in accordance with the AIDCP as a fishing method that can be used to catch tuna in the ETP in a dolphin-safe manner, and the qualification of other fishing methods to catch tuna in a dolphin-safe manner; the different certification requirements for tuna caught by large purse seine vessels in the ETP and tuna caught outside the ETP by large purse seine and other vessels; and the different tracking and verification requirements for tuna caught in the ETP by large purse seine vessels and tuna caught outside the ETP caught by large purse seine and other vessels.[785] Mexico argues that, pursuant to each of these three labelling conditions and requirements, Mexican tuna products are denied access to the US dolphin-safe label while other countries, all of which produce at least some tuna products that may contain tuna caught outside the ETP in a manner that adversely affects dolphins, are permitted to use the label.[786]

7.571. Finally, Mexico stresses that one of the policy objectives pursued by the amended tuna measure is to provide consumers with accurate information regarding the dolphin-safe status of tuna contained in the tuna products on the US market. However, according to Mexico, the amended tuna measure does just the opposite in that the three labelling conditions and requirements established pursuant to the amended tuna measure provide consumers with reliable

[781] United States' second written submission, paras. 219-220.
[782] United States' second written submission, paras. 207-210.
[783] Mexico's second written submission, para. 319.
[784] Mexico's second written submission, para. 323.
[785] Mexico's second written submission, para. 324.
[786] Mexico's second written submission, para. 325.

and objective information concerning the dolphin-safe status of tuna caught inside the ETP, while providing inherently unreliable and unverifiable information concerning the dolphin-safe status of tuna caught outside the ETP.[787]

7.7.3.3.2 Analysis by the Panel

7.572. The Panel considers now whether the United States has demonstrated that the amended tuna measure, and in particular the three challenged aspects of the amended tuna measure that are inconsistent with Articles I and III of the GATT 1994 but provisionally justified under Article XX(g) of that Agreement, are applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restrictions on international trade.

7.7.3.3.2.1 Arbitrary or unjustifiable discrimination between countries where the same conditions prevail

7.573. The United States claims that the amended tuna measure does not impose any arbitrary or unjustifiable discrimination between countries where the same conditions prevail because the relevant conditions with respect to the protection of dolphins are not the same for all fisheries worldwide; the United States adds that if there is any discrimination resulting from its measure, it is justified and not arbitrary.

7.574. Under the chapeau, discrimination exists only where "countries in which the same conditions prevail are treated differently".[788] Thus, we need to review whether the amended tuna measure discriminates between countries in which the same conditions exist.

Eligibility criteria

7.575. The first aspect of the amended tuna measure discussed by the parties is the eligibility criteria. We recall that the eligibility condition regarding setting on dolphins is applicable to all tuna, regardless of where it was caught. All tuna products containing tuna caught by setting on dolphins is ineligible for the label, regardless of the fishery, nationality of the vessel, and nationality of the processor. We agree with the United States that this provision has no carve-out whereby the products of certain Members automatically qualify for different regulatory treatment, as was the case in the measures challenged in *Brazil – Retreaded Tyres* and *EC – Seal Products*.[789]

7.576. The United States insists that its amended tuna measure is "neutral," and submits that whether tuna product is eligible for the dolphin-safe label depends on the choices made by vessel owners, operators, and captains.[790] As discussed extensively in both the original proceedings and before this Panel, there are many ways to catch tuna. Setting on dolphins is one such way, but it is not the only way. The United States submits that even in the ETP purse seine fishery, most sets by large purse seine vessels are not sets on dolphins.[791]

7.577. We note that the amended tuna measure does not impose different regulatory treatment between countries. The main regulatory distinction of the amended tuna measure concerns not countries but different fishing methods: accordingly, it is *the fishing method* of setting on dolphins – considered to be particularly harmful to dolphins because it necessarily entails the chasing of dolphins to find and catch tuna – that is regulated differently and more tightly than other fishing methods. In addition, if a tuna product contains tuna caught during a set or other gear deployment

[787] Mexico's second written submission, para. 336.
[788] Appellate Body Reports, *EC – Seal Products*, para. 5.303 (citing Appellate Body Report, *US – Shrimp*, para. 165).
[789] Appellate Body Reports, *EC – Seal Products*, para. 5.316 (considering the different regulatory treatment to be the prohibition of seal products originating from "commercial hunts" in Canada and Norway and the allowance of seal products originating from indigenous communities in Greenland); Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 226-33 (discussing the Mercosur exception).
[790] United States' first written submission, para. 333 (quoting Panel Report, *US – Tuna II (Mexico)*, para. 7.333 ("[T]he choice facing the fleets of the United States, of Mexico, and other foreign origin was the same, and that US and other fleets operating in the ETP could equally have chosen to continue to set on dolphins in the ETP under the conditions set out in the AIDCP … In that respect, the situation arising from the measure was the same for both fleets.")).
[791] United States' first written submission, para. 92.

in which a dolphin was killed or seriously injured, such tuna product is ineligible to be labelled dolphin-safe regardless of what fishing method was used. This latter eligibility requirement applies to all tuna, regardless of where or how it was caught. As such, these eligibility conditions do not distinguish between Members, or even between fisheries, but between fishing methods. In this context, the United States suggests that the most appropriate "condition" to examine in this analysis is the different harms to dolphins caused by setting on dolphins, on the one hand, and by purse seine (other than setting on dolphins), longline, and pole-and-line fishing, on the other. We agree.

7.578. As we explained above, the Appellate Body found in the original proceedings that the eligibility criteria were not inconsistent with Article 2.1 of the TBT Agreement.[792] We also recall that there are overlaps between the test in the chapeau of Article XX and the second step of the test under Article 2.1 of the TBT Agreement. The Appellate Body in the original proceedings did not address the consistency of the eligibility criteria with the chapeau of Article XX.[793] However, the Panel believes that the factual findings made by the original panel and noted by the Appellate Body are relevant to the application of the chapeau of Article XX.

7.579. As we have explained above, in the original proceedings, the panel found that sufficient evidence had been put forward by the United States to raise a presumption that setting on dolphins not only causes observable harms, but also causes unobservable harms to dolphins beyond mortality and serious injury. . These harms arise "as a result of the chase itself", and may occur even if no dolphin is actually killed or seriously injured in a way that is perceptible during the fishing operation.[794] As we understand it, this is why the Appellate Body concluded that setting on dolphins is "particularly harmful" to dolphins.[795]

7.580. The original panel also found that the observed and unobserved effects of setting on dolphins were "fully addressed" by the original measure precisely because it "disqualif[ied] all tuna products containing tuna harvested with that method from access to the 'dolphin-safe' label"[796], and stated that "to the extent that it would not discourage these unobserved effects of setting on dolphins and their potential consequences on dolphin populations … the use of the AIDCP labelling requirements … could potentially provide a lesser degree of protection than the existing US dolphin-safe provisions".[797]

7.581. Applying these factual findings in the present case, the Panel is not convinced that fishing methods other than setting on dolphins cause the same or similar unobserved harms. Rather, the Panel agrees with the United States that "*even if* there are tuna fisheries using … gear types that produce the same number of dolphin mortalities and serious injuries allowed or caused in the ETP … it is simply *not* the case that such fisheries are producing the same level of unobserved harms, such as cow-calf separation, muscular damage, immune and reproductive system failures, which arise as a result of the chase in itself".[798]

7.582. As we noted above, the Appellate Body's conclusion in the original proceedings was not that the disqualification of setting on dolphins itself gave rise to a violation of Article 2.1 of the TBT Agreement. Rather, the original tuna measure was inconsistent with the WTO Agreement because, although it fully addressed the harms arising from setting on dolphins, it did not sufficiently address the harms caused to dolphins by other tuna fishing methods. In making this finding, the Appellate Body did not say, or even suggest, that the United States must disqualify all other fishing methods from accessing the dolphin-safe label, as Mexico suggests in the present proceedings, or that setting on dolphins and other methods of fishing must be regulated in the same manner. To the contrary, the Appellate Body accepted that, in principle, WTO law allows the United States to "calibrate" the requirements imposed by the amended tuna measure according to

[792] See paras. 7.126-7.135 above.

[793] This is because the original panel exercised judicial economy with respect to Mexico's GATT claims – an exercise that the Appellate Body found to be a violation of Article 11 of the DSU. Ultimately, however, Mexico did not request the Appellate Body to complete the legal analysis, and accordingly it made no finding on this matter: see Appellate Body Report, *US – Tuna II (Mexico)*, paras. 405 and 406.

[794] Appellate Body Report, *US – Tuna II (Mexico),* para. 246 (citing Panel Report, *US – Tuna II (Mexico)*, para. 7.504).

[795] Appellate Body Report, *US – Tuna II (Mexico),* para. 289.

[796] Appellate Body Report, *US – Tuna II (Mexico),* para. 287.

[797] Panel Report, *US – Tuna II (Mexico),* para. 7.613.

[798] United States' first written submission, para. 113 (internal citations omitted) (emphasis original).

"the likelihood that dolphins would be adversely affected in the course of tuna fishing operations in the respective conditions" of different fisheries.[799] And insofar as it found that setting on dolphins is "particularly harmful" to dolphins, it implicitly acknowledged that the United States need not impose the same standards on all fishing methods in order to ensure that its dolphin-safe labelling regime is consistent with the Article 2.1 of the TBT Agreement:

> In addition, we note that nowhere in its reasoning did the Panel state that imposing a requirement that an independent observer certify that no dolphins were killed or seriously injured in the course of the fishing operations in which the tuna was caught would be the *only* way for the United States to calibrate its "dolphin-safe" labelling provisions to the risks that the Panel found were posed by fishing techniques other than setting on dolphins. We note, in this regard, that the measure at issue itself contemplates the possibility that only the captain provide such a certification under certain circumstances.[800]

7.583. Both parties argue that one of the most important factors in determining whether discrimination is "arbitrary or unjustifiable" is "whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX."[801]

7.584. The relevant objectives of the amended measure are (i) ensuring that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins, and (ii) 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.[802] In our view, the eligibility criteria are rationally related to the dolphin protection objective of the amended tuna measure. As the original panel found and the Appellate Body noted, setting on dolphins is a "particularly harmful" fishing method, and other fishing methods do not cause the same kinds of unobserved harms to dolphins as are caused by setting on dolphins.[803] In our view, the fact that other fishing methods do not cause the kind of unobservable harms as are caused by setting on dolphins means that, at least insofar as the eligibility criteria are concerned, the conditions prevailing in fisheries where tuna is caught by setting on dolphins and fisheries where that method is not used are not the same. Accordingly, in our view, the eligibility criteria are directly related to the objective of the amended measure. Any discrimination that they (i.e. the eligibility criteria) cause is directly connected to the main goal of the amended tuna measure, and accordingly we conclude that this aspect of the measure is not inconsistent with the requirements of the chapeau.

7.585. For the same reasons, we also believe that the United States has demonstrated that the eligibility criteria are applied in a manner that does not constitute a disguised restriction on trade. Indeed, setting on dolphins is a "particularly harmful" fishing method, and other fishing methods do not cause the same kinds of unobserved harms to dolphins as are caused by setting on dolphins[804], although according to the Appellate Body they may, in some circumstances, cause the same kinds of observed harms. The eligibility criteria are in line with the fundamental rationale and objective of the amended tuna measure, i.e. to contribute to the protection of dolphins. Any restrictions they cause are directly connected to the main goal of the amended tuna measure and therefore cannot be considered "disguised". Accordingly we conclude that this aspect of the measure is not inconsistent with the requirements of the chapeau.

Different certification requirements

7.586. In Mexico's view, the effect of the different certification requirements is to create "two distinct and conflicting standards for the accuracy of information regarding the dolphin-safe status of tuna: one standard for tuna caught inside the ETP, and a separate and much lower standard for tuna caught outside the ETP".[805] Given, however, that one of the goals of the amended tuna

[799] Appellate Body Report, *US – Tuna II (Mexico),* para. 286.
[800] Appellate Body Report, *US – Tuna II (Mexico)*, para. 296.
[801] Appellate Body Reports, *EC – Seal Products*, para. 5.303.
[802] United States' first written submission, para. 14.
[803] United States' first written submission, paras. 89-101 and 110-61.
[804] United States' first written submission, paras. 89-101 and 110-61.
[805] Mexico's second written submission, para. 193.

measure is "ensuring that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins"[806], Mexico concludes that the amended tuna measure's system of captain self-certification "does not bear a rational connection to", and in fact is "entirely inconsistent"[807] and "irreconcilable"[808] with, the objectives of the amended tuna measure, and accordingly the measure is applied in a manner that constitutes arbitrary discrimination, in contravention of the chapeau.

7.587. In Mexico's opinion, the differences in the nature and degree of risk posed to dolphins by different fishing methods do not explain or justify the different certification requirements. According to Mexico, the amended tuna measure is designed so as to disqualify from accessing the label any and every tuna catch as soon as even a single dolphin is killed or seriously injured. Given that all parties agree that dolphins may be killed or seriously injured in *every* fishery, Mexico concludes that all tuna fishing vessels must have an independent observer on-board if the United States is to ensure that the amended tuna measure operates to provide consumers with accurate and reliable information about the dolphin-safe status of tuna products.

7.588. Mexico challenges the different certification requirements on the basis that captain self-certification "permits or requires a private industry party to participate in the administration of [a law] which affect[s] the party's own commercial interests".[809] In Mexico's view, there is a "financial incentive for captains to declare the tuna caught by their vessels to be 'dolphin-safe', and a corresponding financial disincentive to declare any tuna caught by their vessels to be non-dolphin-safe", because "if a captain were to decline to certify tuna caught by his or her own vessel as dolphin-safe … the value of the tuna would be significantly diminished".[810] According to Mexico, the different certification requirements place captains "in an inherent conflict of interest", because they "have a vested commercial and financial interest in securing dolphin-safe certification for the tuna that they catch". In Mexico's opinion, this creates "a very real risk that the tuna may be improperly certified as dolphin-safe", which would be inconsistent with the amended tuna measure's stated objectives.[811]

7.589. According to Mexico, the risk that captains will make "false"[812], incorrect, or improper statements is heightened by the fact that "there are no safeguards in the form of effective legal sanctions or enforcement mechanisms for fishing vessel captains who inaccurately or improperly certify the dolphin-safe status of tuna that is caught by their own vessels".[813] As such, Mexico submits that "there are no incentives to accurately and properly administer the dolphin-safe certification requirements for tuna caught outside the ETP".[814]

7.590. The United States rejects Mexico's allegations. It submits that the IATTC members agreed to different requirements regarding certification and tracking and verification, because the ETP is different – nowhere else in the world has tuna fishing caused the harm to dolphins that large purse seine vessels have caused in the ETP. The number of dolphins killed in the ETP tuna purse seine fishery since the fishery began in the late 1950s is the greatest known for any fishery.[815] In light of this unique history, the AIDCP parties agreed to *unique* requirements, including the certification requirements that Mexico now insists the United States must require of itself and all of its trading partners, regardless of where or how they catch tuna, to come into compliance with its WTO obligations.

7.591. As we noted in the context of our analysis under Article 2.1 of the TBT Agreement, Mexico's argument is not that the United States should *remove* the certification requirements that exist in the ETP, but, conversely, that "it is both appropriate and necessary to have an

[806] Mexico's second written submission, para. 3.
[807] Mexico's second written submission, para. 194.
[808] Mexico's second written submission, para. 195.
[809] Mexico's second written submission, para. 177 (citing Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.902 and 7.904).
[810] Mexico's second written submission, para. 181.
[811] Mexico's second written submission, para. 182. See also Mexico's first written submission, para. 286.
[812] Mexico's second written submission, para. 185.
[813] Mexico's second written submission, para. 185.
[814] Mexico's second written submission, para. 185
[815] Tim Gerrodette, "The Tuna Dolphin Issue" in Perrin, Wursig and Thewissen (eds.), *Encyclopedia of Marine Mammals* (2nd ed.) (Elservier: 2009), p. 1192 (Exhibit US-29).

independent observer requirement for tuna fishing outside the ETP"[816] – and, indeed, that without imposing an observer requirement for vessels other than large purse seiners in the ETP, the amended tuna measure cannot be "even-handed" as required under Article 2.1 of the TBT Agreement. We believe that the evidence and arguments of the parties on the even-handedness of the regulatory distinction pursuant to Article 2.1 are also relevant for determining whether these aspects of the amended tuna measure impose arbitrary or unjustifiable discrimination between countries where the same conditions exist, in contravention of the chapeau of Article XX. Consequently, throughout our analysis of whether the United States has demonstrated that its certification and tracking and verification requirements are not applied in a manner that constitutes unjustifiable and arbitrary discrimination between countries where the same conditions prevail, we make reference to and use of the factual and legal assessments made in the course of our analysis under Article 2.1 of the TBT Agreement.

7.592. First, in the context of our analysis under Article 2.1 of the TBT Agreement, we were convinced by the United States' argument that observers are necessary on ETP large purse seiners but may not be necessary on other vessels in other fisheries because of the nature of the fishing technique used by ETP large purse seiners, which essentially involves the chasing and encirclement of many dolphins over an extended period of time. This means that it is necessary to have one single person on board with the responsibility of keeping track of those dolphins caught up in the chase and/or the purse seine net sets.[817] Other fishing methods in other oceans may – and, as the United States recognizes, do – cause dolphin mortality and serious injury, but because the nature and degree of the interaction is different in quantitative[818] and qualitative terms (since dolphins are not set on intentionally, and interaction is only accidental),[819] there may be no need to have a single person on board whose sole task is to monitor the safety of dolphins during the set or other gear deployment.

7.593. In our view this argument is sufficient to demonstrate that maintaining different certification requirements does not necessarily amount to imposing unjustifiable or arbitrary discrimination. However, the fact that the United States may be entitled to have different certification requirements for tuna caught in the ETP large purse seine fishery and for tuna caught in other fisheries is not determinative of whether the system in place in fisheries other than the ETP large purse seine fishery – certification by captains only – is balanced and justified within the meaning of the chapeau of Article XX. We now consider whether the amended tuna measure's reliance on captains' certification in all fisheries other than the ETP large purse seine fishery is consistent with the chapeau of Article XX.

7.594. In the context of the Panel's application of Article 2.1 of the TBT Agreement, we noted that Mexico's claim that the different certification requirements were not even-handed (and thus imposed unjustifiable discrimination) rested on the premise that captains' self-certifications are "inherently unreliable" and "meaningless".[820] Mexico submitted two reasons in support of this allegation: first, that captains have a financial incentive to certify that their catch is dolphin-safe even when it is not, and the amended tuna measure contains no mechanism to check this incentive; and second, that captains lack the technical expertise necessary to properly certify that no dolphins were killed or seriously injured in a given set or other gear deployment, and therefore their certifications do not guarantee that tuna labelled dolphin-safe in fact meets the statutory and regulatory requirements.

7.595. In the context of Article 2.1 of the TBT Agreement, the Panel was not convinced by Mexico's argumentation concerning the economic incentives facing captains. The Panel accepted the evidence submitted by the United States that many regional and international organizations and arrangements rely on captains' certifications and logbooks both to monitor compliance with regulatory requirements and as a means of data collection. The fact that many domestic, regional, and international regimes rely on captains' self-certification raised a strong presumption that such certifications are reliable. RFMOs and other fisheries and environmental organizations are experts

[816] Mexico's second written submission, para. 167.
[817] United States' response to Panel question No. 30, para. 168.
[818] United States' response to Panel question No. 20, paras. 120-121; United States' response to Panel question No. 21, paras. 136-142.
[819] United States' response to Panel question No. 20, paras. 120-125; United States' response to Panel question No. 22, paras. 147-149.
[820] Mexico's first written submission, paras. 271, 285 and 295; Mexico's second written submission, paras. 147, 172, 182, 188 and 193.

in their respective fields, and the fact that they have and continue to rely on captains' statements in a variety of fishing and environmental areas strongly suggests that, as a general matter, they consider such certifications to be reliable. The Panel considered that such acceptance was a highly relevant and probative fact.

7.596. The Panel was not convinced that the evidence submitted by Mexico was sufficient to rebut this fact. The documents submitted by Mexico certainly suggest that there have been instances in which captains' certifications have been unreliable. However, Mexico did not prove that there was a general practice of captains providing misstatements contrary to their domestic, regional, and international obligations. As the Panel explained, the fact that there have been cases of unreliable certification is not sufficient to conclude that captain statements are not, as a general matter of fact and law, sufficient to establish compliance with all kinds of fishing regulations. Several international instruments provide captains with multiple responsibilities and duties, and the Panel concluded that asking captains to perform dolphin-safe certification outside the ETP is, at least in principle, justified.

7.597. In light of the above, the Panel found that Mexico had not demonstrated that captains' certifications are inherently unreliable because captains have a financial incentive not to report accurately on the dolphin-safe status of tuna caught in a given set or other gear deployment. We concluded that in principle captains could be reliable to certify compliance with the requirements of the US dolphin-safe label requirements. In our view this means, in our current analysis, that the United States has demonstrated that requesting captains on boats outside the ETP to provide the same dolphin-safe certification that is requested from both the captain and an observer within the ETP, is not necessarily unjustifiable and inconsistent with the chapeau of Article XX.

7.598. However, we agreed with Mexico's second claim that captains' certificates may be unreliable because captains may not have the technical expertise necessary to accurately certify that no dolphins were killed or seriously injured in a particular set or gear deployment.

7.599. We compared the kinds of tasks expected to be carried out by observers in the ETP and other oceans with those that are customarily carried out by captains. Such comparison helped us understand the kinds of skills necessary to certify that no dolphins were killed or seriously injured in a given set or other gear deployment.

7.600. On the basis of this evidence, we concluded that certifying whether a dolphin has been killed or seriously injured in a set or other gear deployment is a highly complex task. The Panel found it especially telling that the amended tuna measure itself recognizes the necessity of training and education in equipping persons with the necessary technical know-how to ensure that they can properly certify the dolphin-safety of a tuna catch.

7.601. Our analysis of the evidence also helped us understand the competencies and tasks generally expected of captains. This evidence, including the various regional and international treaties indicates that captains are generally expected to conduct a wide variety of tasks on board the vessels they command. As we read the evidence, captains are generally expected to have the knowledge and ability to fulfil a range of activities that tends to extend to certifying the existence of facts over which they have control and/or direct knowledge, e.g. port of entry and exit, co-ordinates, date and time of gear deployment, and type of gear deployed.[821] In some cases captains are also expected to certify the species of fish caught, or the presence of whale or bird bycatch.[822] In our opinion, however, these tasks may be rather different from those involved in certifying that no dolphins were killed or seriously injured in sets or other gear deployments. The evidence cited above suggests that this is a highly specialized skill, and none of the evidence before us suggests that captains (or, we would add, any other crew member) are always and necessarily in possession of those skills.

[821] United States' response to Panel question No. 37, paras. 194-196. Mexico's comments to United States' response to Panel question No. 37, paras. 130-134.

[822] As we noted above, the evidence before us suggests that in a very small number of jurisdictions, captains may also be required or enabled to certify about marine mammal bycatch, although the amount of detail required and the mammals covered are different from the amended tuna measure: see paras. 7.220-7.225 above.

7.602. Accordingly, the Panel concluded that the different certification requirements do not stem exclusively from a legitimate regulatory distinction within the meaning of Article 2.1 of the TBT Agreement, because, to the extent that captains' could not be assumed to have the skills necessary to make an accurate dolphin-safe certification, this distinction makes it easier for non-dolphin-safe tuna caught other than by large purse seine vessel in the ETP to be incorrectly labelled as dolphin-safe, which inaccurate labelling would undermine the overall objectives of the amended tuna measure.

7.603. In our view, and taking into account our findings above, we do not think the United States has shown that the different certification requirements do not impose any arbitrary or unjustifiable discrimination. Requiring certification by captains only outside the ETP is not justifiable unless the United States can explain why it believes that captains have the necessary expertise to perform the duties necessary to certify compliance with the dolphin-safe label criteria. The United States has not explained sufficiently how captains can perform the duties inherent to the certification for the dolphin-safe label since they do not appear to have the specific expertise required to do so thoroughly.

7.604. The Panel also found that the determination provisions in the amended tuna measure, which allow the Assistant Administrator to make certain determinations that have the effect of triggering an observer requirement outside the ETP large purse seine fishery, were inconsistent with Article 2.1 of the TBT Agreement (and Articles I and III of the GATT 1994). This finding was based on the fact that such determinations are only possible in respect of certain fisheries, and the United States had not adequately explained how this limitation is rationally connected to the objectives pursed by the amended tuna measure.

7.605. In the Panel's view, the findings we made in the context of Article 2.1 apply with equal force in the context of the chapeau of Article XX. Insofar as the different certification requirements are not justified by the objective of conserving dolphins by providing consumers with accurate information about the dolphin-safe status of tuna products, we find that this aspect of the amended tuna measure is unjustifiably and arbitrarily discriminatory. We also find that, unlike in the context of the eligibility criteria, for the purposes of this element of the measure, the conditions prevailing among Members are the same, because dolphins may be killed or seriously injured by all fishing methods in all oceans, and accordingly accurate certification is necessary regardless of the particular fishery in which tuna is caught. Thus, the Panel finds that the different certification requirements are not applied consistently with the requirements of the chapeau of Article XX of the GATT 1994.

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7.606. As I explained in section 7.5.2.4.2.3 above, the different certification requirements can be justified where the risks in different fisheries are different. In my view, the conditions inside the ETP are not the same as those in other fisheries. In my opinion, the United States has demonstrated that the different requirements as to *who* must make a dolphin-safe certification are rationally connected to the different risks facing dolphins in different areas and from different fishing methods, because those requirements are "calibrated" or otherwise proportionate to those risks. Accordingly, I do not agree with the majority view expressed in paragraph 7.603 above. In my view, requiring observers only in the ETP is not arbitrarily or unjustifiably discriminatory, contrary to the requirements of the chapeau of Article XX of the GATT 1994.

7.607. However, in the context of Article 2.1 of the TBT Agreement, I joined with the majority in finding that the United States has not explained or justified the discrimination caused by the so-called "determination provisions", which only allow the Assistant Administrator to make certain determinations in respect of certain fisheries. These provisions unjustifiably limit the capacity of the amended tuna measure to respond to situations where the risks to dolphins are on a par with those in the ETP large purse seine fishery. Accordingly, I agree with the majority's reasoning at paragraph 7.605 and would find that for this reason the United States has not succeeded in showing that the different certification requirements are not applied in a manner that gives rise to arbitrary or unjustifiable discrimination.

Different tracking and verification requirements

7.608. We turn finally to the different tracking and verification requirements imposed by the amended tuna measure.

7.609. The Panel has already reached the conclusion that the different tracking and verification requirements are not even-handed within the meaning of Article 2.1 of the TBT Agreement because they cause a detrimental impact that the United States has not justified on the basis of the objectives pursued by the amended tuna measure. In our opinion, the circumstances that gave rise to the breach of Article 2.1 of the TBT Agreement give rise also to arbitrary and unjustifiable discrimination under the chapeau of Article XX of the GATT 1994. Our reasons are as follows.

7.610. In our findings under Article 2.1 of the TBT Agreement, we concluded that the different tracking and verification requirements impose a lighter burden on tuna caught other than in the ETP large purse seine fishery. We also saw merit in Mexico's arguments that the lighter tracking and verification requirements imposed outside of the ETP large purse seine fishery may make it more likely that tuna caught other than by large purse seine vessel will be incorrectly labelled as dolphin-safe, although we did not find it necessary to make a definitive finding on that point. In the context of the present analysis, the Panel agrees with Mexico that the lesser burden placed on tuna caught other than in the ETP large purse seine fishery, is not rationally related to the amended tuna measure's objective of conserving dolphins by providing information to consumers concerning the dolphin-safe status of tuna products. Moreover, to the extent that the different requirements may make it easier for tuna caught other than by large purse seine vessel in the ETP to be incorrectly labelled – a point on which we do not make a definitive finding – this would also be inconsistent with the measure's goal of providing accurate information to consumers. In the Panel's view, the United States has not provided any explanation as to how this differential treatment is related to, let alone justified by, the objectives pursed by the amended tuna measure, which is to provide accurate information to consumers in order to conserve dolphins.

7.611. As such, the Panel concludes that the different tracking and verification requirements are applied in a manner that constitutes unjustifiable and arbitrary discrimination contrary to the chapeau of Article XX of the GATT 1994.

7.7.3.3.2.2 Disguised restriction on international trade

7.612. Mexico argues that the amended tuna measure is applied so as to constitute a disguised restriction on trade. For the United States the measure was adopted at a time when it affected the US industry – it was not a measure that would protect US production. And the dolphin-safe label is available regardless of nationality of the fishing vessel or the origin of the product. Mexico asserts that the United States has discriminated arbitrarily and unjustifiably by not working through the AIDCP to "address[] its remaining concerns about dolphins and tuna fishing."[823] The United States responds that it has engaged in multilateral negotiations with Mexico through the AIDCP process.

7.613. It seems to this Panel that the United States and Mexico have been debating the issue of tuna and dolphins for several years. Nevertheless, it is not necessary to decide whether the amended tuna measure is applied in a manner that constitutes a disguised restriction on international trade. This is so because we already found that the United States has not been able to demonstrate that certain aspects of the amended tuna measure is not applied in a manner that constitutes arbitrary or unjustifiable discrimination. We need not discuss whether these same aspects of the amended tuna measure constitute a disguised restriction on international trade.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. Mexico raised claims with regard to certain aspects of the United States' amended tuna measure under Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994.

[823] Mexico's first written submission, paras. 337-339.

8.2. With respect to Mexico's claims under Article 2.1 of the TBT Agreement, the Panel concludes that:

a. the eligibility criteria in the amended tuna measure do not accord less favourable treatment to Mexican tuna and tuna products than that accorded to like products from the United States and to like products originating in any other country, and are thus consistent with Article 2.1 of the TBT Agreement;

b. the different certification requirements in the amended tuna measure accord less favourable treatment to Mexican tuna and tuna products than that accorded to like products from the United States and to like products originating in any other country, in violation of Article 2.1 of the TBT Agreement; and

c. the different tracking and verification requirements in the amended tuna measure accord less favourable treatment to Mexican tuna and tuna products than that accorded to like products from the United States and to like products originating in any other country, in violation of Article 2.1 of the TBT Agreement.

8.3. With respect to Mexico's claims under the GATT 1994, the Panel concludes that:

a. the eligibility criteria in the amended tuna measure accord less favourable treatment to Mexican tuna and tuna products than that accorded to like products from the United States and to like products originating in any other country, in violation of Articles I:1 and III:4 of the GATT 1994;

b. the different certification requirements in the amended tuna measure accord less favourable treatment to Mexican tuna and tuna products than that accorded to like products from the United States and to like products originating in any other country, in violation of Articles I:1 and III:4 of the GATT 1994; and

c. the different tracking and verification requirements in the amended tuna measure accord less favourable treatment to Mexican tuna and tuna products than that accorded to like products from the United States and to like products originating in any other country, in violation of Articles I:1 and III:4 of the GATT 1994.

8.4. With respect to the United States' defence under Article XX(g) of the GATT 1994, the Panel finds that:

a. the eligibility criteria in the amended tuna measure are provisionally justified under Article XX(g);

b. the different certification requirements in the amended tuna measure are provisionally justified under Article XX(g); and

c. the different tracking and verification requirements in the amended tuna measure are provisionally justified under Article XX(g).

8.5. With regard to the question of whether the challenged aspects of the amended tuna measure satisfy the requirements of the chapeau of Article XX of the GATT 1994, the Panel concludes that:

a. the eligibility criteria in the amended tuna measure are applied in a manner that meets the requirements of the chapeau of Article XX of the GATT 1994;

b. the different certification requirements are applied in a manner that does not meet the requirements of the chapeau of Article XX of the GATT 1994; and

c. the different tracking and verification requirements are applied in a manner that does not meet the requirements of the chapeau of Article XX of the GATT 1994.

8.6. Pursuant to Article 19.1 of the DSU, we recommend that the Dispute Settlement Body request the United States to bring its measure, which we have found to be inconsistent with Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994 and not justified under Article XX of the GATT 1994, into conformity with its obligations under the TBT Agreement and the GATT 1994.

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