WORLD TRADE ORGANIZATION

WT/DS381/AB/RW

20 November 2015

(15-6148)

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Original: English

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

AB-2015-6

Report of the Appellate Body

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ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
2013 Final Rule	USDOC, National Oceanic and Atmospheric Administration (NOAA), Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, *United States Federal Register*, Vol. 78, No. 131 (9 July 2013), pp. 40997-41004 (Panel Exhibit MEX-7)
AIDCP	Agreement on the International Dolphin Conservation Program (Original Panel Exhibits US-23a and MEX-11; Panel Exhibit MEX-30)
AIDCP Tracking and Verification System	AIDCP, Resolution to Adopt the Modified System for Tracking and Verification of Tuna (20 June 2001) (Original Panel Exhibit MEX-55; Panel Exhibit MEX-36)
amended tuna measure	The United States' dolphin-safe labelling regime for tuna products, comprising: (i) the DPCIA; (ii) Subpart H of Part 216 of CFR Title 50 as amended by the 2013 Final Rule (implementing regulations); (iii) the Hogarth ruling; and (iv) any implementing guidance, directives, policy announcements, or any other document issued in relation to instruments (i) through (iii), including any modifications or amendments in relation to those instruments
BCI	business confidential information
CFR	*United States Code of Federal Regulations*
DML	dolphin mortality limits
DPCIA	Dolphin Protection Consumer Information Act of 1990, codified in USC Title 16, Section 1385 (Original Panel Exhibit US-5; Panel Exhibit MEX-8)
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ETP	Eastern Tropical Pacific Ocean
FAD(s)	fish aggregating device(s)
Form 370	NOAA, Fisheries Certificate of Origin (Panel Exhibit MEX-22)
GATT 1994	General Agreement on Tariffs and Trade 1994
Hogarth ruling	United States Court of Appeals for the Ninth Circuit, *Earth Island Institute et al. v. William T. Hogarth*, 494 F.3d 757 (9th Cir. 2007) (Original Panel Exhibit MEX-31; Panel Exhibit MEX-16)
IATTC	Inter-American Tropical Tuna Commission
IDCP	International Dolphin Conservation Program
implementing regulations	USDOC, National Marine Fisheries Service/NOAA, Dolphin Safe Tuna Labeling, CFR Title 50, Part 216, Subpart H (Sections 216.90-216.95) (Panel Exhibit US-2)
Mexico's panel request	Request for the Establishment of a Panel by Mexico pursuant to Article 21.5 of the DSU, WT/DS381/20
MMPA	Marine Mammal Protection Act of 1972, as amended
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
original implementing regulations	CFR Title 50, Sections 216.91 and 216.92 (Original Panel Exhibit US-6)

Abbreviation	Description
PBR	potential biological removal
TBT Agreement	Agreement on Technical Barriers to Trade
TTFs	Tuna Tracking Forms
TTVP	NMFS Tuna Tracking and Verification Program
USC	*United States Code*
USDOC	United States Department of Commerce
WIO	Western Indian Ocean
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization

PANEL EXHIBITS CITED IN THIS REPORT

Panel Exhibit	Original Panel Exhibit	Short Title (if any)	Description
	MEX-2		National Research Council, *Dolphins and the Tuna Industry* (National Academy Press: Washington, D.C., 1992)
MEX-4	MEX-91		IDCP, Scientific Advisory Board, "Updated Estimates of N_{min} and Stock Mortality Limits", 7th Meeting (30 October 2009), Document SAB-07-05
MEX-5	MEX-117		AIDCP, 22nd Meeting of the Parties, Minutes (30 October 2009)
MEX-7		2013 Final Rule	USDOC, National Oceanic and Atmospheric Administration (NOAA), Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, *United States Federal Register*, Vol. 78, No. 131 (9 July 2013), pp. 40997-41004
MEX-8	US-5	DPCIA	Dolphin Protection Consumer Information Act of 1990, codified in USC Title 16, Section 1385
MEX-16	MEX-31	Hogarth ruling	United States Court of Appeals for the Ninth Circuit, *Earth Island Institute et al. v. William T. Hogarth*, 494 F.3d 757 (9th Cir. 2007)
MEX-20			CFR Title 50, Section 216
MEX-30	US-23a and MEX-11	AIDCP	Agreement on the International Dolphin Conservation Program
MEX-22		Form 370	NOAA, Fisheries Certificate of Origin
MEX-36	MEX-55	AIDCP Tracking and Verification System	AIDCP, Resolution to Adopt the Modified System for Tracking and Verification of Tuna (20 June 2001)
MEX-40	US-10		National Marine Fisheries Service, *An Annotated Bibliography of Available Literature Regarding Cetacean Interactions with Tuna Purse-Seine Fisheries Outside of the Eastern Tropical Pacific Ocean*, Administrative Report LJ-96-20 (November 1996)
MEX-81			M.N. Maunder, "Evaluating recent trends in EPO dolphin stocks", IATTC draft paper
MEX-82			V.R. Restrepo, Chair's Report of the ISSF Tuna Dolphin Workshop held on 25-26 October 2012
MEX-84			*Programa Nacional de Aprovechamiento del Atún y Protección de Delfines* (National Program for the Utilization of Tuna and Protection of Dolphins), Statement of Dr Michael Dreyfus, Chief Researcher (28 March 2014)

Panel Exhibit	Original Panel Exhibit	Short Title (if any)	Description
MEX-115	MEX-56	AIDCP Dolphin Safe Certification Resolution	AIDCP, Resolution to Establish Procedures for AIDCP Dolphin Safe Tuna Certification (20 June 2001)
MEX-132			Food and Agriculture Organization, Fisheries Glossary, available at: <http://www.fao.org/fi/glossary/>
MEX-161		Anderson, *Cetaceans and Tuna Fisheries*	R.C. Anderson, *Cetaceans and Tuna Fisheries in the Western and Central Indian Ocean*, International Pole and Line Foundation, Technical Report No. 2 (London, 2014)
US-2		implementing regulations	USDOC, National Marine Fisheries Service/NOAA, Dolphin Safe Tuna Labeling, CFR Title 50, Part 216, Subpart H (Sections 216.90-216.95)
	US-6	original implementing regulations	CFR Title 50, Sections 216.91 and 216.92
US-26 (corrected)			IATTC, EPO Dataset 2009-2013
US-27			IDCP, 34th Meeting of the International Review Panel held on 9-10 October 2003, "Effectiveness of Technical Guidelines to Prevent High Mortality During Sets on Large Dolphin Herds", Document IRP-34-10 (revised)
US-28	US-19		B. Reilly et al., *Report of the Scientific Research Program Under the International Dolphin Conservation Program Act* (2005)
US-29			T. Gerrodette, "The Tuna-Dolphin Issue", in *Encyclopedia of Marine Mammals*, 2nd edn, W.F. Perrin, B. Würsig, J.G.M. Thewissen (eds.) (Oxford, 2009), p. 1192
US-48	US-11		A.C. Myrick, Jr. and P.C. Perkins, "Adrenocortical color darkness and correlates as indicators of continuous acute premortem stress in chased and purse-seine captured male dolphins" (1995) 2 *Pathophysiology*
US-49			IATTC, Initial assignment of DMLs for 2008 (21 November 2007)
US-127			Tables Summarizing Fishery-by-Fishery Evidence on the Record

CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Hides and Leather	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, p. 1779
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
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	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
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 – Renewable Energy / Canada – Feed-in Tariff Program	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
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)
Chile – Price Band System (Article 21.5 – Argentina)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, p. 513
China – HP-SSST (Japan) / China – HP-SSST (EU)	Appellate Body Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015
China – Publications and Audiovisual Products	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
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 – 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
Dominican Republic – Import and Sale of Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
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	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
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

Short Title	Full Case Title and Citation
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
EC – Fasteners (China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
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 – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3359
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 – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
EC – Tariff Preferences	Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, p. 925
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
EC and certain member States – Large Civil Aircraft	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report, WT/DS316/AB/R, DSR 2011:II, p. 685
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277
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
Japan – Apples	Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391
Japan – DRAMs (Korea)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, p. 2703
Korea – Alcoholic Beverages	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, p. 3
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
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
Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
Mexico – Taxes on Soft Drinks	Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, adopted 24 March 2006, as modified by Appellate Body Report WT/DS308/AB/R, DSR 2006:I, p. 43

Short Title	Full Case Title and Citation
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
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
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 – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
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	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745
US – COOL (Article 21.5 – Canada and Mexico)	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384/AB/RW / WT/DS386/AB/RW, adopted 29 May 2015
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 and Add.1 / WT/DS386/RW and Add.1, adopted 29 May 2015, as modified by Appellate Body Reports WT/DS384/AB/RW / WT/DS386/AB/RW
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 – FSC (Article 21.5 – EC II)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW2, adopted 14 March 2006, DSR 2006:XI, p. 4721
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 – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/AB/RW, adopted 11 May 2007, DSR 2007:IX, p. 3523
US – Section 337 Tariff Act	GATT Panel Report, *United States Section 337 of the Tariff Act of 1930*, L/6439, adopted 7 November 1989, BISD 36S, p. 345

Short Title	Full Case Title and Citation
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 (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 – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Tuna (EEC)	GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS29/R, 16 June 1994, unadopted
US – Tuna (Mexico)	GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, unadopted, BISD 39S, p. 155
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
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 – 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 – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
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) (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

WORLD TRADE ORGANIZATION
APPELLATE BODY

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

AB-2015-6

Appellate Body Division:

Servansing, Presiding Member
Bhatia, Member
Zhang, Member

Recourse to Article 21.5 of the DSU by Mexico

United States, *Appellant/Appellee*
Mexico, *Other Appellant/Appellee*

Australia, *Third Participant*
Canada, *Third Participant*
China, *Third Participant*
European Union, *Third Participant*
Guatemala, *Third Participant*
Japan, *Third Participant*
Korea, *Third Participant*
New Zealand, *Third Participant*
Norway, *Third Participant*
Thailand, *Third Participant*

1 INTRODUCTION

1.1. The United States and Mexico each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*.[1] The Panel was established pursuant to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) to consider a complaint by Mexico[2] concerning the alleged failure of the United States to comply with the recommendations and rulings of the Dispute Settlement Body (DSB) in the original proceedings in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*.[3]

1.2. This dispute concerns the United States' labelling regime for "dolphin-safe" tuna products. In the original proceedings, Mexico raised claims under the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Technical Barriers to Trade (TBT Agreement) challenging the consistency with these Agreements of certain measures imposed by the United States on the importation, marketing, and sale of tuna and tuna products.[4] Specifically, Mexico challenged: the Dolphin Protection Consumer Information Act of 1990, codified in *United States Code*, Title 16, Section 1385[5] (DPCIA); *United States Code of Federal Regulations* (CFR), Title 50, Sections 216.91 and 216.92 (original implementing regulations)[6]; and a ruling by a US Federal Appeals Court in *Earth Island Institute v. Hogarth*[7] (Hogarth ruling).[8] The original

[1] WT/DS381/RW, 14 April 2015.
[2] Request for the Establishment of a Panel by Mexico pursuant to Article 21.5 of the DSU, WT/DS381/20 (Mexico's panel request).
[3] The recommendations and rulings of the DSB resulted from the adoption, on 13 June 2012, by the DSB of the Appellate Body report (WT/DS381/AB/R) and the panel report (WT/DS381/R) in *US – Tuna II (Mexico)*. In this Report, we refer to the panel that considered the original complaint brought by Mexico as the "original panel" and to its report as the "original panel report".
[4] In the course of the original proceedings, Mexico clarified that its claims under Articles I:1 and III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement were made only in relation to tuna products, and not tuna. For that reason, the original panel limited its findings in this respect to tuna products. (Original Panel Report, para. 6.10)
[5] Original Panel Exhibit US-5; Panel Exhibit MEX-8.
[6] Original Panel Exhibit US-6.
[7] United States Court of Appeals for the Ninth Circuit, *Earth Island Institute et al. v. William T. Hogarth*, 494 F.3d 757 (9th Cir. 2007) (Original Panel Exhibit MEX-31; Panel Exhibit MEX-16).
[8] Panel Report, para. 1.10 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 172).

panel and the Appellate Body referred to these measures, collectively[9], as the "measure at issue" or the "US dolphin-safe labelling provisions".[10] In these compliance proceedings, we refer to them as the "original tuna measure".

1.3. The original tuna measure specified the conditions to be fulfilled in order for tuna products sold in the United States to be labelled "dolphin-safe" or to make similar claims on their labels.[11] The specific conditions varied depending on the fishing method by which tuna contained in the tuna product was harvested, the area of the ocean where the tuna was caught, and the type of vessel used.[12] The original tuna measure did not make the use of a dolphin-safe label obligatory for the importation or sale of tuna products in the United States[13], although the preferences of retailers and consumers are such that the dolphin-safe label has "significant commercial value", and access to that label constitutes an "advantage" on the US market for tuna products.[14]

1.4. The original panel found that the US "dolphin-safe" labelling provisions constituted a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement.[15] With respect to Mexico's claim that the original tuna measure was inconsistent with Article 2.1 of the TBT Agreement, the original panel found that Mexico had failed to establish that the measure accorded treatment less favourable to Mexican tuna products than to US tuna products and tuna products originating in other countries.[16] The panel therefore concluded that the measure was not inconsistent with the United States' obligations under Article 2.1.[17] The original panel found, however, that the original tuna measure was more trade restrictive than necessary to fulfil its legitimate objectives, taking account of the risks non-fulfilment would create, and concluded for that reason that the measure was inconsistent with Article 2.2 of the TBT Agreement.[18] With respect to Mexico's claim under Article 2.4 of the TBT Agreement, the original panel found that the Agreement on the International Dolphin Conservation Program[19] (AIDCP) dolphin-safe definition and certification were a relevant international standard[20], but that Mexico had failed to prove that this standard was an effective and appropriate means to fulfil the United States' objectives at its chosen level of protection.[21] Therefore, the panel found that the original tuna measure was not inconsistent with Article 2.4.[22] The original panel decided to exercise judicial economy with respect to Mexico's claims under Articles I:1 and III:4 of the GATT 1994.[23]

1.5. On appeal, the Appellate Body found that the original panel did not err in characterizing the original tuna measure as a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement.[24] The Appellate Body found, however, that the original panel had erred in its interpretation and application of the phrase "treatment no less favourable" in Article 2.1 of the TBT Agreement. The Appellate Body reversed the panel's finding that the US dolphin-safe labelling provisions were not inconsistent with Article 2.1 of the TBT Agreement, and found, instead, that the dolphin-safe labelling provisions were inconsistent with that provision.[25] Furthermore, the

[9] The original panel and the Appellate Body considered it appropriate to treat these legal instruments as a single measure for purposes of analysing Mexico's claims and reaching findings.

[10] Panel Report, para. 3.1. See also Appellate Body Report, *US – Tuna II (Mexico)*, paras. 2 and 172 and fn 357 thereto.

[11] Appellate Body Report, *US – Tuna II (Mexico)*, para. 172; Original Panel Report, para. 2.2. Under the original tuna measure, only tuna products meeting the specified conditions could be labelled as "dolphin-safe", and use of this term, as well as any reference to dolphins, porpoises, or marine mammals on the label of a tuna product, was prohibited if the tuna contained therein did not comply with the applicable labelling conditions. (Appellate Body Report, *US – Tuna II (Mexico)*, paras. 172, 180, and 193; Original Panel Report, paras. 7.124 and 7.143-7.144)

[12] Original Panel Report, paras. 2.7-2.8; Appellate Body Report, *US – Tuna II (Mexico)*, para. 172.

[13] Appellate Body Report, *US – Tuna II (Mexico)*, para. 172.

[14] Appellate Body Report, *US – Tuna II (Mexico)*, para. 233 (referring to Original Panel Report, paras. 7.289-7.291). The factual aspects of the original proceedings are set forth in greater detail in paragraphs 2.1-2.41 of the original panel report, and paragraphs 172-177 of the Appellate Body report.

[15] Original Panel Report, paras. 7.62, 7.78, and 7.145.

[16] Original Panel Report, para. 7.374.

[17] Original Panel Report, para. 8.1(a).

[18] Original Panel Report, paras. 7.620 and 8.1(b).

[19] Original Panel Exhibits US-23a and MEX-11; Panel Exhibit MEX-30.

[20] Original Panel Report, para. 7.707.

[21] Original Panel Report, para. 7.740.

[22] Original Panel Report, para. 8.1(c).

[23] Original Panel Report, paras. 7.748 and 8.2.

[24] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 199 and 407(a).

[25] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 299 and 407(b).

Appellate Body found that the original panel had erred in concluding that the original tuna measure was more trade restrictive than necessary to fulfil the United States' legitimate objectives, taking account of the risks non-fulfilment would create. Therefore, the Appellate Body reversed the panel's finding that the original tuna measure was inconsistent with Article 2.2 of the TBT Agreement.[26] The Appellate Body also reversed the panel's finding that the AIDCP dolphin-safe definition and certification constituted a relevant international standard within the meaning of Article 2.4 of the TBT Agreement, while leaving undisturbed the panel's finding that the original tuna measure was not inconsistent with Article 2.4 of the TBT Agreement.[27] Finally, the Appellate Body found that the original panel acted inconsistently with Article 11 of the DSU in deciding to exercise judicial economy with respect to Mexico's claims under Articles I:1 and III:4 of the GATT 1994.[28] The Appellate Body recommended that the DSB request the United States to bring its measure into conformity with its obligations under the TBT Agreement.[29]

1.6. On 13 June 2012, the DSB adopted the original panel and Appellate Body reports. 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 for the United States to implement the recommendations and rulings of the DSB.[30] On 17 September 2012, Mexico and the United States informed the DSB that they had agreed on a reasonable period of time of 13 months from 13 June 2012. The reasonable period of time expired on 13 July 2013.[31]

1.7. 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"[32] (2013 Final Rule).[33] The 2013 Final Rule made certain changes to Sections 216.91 and 216.93 of CFR Title 50.[34] Both the DPCIA and the Hogarth ruling remained unchanged.[35] According to the United States, the 2013 Final Rule constitutes the measure taken to comply with the DSB's recommendations and rulings pursuant to Article 21.5 of the DSU.[36]

1.8. Mexico considers that the United States has not brought its labelling regime for "dolphin-safe" tuna products into compliance with the DSB's recommendations and rulings, and that the regime remains inconsistent with the United States' obligations under the covered agreements.[37] On 2 August 2013, Mexico and the United States informed the DSB of their Agreed Procedures under Articles 21 and 22 of the DSU[38] and, on 14 November 2013, Mexico requested the establishment of a panel under Articles 6 and 21.5 of the DSU, Article 14 of the TBT Agreement, and Article XXIII of the GATT 1994.[39]

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[26] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 331 and 407(c). The Appellate Body, however, upheld the original panel's conclusion that the United States' objective of "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", was a legitimate objective within the meaning of Article 2.2 of the TBT Agreement. Furthermore, the Appellate Body rejected Mexico's request to find the original tuna measure to be inconsistent with Article 2.2 of the TBT Agreement based on the original panel's finding that the measure did not entirely fulfil its objectives. (Ibid., paras. 342 and 407(d)-(e))

[27] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 401 and 407(f).

[28] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 405 and 407(g).

[29] Appellate Body Report, *US – Tuna II (Mexico)*, para. 408.

[30] Panel Report, para. 1.12 (referring to Communication from Mexico and the United States concerning Article 21.3(c) of the DSU, WT/DS381/16).

[31] Panel Report, para. 1.12 (referring to Agreement under Article 21.3(b) of the DSU, WT/DS381/17).

[32] US Department of Commerce (USDOC), National Oceanic and Atmospheric Administration (NOAA), Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, *United States Federal Register*, Vol. 78, No. 131 (9 July 2013), pp. 40997-41004 (Panel Exhibit MEX-7).

[33] Panel Report, para. 1.13 (referring to United States' first written submission to the Panel, para. 10).

[34] Section 216.92 of the original implementing regulations was not amended by the 2013 Final Rule. (Panel Report, paras. 3.32 and 3.39)

[35] Panel Report, para. 3.32.

[36] Panel Report, para. 1.13.

[37] Mexico's panel request, p. 2.

[38] WT/DS381/19. The parties agreed, *inter alia*, that, in the event that the DSB, following a proceeding under Article 21.5 of the DSU, rules that a measure taken to comply does not exist or is inconsistent with a WTO covered agreement, Mexico may request authorization to suspend the application of concessions or other obligations under the covered agreements to the United States pursuant to Article 22 of the DSU and that the United States will not assert that Mexico is precluded from obtaining such authorization on the ground that the request was made outside the 30-day time period specified in Article 22.6 of the DSU.

[39] WT/DS381/20.

1.9. In its panel request, Mexico indicated that the "measure taken to comply with the recommendations and rulings" of the DSB, hereinafter referred to as the "amended tuna measure", comprises: (i) the DPCIA; (ii) Subpart H of Part 216 of CFR Title 50 as amended by the 2013 Final Rule[40] (implementing regulations); (iii) the Hogarth ruling; and (iv) any implementing guidance, directives, policy announcements, or any other document issued in relation to instruments (i) through (iii), including any modifications or amendments in relation to those instruments.[41] Mexico claimed that the amended tuna measure is still inconsistent with Article 2.1 of the TBT Agreement, and with Articles I:1 and III:4 of the GATT 1994.[42] On this basis, Mexico requested the Panel to find that the United States has failed to comply with the recommendations and rulings adopted by the DSB.[43]

1.10. The Panel Report was circulated to Members of the World Trade Organization (WTO) on 14 April 2015. Before proceeding to the merits of the case, the Panel addressed several preliminary issues.[44] The Panel rejected two arguments made by the United States relating to the scope of the Panel's jurisdiction in these Article 21.5 proceedings, namely: (i) that the scope of the Panel's review was limited to the measure taken to comply – the 2013 Final Rule – rather than extending to the amended tuna measure as a whole; and (ii) that the Panel could not entertain Mexico's claims relating to three elements of the amended tuna measure – the eligibility criteria for the dolphin-safe label, the different tracking and verification requirements, and the different observer or certification requirements – because these elements were unchanged from the original tuna measure, and were not found by the Appellate Body to be WTO-inconsistent in the original proceedings. The Panel considered that the legal question before it was whether the amended tuna measure, including the 2013 Final Rule, brought the United States into compliance with WTO law[45], and that it had jurisdiction to consider all of Mexico's claims, including as they related to the eligibility criteria, the certification requirements, and the tracking and verification requirements.[46] In addition, at the outset of its analysis of Mexico's claim under Article 2.1 of the TBT Agreement, in the light of the findings made in the original proceedings, as well as the agreement of both parties, the Panel accepted that the US dolphin-safe labelling regime is a "technical regulation" for purposes of the TBT Agreement, and that the relevant tuna products are "like".[47]

[40] USDOC, National Marine Fisheries Service/NOAA, Dolphin Safe Tuna Labeling, CFR Title 50, Part 216, Subpart H (Sections 216.90-216.95) as amended (Panel Exhibit US-2).

[41] Panel Report, para. 2.1.

[42] Panel Report, para. 2.2. Mexico also claimed that the amended tuna measure nullifies or impairs benefits that accrue to Mexico under the GATT 1994 within the meaning of Article XXIII:1(b) of the GATT 1994.

[43] Panel Report, para. 2.3 (referring to Mexico's first written submission to the Panel, para. 331).

[44] One procedural issue addressed by the Panel was the European Union's request for enhanced third-party rights. After considering the request and consulting with the parties, the Panel decided to decline the request. (Panel Report, para. 1.8)

[45] Panel Report, paras. 7.24 and 7.43. The Panel stated that such a task necessarily required it 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. (Ibid., para. 7.23)

[46] Panel Report, para. 7.43. The Panel disagreed with the United States that the 2013 Final Rule is "separable from the rest of the tuna measure". The Panel instead expressed the view that the 2013 Final Rule is "an integral component of the amended tuna measure" and "the fact that it adds new requirements rather than changing pre-existing requirements … 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 [the Panel's] jurisdiction." (Ibid., para. 7.41 (fn omitted))

[47] Panel Report, para. 7.71 (referring to Original Panel Report, para. 7.251; Appellate Body Report, *US – Tuna II (Mexico)*, para. 202; Mexico's first written submission to the Panel, paras. 205 and 208; United States' first written submission to the Panel, para. 181; and second written submission to the Panel, para. 181).

1.11. In its Report, the Panel made the following findings with respect to the "eligibility criteria", the "certification requirements", and the "tracking and verification requirements" in the amended tuna measure[48]:

a. with respect to Mexico's claims under Article 2.1 of the TBT Agreement:

   i. 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[49];

   ii. 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[50]; and

   iii. 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[51];

b. with respect to Mexico's claims under the GATT 1994:

   i. 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[52];

   ii. 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[53]; and

   iii. 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[54];

c. with respect to the United States' defence under Article XX(g) of the GATT 1994, the eligibility criteria, the different certification requirements, and the different tracking and verification requirements in the amended tuna measure are provisionally justified under Article XX(g)[55]; and

d. with regard to whether the challenged aspects of the amended tuna measure satisfy the requirements of the chapeau of Article XX of the GATT 1994, the eligibility criteria in the amended tuna measure are applied in a manner that meets the requirements of the chapeau of Article XX, whereas the different certification requirements and 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.[56]

[48] The "eligibility criteria", the "certification requirements", and the "tracking and verification requirements" in the amended tuna measure are explained *infra*, paras. 6.8-6.14 and 7.5.
[49] Panel Report, paras. 7.135 and 8.2.a.
[50] Panel Report, paras. 7.233, 7.263, and 8.2.b.
[51] Panel Report, paras. 7.402 and 8.2.c.
[52] Panel Report, paras. 7.451, 7.499, and 8.3.a.
[53] Panel Report, paras. 7.456, 7.501, and 8.3.b.
[54] Panel Report, paras. 7.465, 7.503, and 8.3.c.
[55] Panel Report, paras. 7.541 and 8.4.
[56] Panel Report, paras. 7.585, 7.605, 7.611, and 8.5.

1.12. The Panel recommended, pursuant to Article 19.1 of the DSU, that the DSB request the United States to bring its measure into conformity with its obligations under the TBT Agreement and the GATT 1994.[57]

1.13. On 5 June 2015, the United States notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report, and certain legal interpretations developed by the Panel, and filed a Notice of Appeal and an appellant's submission.[58] On 10 June 2015, Mexico notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report, and certain legal interpretations developed by the Panel, and filed a Notice of Other Appeal and an other appellant's submission.[59] On 23 June 2015, Mexico and the United States each filed an appellee's submission.[60] On 26 June 2015, Canada, the European Union, Japan, and New Zealand each filed a third participant's submission.[61] On the same day, Australia, China, Guatemala, Korea, and Norway each notified its intention to appear at the oral hearing as a third participant.[62] On 17 September 2015, Thailand also notified its intention to appear at the oral hearing as a third participant.[63]

1.14. On 13 July 2015, the Appellate Body Division hearing this appeal informed the participants and the third participants that the oral hearing would take place on 7-8 September 2015. On 15 July 2015, the Division received a letter from Mexico requesting that the oral hearing not be held as scheduled because a key member of Mexico's litigation team would not be available on those dates. Mexico submitted that attending the hearing with a reduced legal team would have an impact on its ability to present adequately its arguments before the Appellate Body. Mexico requested the Division to modify the date of the oral hearing to a date either before, or after, 7-8 September 2015, and proposed 3-4 September or 21-22 September as possible alternative dates. The Division wrote to the United States and to the third participants soliciting their views on Mexico's request. Neither the United States nor any of the third participants objected to Mexico's request, at least with respect to the proposed alternative dates of 21-22 September 2015. On 21 July 2015, the Division issued a Procedural Ruling finding that Mexico had identified "exceptional circumstances", within the meaning of Rule 16(2) of the Working Procedures for Appellate Review[64], warranting modification of the dates for the oral hearing, and deciding to hold the oral hearing on 21-22 September 2015.[65] In reaching its conclusion, the Division took into account Mexico's right to defend properly its case, as well as the high level of activity experienced currently by the WTO dispute settlement system, which can impair a Member's ability to engage effectively in multiple, parallel proceedings.[66]

1.15. By letter dated 3 August 2015[67], the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision. The Chair of the Appellate Body explained that this was due to a number of factors, including the substantial workload of the Appellate Body, scheduling difficulties arising from overlap in the composition of Divisions hearing appeals concurrently pending before the Appellate Body, the rescheduling of the oral hearing in this appeal, the number and complexity of the issues raised in these and concurrent appellate proceedings, and the shortage of staff in the Appellate Body

[57] Panel Report, para. 8.6.

[58] Pursuant to Rules 20 and 21, respectively, of the Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010 (Working Procedures).

[59] Pursuant to Rule 23 of the Working Procedures.

[60] Pursuant to Rules 22 and 23(4) of the Working Procedures.

[61] Pursuant to Rule 24(1) of the Working Procedures.

[62] Pursuant to Rule 24(2) of the Working Procedures.

[63] On 17 September 2015, Thailand submitted its delegation list for the oral hearing to the Appellate Body Secretariat and the participants and third participants in this dispute. For purposes of this appeal, we have interpreted this action as a notification expressing Thailand's intention to attend the oral hearing pursuant to Rule 24(4) of the Working Procedures.

[64] WT/AB/WP/6, 16 August 2010.

[65] The Procedural Ruling is contained in Annex D of the Addendum to this Report, WT/DS381/AB/RW/Add.1.

[66] The Appellate Body noted, in particular, that at least some members of the legal teams representing the United States and Mexico in this appeal were also representing those Members in the arbitration proceedings in *US – COOL (Article 22.6 – US)*, and that an oral hearing in those proceedings was scheduled for 15-16 September 2015.

[67] WT/DS381/26.

Secretariat. The Chair of the Appellate Body estimated that the Report in this appeal would be circulated to WTO Members no later than Friday, 20 November 2015.

1.16. The oral hearing in this appeal was held on 21-22 September 2015. The participants and five of the third participants (Australia, Canada, Japan, New Zealand, and Norway) made opening oral statements. The participants and third participants responded to questions posed by the Members of the Appellate Body Division hearing the appeal.[68]

2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.[69] The Notices of Appeal and Other Appeal, and the executive summaries of the participants' claims and arguments, are contained in Annexes A and B of the Addendum to this Report, WT/DS381/AB/RW/Add.1.

3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of those third participants that submitted written submissions are reflected in the executive summaries of their written submissions provided to the Appellate Body[70], and are contained in Annex C of the Addendum to this Report, WT/DS381/AB/RW/Add.1.

4 ISSUES RAISED IN THIS APPEAL

4.1. The following issues are raised in this appeal:

a. whether the Panel erred in its application of Article 2.1 of the TBT Agreement and Articles I:1, III:4, and XX of the GATT 1994 by making discrete findings regarding each of the three different sets of requirements under the amended tuna measure[71], rather than making findings under those provisions in respect of the amended tuna measure as a whole (raised by Mexico);

b. with respect to Article 2.1 of the TBT Agreement:

   i. with respect to the detrimental impact of the amended tuna measure, whether the Panel erred by finding that the different certification requirements and the different tracking and verification requirements modify the conditions of competition to the detriment of Mexican tuna products in the US market on the basis that such requirements impose a lesser burden on tuna products derived from tuna caught outside the ETP large purse-seine fishery than on tuna products derived from tuna caught within that fishery (raised by the United States);

   ii. with respect to the Panel's analysis of whether the detrimental impact of the amended tuna measure stems exclusively from a legitimate regulatory distinction:

      - whether the Panel erred in its interpretation of Article 2.1 by articulating an incorrect legal standard (raised by the United States);

      - with respect to the "eligibility criteria" (raised by Mexico):

[68] On 29 June 2015, the Appellate Body received one unsolicited *amicus curiae* brief from a professor of law. The Division hearing this appeal did not find it necessary to rely on this *amicus curiae* brief in rendering its decision.

[69] Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings". (WT/AB/23, 11 March 2015)

[70] Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings". (WT/AB/23, 11 March 2015)

[71] The three different sets of requirements – the "eligibility criteria", the "certification requirements", and the "tracking and verification requirements" – in the amended tuna measure are explained *infra*, paras. 6.8-6.14 and 7.5.

- whether the Panel erred in its application of Article 2.1 by misreading the Appellate Body's findings in the original proceedings; and

- whether the Panel acted inconsistently with its duty to conduct an objective assessment of the matter pursuant to Article 11 of the DSU in reaching its findings: (i) regarding the unobserved adverse effects on dolphins of the fishing method of "setting on" dolphins; (ii) regarding the unobserved adverse effects on dolphins of tuna fishing methods other than setting on dolphins; and (iii) that the Appellate Body had made a finding in the original proceedings that setting on dolphins is more harmful to dolphins than other fishing methods; and

- with respect to the "certification requirements" and the "tracking and verification requirements":

  - whether the Panel erred in its application of Article 2.1 by not taking into account: (i) the different levels of risk to dolphins inside and outside the ETP large purse-seine fishery; or (ii) the fact that the certification requirements and the tracking and verification requirements that apply to the ETP large purse-seine fishery reflect international obligations under the AIDCP (raised by the United States);

  - whether the Panel disregarded evidence on the record and thereby acted inconsistently with its duty to conduct an objective assessment of the matter pursuant to Article 11 of the DSU by failing to find that: (i) captains in some cases have an economic incentive to under-report dolphin injury and mortality; and (ii) tuna-dolphin association and setting on dolphins occur in certain ocean regions outside the ETP (raised by Mexico); and

  - whether, with respect to the "determination provisions"[72] (raised by the United States):

    - the Panel erred in its application of Article 2.1 by: (i) improperly making the case for Mexico; and (ii) making its findings based solely on the design of the determination provisions and not on their application;

    - the Panel acted inconsistently with its duty to conduct an objective assessment of the matter pursuant to Article 11 of the DSU by failing to base its findings on a sufficient evidentiary basis; and

c. whether the Panel erred in its application of Article I:1 of the GATT 1994 to the amended tuna measure by finding that the certification requirements and the tracking and verification requirements under the amended tuna measure provide an "advantage, favour, privilege, or immunity" to tuna products from other Members that is not "accorded immediately and unconditionally" to like products from Mexico because they impose a lesser burden on tuna products derived from tuna caught outside the ETP large purse-seine fishery than on tuna products derived from tuna caught within that fishery (raised by the United States);

d. whether the Panel erred in its application of Article III:4 of the GATT 1994 to the amended tuna measure by finding that the certification requirements and the tracking and verification requirements under the amended tuna measure accord "treatment less favourable" to Mexican tuna products than that accorded to like domestic products because they impose a lesser burden on tuna products derived from tuna caught outside the ETP large purse-seine fishery than on tuna products derived from tuna caught within that fishery (raised by the United States); and

[72] The "determination provisions" in the amended tuna measure are explained *infra*, para. 6.11.

e. with respect to the chapeau of Article XX of the GATT 1994:

i. whether, in assessing "countries where the same conditions prevail", the Panel erred in its application of the chapeau of Article XX by finding that:

- the conditions are not the same in respect of the eligibility criteria (raised by Mexico); or

- the conditions are the same in respect of the certification requirements and the tracking and verification requirements (raised by the United States);

ii. whether, in assessing "arbitrary or unjustifiable discrimination":

- the Panel erred in its interpretation of the chapeau of Article XX by articulating an incorrect legal standard and improperly relying on its analysis under Article 2.1 of the TBT Agreement (raised by the United States);

- the Panel erred in its application of the chapeau of Article XX by finding that the eligibility criteria are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination (raised by Mexico);

- the Panel erred in its application of the chapeau of Article XX by finding that the certification requirements and the tracking and verification requirements are applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination and, more specifically, whether the Panel erred (raised by the United States):

  - by not taking into account the different levels of risk to dolphins inside and outside the ETP large purse-seine fishery;

  - by not taking into account the fact that the certification requirements and the tracking and verification requirements that apply to the ETP large purse-seine fishery reflect international obligations under the AIDCP; and

  - in finding that, due to the determination provisions, the certification requirements constitute a means of arbitrary and unjustifiable discrimination.

5 PRELIMINARY ISSUES

5.1 Business confidential information

5.1. The cover page of Mexico's appellee's submission indicates that it "[c]ontains business confidential information (BCI) on page 13".[73] Mexico also indicates in the cover letter to its appellee's submission that it has served a "non-BCI version" of that submission on the third participants.

5.2. Neither participant has requested that we adopt special procedures for handling information designated as BCI in these appellate proceedings, although the European Union, in its third participant's submission, requests that the issue of BCI be addressed in this Report. The European Union does not, however, refer to Mexico's appellee's submission. Rather, the European Union asserts that, in these proceedings, its ability to comment upon the Panel Report is

[73] On page 13 of that submission, two sentences of paragraph 29, and four sentences of footnote 50 to paragraph 29 are enclosed within double square brackets, indicating that these sentences are BCI.

impaired by the extensive redaction of text said to contain BCI from the Panel's reasoning with respect to the tracking and verification requirements under the amended tuna measure.[74]

5.3. In disputes raising issues relating to BCI, the Appellate Body has highlighted the need to distinguish between "the general layer of confidentiality that applies in WTO dispute settlement proceedings, as foreseen in Articles 18.2 and 13.1 of the DSU", and "the additional layer of protection of sensitive business information that a panel may choose to adopt, usually at the request of a party".[75] It is for the parties to request and justify the need for additional protection of BCI.[76] It is for the panel and/or the Appellate Body, relying upon objective criteria, to determine whether particular information deserves additional protection, as well as the degree of protection that is warranted.[77] When additional procedures to protect BCI are adopted, the panel and/or Appellate Body must also "adjudicate any disagreement or dispute that may arise under those procedures regarding the designation or the treatment of information as business confidential".[78] It is, moreover, for the adjudicator to ensure that an appropriate balance is struck between the need to guard against the risk of harm that could result from the disclosure of particularly sensitive information, on the one hand, and the integrity of the adjudication process, the participation rights of third participants, and the rights and systemic interests of the WTO membership at large, on the other hand.[79] That same balance must be struck by a panel in applying any additional procedures adopted. This means, among other things, that, when considering whether to redact information from its report, a panel "should bear in mind the rights of third parties and other WTO Members under various provisions of the DSU"[80] and "ensure that the public version of its report circulated to all Members of the WTO is understandable."[81]

5.4. In these proceedings, while the cover page of the Panel Report does not mention BCI, the Panel redacted, in part or in full, 17 paragraphs and 3 footnotes of its Report, in each case replacing the redacted text with the following designation: "**[[BCI]]**".[82] We see no indication in the Panel record suggesting that either Mexico or the United States requested the adoption of special procedures to protect BCI. Nor does the record show that the Panel adopted such special procedures either as part of its Working Procedures or on an *ad hoc* basis.[83] The Panel Report also lacks an indication of the criteria used to identify the information considered to constitute BCI. We are therefore surprised by the fact that the Panel redacted portions of its reasoning from its Report, and uncertain of the legal basis on which it did so.

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[74] The European Union contends that its ability to comment on the Panel's analysis of the tracking and verification requirements is "hampered" by the Panel Report circulated to Members, which "contains many instances in which allegedly confidential information has been extensively deleted". The European Union notes that some of this information was described by the Panel as "crucial" to its assessment. (European Union's third participant's submission, para. 52 (quoting Panel Report, para. 7.561)) The European Union remarks that its ability to participate as a third participant has been significantly curtailed, and, referring to Article 18.2 of the DSU, considers that "the Panel Report should have contained an indication of the extent of the redactions and a non-confidential summary of the redacted information." (Ibid., para. 52)

[75] Appellate Body Reports, *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 5.315.

[76] In *EC and certain member States – Large Civil Aircraft*, the Appellate Body explained that the "burden of justification will increase the more the proposed arrangements affect the exercise by the Appellate Body of its adjudicative duties, the exercise by the participants of their rights to due process and to have the dispute adjudicated, the exercise by the third participants of their participatory rights, and the rights and systemic interests of the WTO membership at large." (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 10. See also Appellate Body Reports, *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 5.311)

[77] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15.

[78] Appellate Body Reports, *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 5.311.

[79] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15.

[80] For example, Articles 12.7 and 16 of the DSU. See Appellate Body Report, *Japan – DRAMS (Korea)*, para. 279.

[81] Appellate Body Report, *Japan – DRAMS (Korea)*, para. 279.

[82] See Panel Report, paras. 6.15-6.16, 6.18, 7.309-7.311, 7.319-7.322, 7.356-7.359, 7.361-7.362, and 7.370, and fns 79, 515, and 579 thereto. We note that the Panel record that was transmitted to the Appellate Body contains a version of the Panel Report that states "**[BCI VERSION]**" on its cover page; carries the symbol "WT/DS381/BCI/RW" on each page; and includes all the text that was redacted from the Panel Report circulated to Members on 14 April 2015, which carries the symbol "WT/DS381/RW" on each page.

[83] The participants confirmed our understanding in this regard in response to questioning at the oral hearing.

5.5. We also observe that, absent any request from the participants, procedures for additional protection of BCI do not apply in these appellate proceedings.

5.2 The scope of Article 21.5 proceedings

5.6. A second preliminary issue relates to the scope of these proceedings under Article 21.5 of the DSU. We note that neither Mexico nor the United States claims on appeal that the Panel erred in interpreting Article 21.5, or in understanding the scope and nature of proceedings conducted under that provision.[84] Nonetheless, we find it useful to recall certain observations that the Appellate Body has previously made in this regard.

5.7. The task of a panel operating pursuant to Article 21.5 of the DSU is to resolve disagreements "as to the existence or consistency with a covered agreement of a measure taken to comply with the recommendations and rulings" of the DSB.[85] Article 21.5 proceedings involve "a new and different measure which was not before the original panel"[86], such that "the claims, arguments and factual circumstances which are pertinent to the 'measure taken to comply' will not, necessarily, be the same as those which were pertinent in the original dispute."[87] When a Member revises a measure found to be WTO-inconsistent in the original proceedings by modifying only certain aspects and leaving others unchanged, such revision, in principle, turns the original measure "in its totality"[88] into a "new and different measure".[89] Indeed, even when certain elements of a compliance measure remain unchanged from an original measure, the legal import and significance of such elements may be altered as a result of the modifications introduced in other parts of the compliance measure.[90]

5.8. In reviewing the WTO-consistency of a measure "taken to comply", compliance panels should be mindful of the principle of prompt settlement of disputes embodied in Article 3.3 of the DSU.[91] Accordingly, compliance proceedings cannot be used "to 're-open' issues decided in substance in

[84] However, the United States did argue before the Panel that the 2013 Final Rule is the sole instrument constituting the "measure taken to comply" with the recommendations and rulings of the DSB, and that the Panel should limit the scope of its review to this legal instrument. (Panel Report, para. 7.17 (referring to United States' first written submission to the Panel, para. 13; and second written submission to the Panel, para. 4)) The United States further argued that the three elements of the amended tuna measure on which Mexico based its claims – i.e. the eligibility criteria, the certification requirements, and the tracking and verification requirements – are all unchanged from the original measure, and that therefore Mexico could not raise claims relating to these elements in these compliance proceedings. (Ibid., para. 7.27) The Panel rejected the United States' arguments. It reasoned, *inter alia*, that a compliance measure is, in principle, a "new and different measure" even when it contains aspects that remain unchanged from the original measure. (Ibid., para. 7.39 (quoting Appellate Body Reports, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 432; and *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36)) Thus, the Panel stated that its mandate was to examine "whether the amended tuna measure, *including* the 2013 Final Rule, brings the United States into compliance" with the WTO Agreement. (Ibid., paras. 7.24 and 7.43 (emphasis added))

[85] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 102. See also Panel Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 7.22-7.23.

[86] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41.

[87] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41.

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

[89] Appellate Body Reports, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 432; *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41.

[90] See Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, fn 101 to para. 86. The Appellate Body reasoned that a change in one element of the anti-dumping determination made to comply with the DSB's recommendations and rulings – i.e. the volume of "dumped imports" – may affect another element of that determination that remained unchanged from the original measure – i.e. the injury caused by "other factors".

[91] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 94. See also Appellate Body Reports, *US – Shrimp (Article 21.5 – Malaysia)*, para. 97; and *Chile – Price Band System (Article 21.5 – Argentina)*, para. 236.

the original proceedings".[92] At the same time, if certain claims against aspects of a measure were not decided on the merits in the original proceedings, "they are not covered by the recommendations and rulings of the DSB" and, therefore, "a Member should not be entitled to assume that those aspects of the measure are consistent with the covered agreements."[93] In *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body stated that "[a] complaining Member ordinarily would not be allowed to raise claims in an Article 21.5 proceeding that it could have pursued in the original proceedings, but did not."[94] In *US – Zeroing (EC) (Article 21.5 – EC)*, the Appellate Body clarified, however, that this is not the case for "new claims against a measure taken to comply" when such measure "incorporates components of the original measure that are unchanged, but are not separable from other aspects of the measure taken to comply".[95] Thus, the possibility to challenge an element of the measure at issue for the first time in compliance proceedings, even if that element may not have changed, hinges on the "critical question" of whether such an element forms "an integral part of the measure taken to comply".[96]

5.9. The Appellate Body has also explained that "Article 21.5 proceedings do not occur in isolation from the original proceedings, but that both proceedings form part of a continuum of events."[97] Since Article 21.5 of the DSU expressly links the "measures taken to comply" with the recommendations and rulings of the DSB concerning the original measure, a panel's examination of a measure taken to comply "cannot … be undertaken in abstraction from the findings by the original panel and the Appellate Body adopted by the DSB"[98], but must rather be conducted "with due cognizance of this background".[99] Indeed, "doubts could arise about the objective nature of an Article 21.5 panel's assessment" if, on a specific issue, that panel were to "deviate from the reasoning" in the original report "in the absence of any change in the underlying evidence in the record".[100] In other words, a compliance panel should take due account of the relevant reasoning that led to the original measure being found to be WTO-inconsistent in its examination of whether the measure taken to comply redresses such WTO-inconsistencies. The relevance of the original reasoning and findings to a compliance panel's analysis must be ascertained on a case-by-case basis, and may vary depending on factors such as the degree of similarity between the measure taken to comply with the original measure, or the extent to which the features of the relevant market have changed.

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[92] Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.47 (quoting Appellate Body Report, *US – Zeroing (EC)*, para. 427; and referring to Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 96-98). Thus, for instance, a complainant that failed to make out a *prima facie* case in the original proceedings regarding an element of the measure that remained unchanged since the original proceedings "may not re-litigate the same claim with respect to the unchanged element of the measure in the Article 21.5 proceedings." (Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210 (referring to Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 93)) Similarly, "a complainant may not reassert the same claim against an unchanged aspect of the measure that had been found to be *WTO-consistent* in the original proceedings." (Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210 (referring to Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 96) (emphasis original))

[93] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 424.

[94] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 211.

[95] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 432.

[96] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 434. See also Panel Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.65.

[97] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 136 (referring to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 121). See also Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 386.

[98] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 136 (referring to Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 102; and *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77).

[99] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 136 (referring to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 121).

[100] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 103. See also Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 386.

6 BACKGROUND AND OVERVIEW OF THE MEASURE AT ISSUE

6.1. These proceedings under Article 21.5 of the DSU concern a labelling regime for tuna products[101] maintained by the United States.

6.2. Commercial tuna fishing can have harmful effects on marine mammals, including dolphins, and these may vary depending on factors such as the method of fishing used, the size of the fishing vessel, and the area of the ocean in which the vessel engages in tuna fishing. Since the 1970s[102], the United States has undertaken certain domestic measures, and participated in certain multilateral initiatives, aimed at reducing the adverse effects on dolphins associated with commercial fishing operations.

6.3. In 1990, the United States put in place a domestic regime for labelling tuna products as "dolphin-safe" through the enactment of the DPCIA.[103] As explained below, this instrument, as subsequently amended, together with its implementing regulations and a court decision, constitute the "amended tuna measure", the measure at issue in these compliance proceedings. Together, these instruments aim to: (i) ensure that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins; and (ii) contribute to the protection of dolphins by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins.[104] The amended tuna measure defines what constitutes dolphin-safe tuna products for purposes of the US market, and establishes certain requirements and conditions that must be satisfied in order for a tuna product sold in the United States to bear a label indicating that it is dolphin-safe. The preferences of consumers and retailers in the United States are such that a dolphin-safe label has "significant commercial value" in the US market for tuna products.[105]

6.4. At the international level, both the United States and Mexico are parties to the AIDCP, an agreement among 14 countries that entered into force in February 1999.[106] The AIDCP, administered by the Inter-American Tropical Tuna Commission (IATTC), addresses a particular tuna fishing method (purse-seine fishing) in a specific area of the ocean, namely, the Eastern Tropical Pacific Ocean (ETP).[107]

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[101] The DPCIA defines "tuna product" in Section 1385(c)(5) as a "food item which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days". In addition, for purposes of CFR Title 50, Section 216, "tuna product" means "any food product processed for retail sale and intended for human or animal consumption" containing one of the species of tuna listed in CFR Title 50, Section 216.24(f)(2)(i) and (ii), and not including "perishable items with a shelf life of less than 3 days". (Original Panel Report, paras. 7.60-7.61)

[102] In the original proceedings, Mexico commented that "[t]he principal US law relating to the overall issue of the protection of dolphins and other marine mammals is the Marine Mammal Protection Act of 1972, as amended (the 'MMPA')". (Original Panel Report, para. 4.17)

[103] Aspects of the MMPA and the DPCIA were challenged by Mexico and the European Economic Communities in disputes brought under the General Agreement on Tariffs and Trade 1947, but the panel reports in those disputes were never adopted. These reports are GATT Panel Reports, *US – Tuna (Mexico)*; and *US – Tuna (EEC)*.

[104] Panel Report, para. 7.523. See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 302; and Original Panel Report, paras. 7.401 and 7.425.

[105] Appellate Body Report, *US – Tuna II (Mexico)*, para. 233 (referring to Original Panel Report, paras. 7.289-7.290). Following public campaigning by the environmental organization Earth Island Institute in the late 1980s, tuna processors responded to pressure to stop purchasing tuna caught in conditions that were harmful to dolphins. (Original Panel Report, para. 7.288)

[106] Belize, Colombia, Costa Rica, Ecuador, El Salvador, the European Union, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, the United States, and Venezuela are parties to the AIDCP. Bolivia and Vanuatu apply the AIDCP provisionally. (See United States' appellant's submission, fn 47 to para. 60)

[107] Original Panel Report, para. 2.35. In 1976, the IATTC began multilateral endeavours that led to the creation of the International Dolphin Conservation Program (IDCP). The efforts were reflected in a series of multilateral agreements. These agreements were the La Jolla Agreement (1992) and the Panama Declaration (1995), which were succeeded by the AIDCP (1999). (Ibid.)

6.5. Within this area of the ocean[108], there is a regular association between tuna and dolphins, meaning that schools of tuna tend to aggregate and swim beneath certain species of dolphins.[109] Certain vessels operating in this area thus employ the fishing technique known as "setting on" dolphins, which takes advantage of this association, and involves chasing and encircling the dolphins with a purse-seine net in order to catch the tuna swimming beneath the dolphins.[110] The ETP is a "traditional fishing ground" for Mexico, and its tuna fleet operates almost exclusively therein using the method of setting on dolphins.[111]

6.6. The AIDCP was negotiated in response to evidence that many dolphins were dying in the ETP each year[112] and, together with the instruments that have been adopted thereunder[113], establishes a programme of monitoring, tracking, verification, and certification of particular tuna fishing practices in the ETP.[114] The AIDCP is recognized to have made an important contribution to dolphin protection and to the dramatic reduction of observed dolphin mortality in the ETP.[115] The AIDCP regulates the fishing methods of purse-seine vessels in the ETP according to the size of the vessel, by prohibiting small purse-seine vessels from setting on dolphins and permitting large purse-seine vessels to set on dolphins only within specified dolphin mortality limits (DMLs).[116] Under the AIDCP, large purse-seine vessels are also subject to a number of requirements in respect of the fishing gear that they must carry and certain procedures that they must perform, so as to reduce the risks to dolphins arising from setting on dolphins. The AIDCP has established certain mechanisms to enforce these requirements and mortality limits. In addition to mandating the presence of independent observers on board large purse-seine vessels fishing in the ETP, each party must also establish its own tracking and verification programme, implemented and operated by a designated national authority, and ensure that it includes periodic audits and spot checks for tuna products.[117] Finally, voluntary procedures are put in place to enable tuna caught and tracked in accordance with this programme to receive an "AIDCP dolphin-safe certification".[118] As

[108] The ETP, as defined under US law, extends westward from the west coast of the Americas to include most of the tropical Pacific east of the Hawaiian Islands, and includes high seas areas as well as the exclusive economic zones and territorial seas of Chile, Colombia, Costa Rica, Ecuador, El Salvador, France (due to the French overseas possession, Clipperton Island), Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, and the United States. More specifically, the DPCIA defines the ETP as "the area of the Pacific Ocean bounded by 40 degrees north latitude, 40 degrees south latitude, 160 degrees west longitude, and the western coastlines of North, Central, and South America". (Appellate Body Report, *US – Tuna II (Mexico)*, fn 356 to para. 172 (quoting Section 1385(c)(2) of the DPCIA))

[109] Original Panel Report, paras. 4.6 and 7.306; Appellate Body Report, *US – Tuna II (Mexico)*, fn 355 to para. 172.

[110] Appellate Body Report, *US – Tuna II (Mexico)*, fn 355 to para. 172. The original panel found that setting on dolphins occurs especially in the ETP because of the regular association observed between tuna and dolphins in that area. (Original Panel Report, para. 7.306. See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 248)

[111] Appellate Body Report, *US – Tuna II (Mexico)*, para. 234. See also Original Panel Report, para. 7.308 (referring to Mexico's first written submission to the original panel, paras. 165, 167, 186, and 188).

[112] Original Panel Report, para. 2.35.

[113] In particular, AIDCP, Resolution to Adopt the Modified System for Tracking and Verification of Tuna (AIDCP Tracking and Verification System) (Original Panel Exhibit MEX-55; Panel Exhibit MEX-36) (see Panel Report, para. 7.296; and Original Panel Report, para. 2.40); and AIDCP, Resolution to Establish Procedures for AIDCP Dolphin Safe Tuna Certification (Original Panel Exhibit MEX-56; Panel Exhibit MEX-115) (see Original Panel Report, para. 2.41). Both resolutions were adopted by the parties to the AIDCP on 20 June 2001.

[114] Original Panel Report, para. 2.39. The objectives of the AIDCP are threefold: (i) to reduce progressively incidental dolphin mortalities in the tuna purse-seine fishery in the Agreement Area to levels approaching zero, through the setting of annual limits; (ii) with the goal of eliminating dolphin mortality in this fishery, to seek ecologically sound means of capturing large yellowfin tunas not in association with dolphins; and (iii) to ensure the long-term sustainability of the tuna stocks in the Agreement Area, as well as that of the marine resources related to this fishery, taking into consideration the interrelationship among species in the ecosystem, with special emphasis on, *inter alia*, avoiding, reducing, and minimizing bycatch and discards of juvenile tuna and non-target species. (Article II of the AIDCP (Original Panel Exhibits US-23a and MEX-11; Panel Exhibit MEX-30))

[115] Original Panel Report, paras. 2.39 and 7.609.

[116] Large purse-seine vessels are defined as vessels with a carrying capacity greater than 363 metric tons. The AIDCP does not apply to other fishing vessels in the ETP, such as longline vessels, and pole and line vessels. According to the United States, this is because such vessels are not capable of setting on dolphins. (United States' appellant's submission, fn 61 to para. 65; Annexes I, IV(I)(3)(c), and VII(6) to the AIDCP (Original Panel Exhibits US-23a and MEX-11; Panel Exhibit MEX-30))

[117] Original Panel Report, para. 7.611.

[118] Original Panel Report, para. 2.41; Article 2.1 of the AIDCP Dolphin Safe Certification Resolution (Original Panel Exhibit MEX-56; Panel Exhibit MEX-115).

discussed below, the AIDCP's definition of "dolphin safe" is not coextensive with the definition of "dolphin safe" under the US measure at issue in this dispute.[119]

6.1 The amended tuna measure

6.7. Mexico challenges the United States' regulatory regime establishing the conditions for the use of a dolphin-safe label on tuna products sold in the US market. As discussed above[120], in its request for the establishment of an Article 21.5 panel, Mexico asserted that the US regime comprises the following three legal instruments: (i) the DPCIA[121]; (ii) the implementing regulations[122]; and (iii) the Hogarth ruling.[123]

6.8. Taken together, the DPCIA, the implementing regulations, and the Hogarth ruling constitute the "amended tuna measure"[124] and condition access to a dolphin-safe label upon certain requirements that vary depending on the fishing method by which tuna contained in the tuna product is harvested, the ocean area where it is caught, and the type of vessel used. 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 these instruments.[125]

6.9. The amended tuna measure sets out several substantive conditions for access to the dolphin-safe label. First, the measure disqualifies from access to that label all tuna products containing tuna harvested by two methods of fishing: (i) large-scale driftnet fishing on the high seas; and (ii) vessels using purse-seine nets to encircle or "set on" dolphins anywhere in the world.[126] Although the DPCIA's disqualification of tuna products derived from tuna caught by setting on dolphins was suspended in 2002 by virtue of administrative action[127], the Hogarth ruling overturned that action shortly thereafter[128], thereby restoring this condition of access to the US dolphin-safe labelling regime. The disqualification of tuna products containing tuna caught by setting on dolphins thus formed part of, and is unchanged as compared to, the original tuna measure. Second, all other tuna products, that is, those containing tuna harvested by all other fishing methods, are eligible for the dolphin-safe label only if no dolphins were killed or seriously injured in the sets or other gear deployment in which the tuna were caught. The amended tuna

[119] Under the AIDCP Dolphin Safe Certification Resolution, "dolphin-safe tuna" is defined as "tuna captured in sets in which there is no mortality or serious injury of dolphins", and "non-dolphin-safe tuna" is defined as "tuna captured in sets in which mortality or serious injury of dolphins occurs". (Original Panel Report, para. 2.40)

[120] See *supra*, para. 1.9.

[121] Original Panel Exhibit US-5; Panel Exhibit MEX-8.

[122] Panel Exhibit US-2.

[123] Original Panel Exhibit MEX-31; Panel Exhibit MEX-16. Mexico further challenged any implementing guidance, directives, policy announcements or any other document issued in relation to instruments (i) through (iii), including any modifications or amendments in relation to those instruments. (Panel Report, para. 2.1 (referring to Mexico's panel request; and first written submission to the Panel, para. 11))

[124] The US dolphin-safe labelling provisions do not make the use of a dolphin-safe label obligatory for the importation or sale of tuna products in the United States. (Appellate Body Report, *US – Tuna II (Mexico)*, para. 196)

[125] Section 1385(d)(3)(B) of the DPCIA; Section 216.90 of the implementing regulations. See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 172.

[126] Panel Report, paras. 3.35-3.36; Appellate Body Report, *US – Tuna II (Mexico)*, para. 174.

[127] According to Section 1385(h) of the DPCIA, the type of certification required for tuna products containing tuna harvested by large purse-seine vessels in the ETP was subject to a finding by the US Secretary of Commerce on whether the intentional deployment on or encirclement of dolphins with purse-seine nets was having a significant adverse impact on any depleted dolphin stock in the ETP. The US Secretary of Commerce initially found that setting on dolphins was not having a significant adverse effect on any depleted dolphin stock in the ETP. The effect of this finding was that tuna products containing tuna caught by setting on dolphins could be labelled dolphin-safe provided that the other conditions for access to the label were satisfied. (Original Panel Report, para. 2.18; Appellate Body Report, *US – Tuna II (Mexico)*, para. 176)

[128] The finding of the US Secretary of Commerce was overruled in *Earth Island Institute v. Evans*, 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. The ruling was affirmed on appeal in the Hogarth ruling. As a result, Section 1385(h) requires that tuna products derived from tuna harvested by large purse-seine vessels in the ETP may be labelled dolphin safe only if the captain and an IDCP-approved observer certify both that there was "no setting on dolphins" and that there were "no dolphins killed or seriously injured". (Panel Report, para. 3.19. See also Original Panel Report, paras. 2.15-2.20; and Appellate Body Report, *US – Tuna II (Mexico)*, paras. 175-176)

measure also prescribes a number of certification requirements and tracking and verification requirements relating to the substantive conditions.

6.10. Apart from large-scale driftnet fishing on the high seas[129], the amended tuna measure distinguishes among three general categories of fisheries[130]: (i) large purse-seine[131] vessels in the ETP[132] (the ETP large purse-seine fishery); (ii) purse-seine vessels outside the ETP[133] (the non-ETP purse-seine fishery); and (iii) other fisheries, which include non-purse-seine vessels in any ocean area and small purse-seine vessels in the ETP ("all other fisheries").[134] Access to the dolphin-safe label for all fisheries requires certification that no dolphins were killed or seriously injured in the sets or other gear deployment in which the tuna were caught ("no dolphins killed or seriously injured" certification). For tuna caught by purse-seine vessels falling within the first two categories, certification that no purse-seine net was intentionally deployed on or used to encircle dolphins during the particular trip on which the tuna were caught ("no setting on dolphins" certification) is also a condition of access to the label. The relevant certification(s) must be made by a vessel's captain. The relevant certification(s) may also need to be made by an observer in certain defined circumstances.

6.11. More specifically, for tuna products derived from tuna caught in the ETP large purse-seine fishery, both of the above certifications have to be provided by both the captain and an International Dolphin Conservation Program (IDCP)-approved observer. For tuna products derived from tuna caught in any fishery other than the ETP large purse-seine fishery, these certifications have to be provided, in principle, only by the vessel captain.[135] For such tuna products, it is only where the National Marine Fisheries Service (NMFS)[136] Assistant Administrator has made certain determinations that the amended tuna measure also conditions access to the label upon the provision of the above certifications by a qualified and approved observer. This additional requirement to provide observer certification(s) is triggered when the NMFS Assistant Administrator makes a determination with respect to a specific fishery: (i) within the non-ETP purse-seine fishery, that there is a regular and significant association between dolphins and tuna, similar to the association between dolphins and tuna in the ETP; or (ii) within "all other fisheries", that there is a regular and significant mortality or serious injury of dolphins.[137] The Panel referred to this aspect of the amended tuna measure as the "determination provisions".[138]

6.12. Furthermore, under the amended tuna measure, access to the dolphin-safe label requires the segregation of dolphin-safe and non-dolphin-safe tuna from the moment of the catch through the entire processing chain. In order to track and verify the dolphin-safe status of tuna, the NMFS

[129] Section 1385(d)(1)(A) of the DPCIA; and Section 216.91(a)(3) of the implementing regulations.

[130] For purposes of this dispute, the term "fishery" may be defined by the geographic region in which the fishing occurs, the vessel and fishing method used, and the target species. (See Mexico's response to Panel question No. 52, para. 139 (referring to Food and Agriculture Organization, Fisheries Glossary, available at: <http://www.fao.org/fi/glossary/> (Panel Exhibit MEX-132)); and United States' response to Panel question No. 21, para. 135)

[131] The Panel indicated that, consistent with the AIDCP, US law, and the reports in the original proceedings, it would use 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. (Panel Report, fn 28 to para. 3.12)

[132] Section 1385(d)(1)(C), in conjunction with Section 1385(d)(2) of the DPCIA; Section 216.91(a)(1) of the implementing regulations.

[133] Section 1385(d)(1)(B) of the DPCIA; Section 216.91(a)(2) of the implementing regulations.

[134] Section 1385(d)(1)(D) of the DPCIA; Section 216.91(a)(4) of the implementing regulations.

[135] Only the "no dolphins killed or seriously injured" certification has to be provided by the vessel captain for tuna products derived from tuna caught in "all other fisheries".

[136] The NMFS is part of the USDOC.

[137] Under the amended tuna measure, the requirement to provide observer certification(s) is also triggered where the NMFS Assistant Administrator has determined that observers are qualified and authorized to make the necessary certification(s), and such observers are already on board the vessel. The NMFS Assistant Administrator has the authority to make such determinations with respect to all fisheries other than the ETP large purse-seine fishery. (Sections 216.91(a)(2)(iii)(B) and 216.91(a)(4)(ii) of the implementing regulations)

[138] Panel Report, paras. 7.249 and 7.256.

has established the Tuna Tracking and Verification Program (TTVP).[139] The basic requirement to segregate dolphin-safe from non-dolphin-safe tuna from the time it was caught through unloading and processing applies irrespective of the area of the ocean in which the tuna was caught and the type of vessel that harvested it.[140] More detailed segregation requirements apply, however, to tuna products derived from tuna caught in the ETP large purse-seine fishery, given that the tracking and verification of tuna caught in this fishery should be conducted consistent with the AIDCP Resolution to Adopt the Modified System for Tracking and Verification of Tuna[141] (AIDCP Tracking and Verification System).[142]

6.13. Certain documentation requirements pertain to the segregation that is to be conducted by persons and entities involved in the catch and processing of tuna. First, all tuna products imported into the United States, regardless of where the tuna is caught and whether the dolphin-safe label is used, must be accompanied by a Fisheries Certificate of Origin[143] (Form 370) of the National Oceanic and Atmospheric Administration (NOAA).[144] Form 370 requires the importer to indicate whether it seeks to declare the status of the tuna product as "dolphin-safe", and, if so, to attach the certification(s) identified as necessary to establish the dolphin-safe status of the relevant category.[145] Second, tuna caught by US-flagged large purse-seine vessels fishing in the ETP must be accompanied by Tuna Tracking Forms (TTFs), which record certain information regarding each tuna set made on a particular fishing trip. One TTF is used to record dolphin-safe sets and another one to record non-dolphin-safe sets. For non-US-flagged large purse-seine vessels in the ETP, the TTF numbers must be listed in a certification attached to the Form 370.[146]

6.14. Tracking and verification requirements also apply regarding the oversight exercised by US authorities on importers and US-based persons and entities involved in the catch and

[139] Panel Report, paras. 3.26 and 3.28; Section 1385(f) of the DPCIA; Section 216.93 of the implementing regulations. The provisions establishing the TTVP are mainly contained in CFR Title 50, Section 216.24, and Sections 216.91-216.93 of the implementing regulations. Through the use of the TTVP, information is collected from domestic tuna processors, US tuna vessels, and importers of tuna products to verify whether tuna products labelled dolphin-safe meet the applicable conditions. (Panel Report, para. 3.26 (referring to Original Panel Report, para. 2.31))

[140] Panel Report, paras. 3.50-3.51. Thus, for all fisheries, during fishing trips, tuna caught in sets designated as "dolphin-safe" must be stored separately from tuna caught in non-dolphin-safe sets from the time of capture through unloading. The vessel captain or the observer, where applicable, should designate separate wells, and any commingling of dolphin-safe and non-dolphin-safe tuna in any given well disqualifies the entire contents of that well from access to the label. (Panel Report, paras. 3.28, 3.31, and 3.51; Sections 216.93(c)(1)(i), 216.93(c)(2)(i), and 216.93(c)(3)(i) of the implementing regulations. See also Section 4 of the AIDCP Tracking and Verification System for tuna caught by a large purse-seine vessel in the ETP) Furthermore, tuna offloaded to trucks, storage facilities, or carrier vessels must be loaded or stored in such a way as to maintain and safeguard the identification of the dolphin-safe or non-dolphin-safe status of the tuna as it left the fishing vessel. (Panel Report, paras. 3.31 and 3.51; Sections 216.93(c)(1)(iv), 216.93(c)(2)(ii), and 216.93(c)(3)(ii) of the implementing regulations. See also Section 5 of the AIDCP Tracking and Verification System, for tuna caught by a large purse-seine vessel in the ETP) Finally, during canning activities of US canneries, non-dolphin-safe tuna may not be mixed in any manner or at any time during processing with any dolphin-safe tuna or tuna products and may not share the same storage containers, cookers, conveyers, tables, or other canning and labelling machinery. (Panel Report, paras. 3.31 and 3.51; Section 216.93(d)(4) of the implementing regulations. See also Section 6(b) of the AIDCP Tracking and Verification System, for tuna caught by a large purse-seine vessel in the ETP)

[141] Adopted on 20 June 2001. (Original Panel Exhibit MEX-55; Panel Exhibit MEX-36)

[142] Section 216.93(c)(v) of the implementing regulations.

[143] Panel Exhibit MEX-22.

[144] Panel Report, para. 3.49. CFR Title 50, Section 216.24(f)(2), and Sections 216.92(b)(2)(ii) and 216.93(f) of the implementing regulations, refer to the need for tuna products imported into the United States to be accompanied by a properly completed Form 370. Form 370 requires information regarding, *inter alia*, the dolphin-safe conditions of the tuna caught during the trip, the ocean area in which the trip took place, the fishing gear used, and the vessel's name and flag. (CFR Title 50, Section 216.24(f)(4); see Panel Exhibit MEX-20)

[145] In this respect, Form 370 lists 5 categories for which specific certifications have to be attached: (i) tuna caught without using a purse-seine net in a fishery where no determination of regular and significant mortality or serious injury of dolphins has been made; (ii) tuna caught outside the ETP using a purse-seine net in a fishery where no determination of regular and significant association between dolphins and tuna has been made; (iii) tuna caught outside the ETP using a purse-seine net in a fishery where a determination of regular and significant association between dolphins and tuna has been made; (iv) tuna caught in the ETP by a small purse-seine vessel; or (v) tuna caught in the ETP by a large purse-seine vessel.

[146] Panel Report, paras. 3.28-3.29; Sections 216.92(a)(1) and 216.92(b)(2)(iii) of the implementing regulations. The content of the TTFs is described in more detail in section 6.1.1 below.

processing of tuna for sale in the US market. The relevant provisions provide for checks to be performed on the operation of US canneries[147], and require monthly reports from canneries and other US tuna processors containing certain specified information, including the certifications required for access to the dolphin-safe label.[148] US authorities may also conduct audits and spot checks on any exporter, trans-shipper, importer, processor, or wholesaler/distributor of tuna or tuna products.[149]

6.15. The specific conditions applicable to the three categories of fisheries under the amended tuna measure are described below.

6.16. We recall that the original tuna measure comprised three legal instruments: the DPCIA; the original implementing regulations; and the Hogarth ruling. In the amended tuna measure, the DPCIA and the Hogarth ruling remain unchanged. Conversely, the 2013 Final Rule, which the United States identifies as the measure taken to comply with the recommendations and rulings of the DSB in the original proceedings[150], modified certain aspects of Sections 216.91 and 216.93 of CFR Title 50.[151] The other sections of the implementing regulations challenged by Mexico – notably Section 216.92, which sets out requirements for access to the dolphin-safe label that apply specifically to tuna products derived from tuna harvested in the ETP by large purse-seine vessels – are unchanged by the 2013 Final Rule.

6.1.1 The ETP large purse-seine fishery

6.17. In order to qualify for the dolphin-safe label, tuna products derived from tuna caught by a large purse-seine vessel in the ETP must be accompanied by the following certifications:

a. a certification from an authorized IATTC or government official that an IDCP-approved observer was on board the vessel during the entire trip during which the tuna was caught[152]; and

b. a certification from the vessel captain and an IDCP-approved observer that:

   i. no purse-seine net was intentionally deployed on or used to encircle dolphins during the same fishing trip[153]; and

   ii. no dolphins were killed or seriously injured in the sets in which the tuna was caught.[154]

[147] Panel Report, paras. 3.52 and 7.303 (referring to United States' first written submission to the Panel, para. 53). These checks include scheduled or unscheduled inspections by an NMFS representative in order to monitor delivery and verify that dolphin-safe and non-dolphin-safe tuna are clearly identified and remain segregated. (Section 216.93(d)(1) of the implementing regulations)

[148] Panel Report, para. 7.303; Sections 216.93(d) and 216.93(e) of the implementing regulations. Tuna processors must submit reports on all tuna received at the processing facilities containing information about, *inter alia*, species, condition, weight, ocean area, catcher vessel, gear type, trip dates, carrier name, unloading dates, location of unloading, dolphin-safe status, and relevant certifications, as well as the Form 370 (for imported tuna). Where the tuna processor indicates the tuna is eligible for the dolphin-safe label, it must enclose the required certifications. (Ibid.)

[149] In order to facilitate monitoring, all such persons and entities must maintain records relating to tuna for two years, including the relevant certifications, forms, and reports submitted to US authorities. (Panel Report, para. 7.303 (referring to United States' first written submission to the Panel, para. 52); Section 216.93(g) of the implementing regulations)

[150] Panel Report, para. 3.3.

[151] Panel Report, para. 3.32. See also Mexico's panel request, p. 1.

[152] Section 1385(d)(2)(B)(ii)(III) of the DPCIA; Section 216.91(a)(1)(i), in conjunction with Section 216.92(b)(2)(iii)(A), of the implementing regulations.

[153] Section 1385(d)(2)(B)(i), in conjunction with Section 1385(h)(2)(C) of the DPCIA; Section 216.91(a)(1)(iii) of the implementing regulations.

[154] Section 1385(d)(2)(B)(i), in conjunction with Section 1385(h)(2) of the DPCIA; Section 216.91(a)(1)(ii) of the implementing regulations.

6.18. These certification requirements should be distinguished from those under the AIDCP, where "dolphin-safe" tuna is defined as "tuna captured in sets in which there is no mortality or serious injury of dolphins".[155]

6.19. As regards the tracking and verification requirements, access to the dolphin-safe label for US-flagged large purse-seine vessels fishing in the ETP is conditional upon maintaining TTFs consistently with the AIDCP Tracking and Verification System.[156] IDCP-approved TTFs, each bearing a unique number, are used by the observer to record every set made during a fishing trip. Two TTFs are used for each trip, one to record tuna harvested in dolphin-safe sets, and one to record tuna harvested in non-dolphin-safe sets.[157] A set is "non-dolphin safe" if a dolphin died or was seriously injured during the set.[158] The IDCP-approved observer[159] and the vessel engineer each initials 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. Tuna caught in sets designated as dolphin safe by the observer must be stored separately from tuna caught in non-dolphin-safe sets from the time of capture through unloading.[160] Independent observers monitor the loading and unloading of wells, and individual lots of tuna are assigned the corresponding TTF tracking numbers that can be traced through each step of production of the tuna products.[161]

6.20. The amended tuna measure directly conditions access to the dolphin-safe label upon maintaining TTFs only for tuna products derived from tuna caught by US-flagged ETP large purse-seine vessels.[162] In practice, however, the same tracking and verification regime also applies in respect of non-US-flagged large purse-seine vessels in the ETP. Under the amended tuna measure, tuna products containing tuna harvested in the ETP by non-US-flagged large purse-seine vessels may be labelled dolphin safe only if the vessel belongs to a nation that is a party to the AIDCP.[163] In addition, it is undisputed between the parties that the AIDCP requires imposition of the same TTF system as the one implemented by the amended tuna measure for US-flagged ETP large purse-seine vessels.[164] Moreover, Form 370 requires that imports of tuna harvested by non-US-flagged ETP large purse-seine vessels, or of tuna products derived from the same, be accompanied by documentation from the appropriate IDCP member country certifying that there was an IDCP-approved observer on board the vessel at all times and listing the numbers for the

[155] AIDCP Tracking and Verification System (Original Panel Exhibit MEX-55; Panel Exhibit MEX-36). Thus, under the AIDCP, there is no requirement to certify that a large purse-seine vessel did not set on dolphins.

[156] Section 216.93(c)(1)(v) of the implementing regulations. See also Panel Report, para. 3.28; and AIDCP Tracking and Verification System (Original Panel Exhibit MEX-55; Panel Exhibit MEX-36).

[157] Panel Report, para. 3.28; Section 216.93(a) of the implementing regulations. 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. (Ibid.)

[158] Panel Report, para. 3.28 (referring to Section 216.93(c)(1)(i); and United States' first written submission to the Panel, fn 63 to para. 35).

[159] The TTF forms must be certified by the independent observers who are required to be on board large purse-seine vessels in the ETP. (Panel Report, para. 3.28 (referring to Mexico's first written submission to the Panel, para. 82))

[160] Panel Report, paras. 3.31 and 3.50; Section 216.93(c)(1)(i) of the implementing regulations. Specifically, if tuna is 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. In addition, when tuna is to be unloaded from a large purse-seine vessel fishing in the ETP, the captain, managing owner, or vessel agent must provide to US authorities at least 48 hours' notice of the vessel's intended place of landing, arrival time, and schedule of unloading. (Section 216.93(c)(1)(ii) of the implementing regulations)

[161] Panel Report, para. 3.50 (referring to Mexico's first written submission to the Panel, para. 92). At port, the species and amount of tuna unloaded are noted in the respective original TTFs. (Section 216.93(c)(1)(iii) of the implementing regulations)

[162] Panel Report, paras. 3.47-3.48.

[163] Panel Report, para. 3.29; Section 216.92(b)(2)(i) of the implementing regulations.

[164] Panel Report, para. 3.29 (referring to Mexico's first written submission to the Panel, paras. 85-88).

associated TTFs.[165] Thus, under the amended tuna measure, tuna products containing tuna caught by both US-flagged and non-US-flagged large purse-seine vessels in the ETP have access to the dolphin-safe label only if the handling of the TTFs and the tracking and verification of tuna is conducted consistent with the AIDCP Tracking and Verification System.[166]

6.21. The certification and tracking and verification requirements applicable to large purse-seine vessels in the ETP remain unchanged from the original tuna measure.[167]

6.1.2 The non-ETP purse-seine fishery

6.22. In order to qualify for the dolphin-safe label, tuna products derived from tuna caught by a non-ETP purse-seine vessel[168] must be accompanied by a certification from the vessel captain that:

a. no purse-seine net was intentionally deployed on or used to encircle dolphins during the same fishing trip; and

b. no dolphins were killed or seriously injured in the sets in which the tuna was caught.[169]

6.23. Therefore, in principle, certification by the vessel captain is sufficient for tuna products derived from tuna caught by purse-seine vessels outside the ETP to gain access to the label. Nevertheless, a requirement also to provide these certifications from an observer participating in a national or international programme acceptable to the NMFS Assistant Administrator will be triggered, in the event that the NMFS Assistant Administrator determines for a specific fishery that regular and significant association occurs between dolphins and tuna similar to the association between dolphins and tuna in the ETP.[170] At the time of the panel request in these Article 21.5 proceedings, however, no fishery outside the ETP had been determined to have regular and significant association between dolphins and tuna similar to that in the ETP.[171]

6.24. Therefore, in order to obtain access to the dolphin-safe label, tuna products derived from tuna caught by purse-seine vessels outside the ETP are presently required to have a captain's certification that there were "no dolphins killed or seriously injured" and that there was "no setting on dolphins". Under the original tuna measure, the only requirement for access to the dolphin-safe

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[165] Panel Report, para. 3.48 (referring to United States' first written submission to the Panel, para. 46). Form 370 does not require the provision of the TTFs themselves, but requires that an authorized representative of an IDCP member nation certify that: (i) there was an IDCP-approved observer on board the vessel during the entire trip; and (ii) the tuna contained in the shipment was caught according to the dolphin-safe labelling standards of Section 216.91 (i.e. 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 was caught). Form 370 should also contain the harvesting vessel names and list the TTF numbers represented in the shipment. (Section 216.92(b)(2)(iii) of the implementing regulations) The associated TTFs contain the captain and observer certifications. (United States' response to Panel question No. 59, para. 292) All information concerning the TTFs is maintained by the IATTC and is available for audit and inspection by the members of the AIDCP. (Mexico's response to questioning at the oral hearing)

[166] Panel Report, paras. 3.47-3.48; Section 216.93(c)(v) of the implementing regulations.

[167] Panel Report, paras. 3.39 and 3.47.

[168] Contrary to the labelling conditions applicable to tuna caught in the ETP, those applying to tuna caught outside the ETP do not draw a distinction between large and small purse-seine vessels.

[169] Section 1385(d)(1)(B)(ii) of the DPCIA; Section 216.91(a)(2)(iii)(A) of the implementing regulations.

[170] Section 1385(d)(1)(B)(i) of the DPCIA; Section 216.91(a)(2)(i) of the implementing regulations.

[171] Panel Report, para. 3.22. See also United States' response to Panel question No. 21, para. 133. Under the amended tuna measure, the requirement to provide an observer certification applicable to the non-ETP purse-seine fishery is also triggered where the NMFS Assistant Administrator has determined that observers are qualified and authorized to make the necessary certifications, and such an observer is already on board the vessel. (Section 216.91(a)(2)(iii)(B) of the implementing regulations) The NMFS Assistant Administrator has determined that US observers in seven US domestic fisheries are qualified and authorized to make the relevant certifications. With respect to these fisheries, therefore, the amended tuna measure conditions access to the dolphin-safe label on the provision of both captain and observer certifications, but only when the observer was already on board the vessel for other reasons. Thus, tuna caught on a trip where no observer is already on board may still be labelled dolphin-safe with only a captain's certification. (Panel Report, para. 3.46 (referring to United States' second written submission to the Panel, para. 128))

label applicable to such tuna products was to provide a captain's certification of "no setting on dolphins".[172]

6.25. The amended tuna measure also imposes segregation requirements on this fishery. Tuna caught in sets designated as dolphin safe must be stored separately from tuna caught in non-dolphin-safe sets from the time of capture through unloading.[173] Imported tuna products must also be accompanied by a Form 370, which identifies the gear type that was used to catch the tuna, and contains the necessary certifications.[174]

6.1.3 "All other fisheries"

6.26. Imported tuna products derived from tuna caught in "all other fisheries", i.e. by non-purse-seine vessels in any fishery and small purse-seine vessels in the ETP, may be labelled dolphin safe when accompanied by a certification by the vessel captain that no dolphins were killed or seriously injured during the sets in which the tuna was caught.[175]

6.27. Nevertheless, a requirement also to provide such certification from an observer participating in a national or international programme acceptable to the NMFS Assistant Administrator will be triggered, in the event that the NMFS Assistant Administrator determines for a certain fishery that there is regular and significant mortality or serious injury of dolphins.[176] At the time of the panel request in these Article 21.5 proceedings, no fishery outside the ETP had been determined to have regular and significant mortality or serious injury of dolphins.[177]

6.28. Therefore, in order to obtain access to the dolphin-safe label, tuna products derived from tuna caught by non-purse-seine vessels in any fishery and by small purse-seine vessels in the ETP are presently required to have a captain's certification that there were "no dolphins killed or seriously injured". Under the original tuna measure, access to the dolphin-safe label for such tuna products was not subject to any certification requirements.[178]

6.29. The tracking and verification requirements applicable to this category of fisheries correspond to those for tuna caught by purse-seine vessels outside the ETP.[179]

6.2 Principal modifications under the amended tuna measure

6.30. In summary, under the amended tuna measure, all tuna products derived from tuna caught on a fishing trip involving setting on dolphins remain disqualified from access to the dolphin-safe label. Access to the label is conditional upon the provision of a certification: (a) from both the vessel captain and an IDCP-approved observer that there were "no dolphins killed or seriously injured" and that there was "no setting on dolphins", in the case of tuna products derived from tuna caught by a large purse-seine vessel in the ETP[180]; (b) from the vessel captain that there were "no dolphins killed or seriously injured" and that there was "no setting on dolphins", in the case of tuna products derived from tuna caught by a non-ETP purse-seine vessel; and (c) from the vessel captain that there were "no dolphins killed or seriously injured", in the case of tuna products derived from tuna caught in "all other fisheries". Therefore, in the absence of any

[172] Appellate Body Report, *US – Tuna II (Mexico)*, para. 292. See also Original Panel Report, para. 2.25.
[173] Panel Report, para. 7.302 (referring to United States' first written submission to the Panel, para. 50).
[174] Panel Report, para. 7.301 (referring to United States' first written submission to the Panel, para. 49).
[175] Section 1385(d)(1)(D) of the DPCIA; Section 216.91(a)(4)(i) of the implementing regulations.
[176] Section 1385(d)(1)(D) of the DPCIA; Section 216.91(a)(4)(iii) of the implementing regulations.
[177] Panel Report, para. 3.22. See also United States' response to Panel question No. 21. An observer certification for this category of fisheries is also necessary where the NMFS Assistant Administrator has determined that observers are qualified and authorized to make the necessary certification of "no dolphins killed or seriously injured", and such observers are already on board the vessel. (Section 216.91(a)(4)(ii) of the implementing regulations) As noted above, the NMFS Assistant Administrator has determined that US observers in seven US domestic fisheries are qualified and authorized to make the relevant certification(s). Certification is required only when the observer is already on board of the vessel for other reasons. (See *supra*, fn 171 to para. 6.23)
[178] Appellate Body Report, *US – Tuna II (Mexico)*, para. 248 (referring to Original Panel Report, para. 7.532). See also Original Panel Report, para. 2.25.
[179] Section 216.93(c)(3) of the implementing regulations. See *supra*, para. 6.25.
[180] In addition, a certification must be provided by an authorized IATTC or government official that an IDCP-approved observer was on board the vessel during the entire trip during which the tuna was caught.

determinations made by the NMFS Assistant Administrator[181], observer certification is a condition for access to the dolphin-safe label only as regards tuna products derived from tuna harvested in the ETP large purse-seine fishery. Moreover, the amended tuna measure extends the same basic condition to segregate dolphin-safe from non-dolphin-safe tuna across fisheries in all ocean areas. Specific documentation requirements in the form of TTFs, however, exist only for tuna products derived from tuna caught in the ETP large purse-seine fishery.

6.31. As the overview above shows, the 2013 Final Rule introduced several modifications to the conditions for access to the dolphin-safe label, as compared to the original tuna measure. All of the changes apply only in respect of tuna caught in fisheries outside the ETP large purse-seine fishery. For such fisheries, the 2013 Final Rule introduced three additional conditions, as set out below.

6.32. First, outside the ETP large purse-seine fishery, the amended tuna measure adds as a condition of access to the dolphin-safe label for any tuna product the requirement that a certification be provided by the vessel captain that "no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught". No such certification was required under the original tuna measure. Rather, under the original tuna measure, such certification was required only for tuna products derived from tuna caught by large purse-seine vessels fishing in the ETP.[182]

6.33. Second, outside the ETP large purse-seine fishery, the amended tuna measure establishes as a condition of access to the dolphin-safe label certain segregation requirements whereby tuna caught in sets or other gear deployments designated as dolphin safe must be stored separately from tuna caught in non-dolphin-safe sets or other gear deployments. Such tuna must be offloaded and stored in such a way as to maintain segregation as the tuna leaves the fishing vessel, as well as during the operations of US tuna canneries and other processors. By contrast, under the original tuna measure, segregation was a condition for access to the dolphin-safe label only for tuna products derived from tuna caught by large purse-seine vessels fishing in the ETP.[183]

6.34. Third, outside the ETP large purse-seine fishery, the amended tuna measure contemplates that access to the dolphin-safe label for a particular fishery may also be subject to certification by an observer of "no dolphins killed or seriously injured" and, where applicable, of "no setting on dolphins"[184], where the NMFS Assistant Administrator has determined such observer to be qualified and authorized to make the relevant certifications, and the observer is already on board the vessel.[185] Under the original tuna measure, no such possibility to trigger an additional requirement for certification by an observer existed as a condition for access to the dolphin-safe label.

7 ANALYSIS OF THE APPELLATE BODY

7.1 Mexico's claim regarding the amended tuna measure as a whole

7.1. We first address Mexico's claim that the Panel erred because it reached findings of inconsistency in "a narrow manner rather than concluding that the amended tuna measure, as a

[181] The NMFS Assistant Administrator may determine, in respect of a specific fishery within the non-ETP purse-seine fishery, that there is a regular and significant tuna-dolphin association, similar to the tuna-dolphin association in the ETP, or, in respect of a specific fishery within "all other fisheries", that there is a regular and significant mortality or serious injury of dolphins.

[182] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 176 and 292; Original Panel Report, paras. 2.20 and 2.25(c). Under the original tuna measure, a certification of "no dolphins killed or seriously injured" would also have been required as a condition of access to the dolphin-safe label for fisheries other than the ETP large purse-seine fishery, in case the US Secretary of Commerce had made a determination, with respect to a specific fishery within the non-ETP purse-seine fishery, that there was a regular and significant tuna-dolphin association, or, with respect to a non-purse-seine fishery, that there was a regular and significant mortality or serious injury of dolphins. No such determinations had been made at the time of the original proceedings. (Appellate Body Report, *US – Tuna II (Mexico)*, para. 249 (referring to Original Panel Report, para. 7.534))

[183] Panel Report, para. 3.31.

[184] In the case of the category of "all other fisheries", access to the dolphin-safe label is conditioned only upon a certification of "no dolphins killed or seriously injured". (Section 216.91(a)(4)(i) of the implementing regulations)

[185] In response to questioning at the oral hearing, the United States and Mexico agreed with this description of the three additional conditions and that there are no other significant additional elements introduced to the amended tuna measure by the 2013 Final Rule.

whole, is inconsistent with the covered agreements".[186] Specifically, Mexico considers that the Panel erred in finding that only two of the three elements of the amended tuna measure – the "certification requirements" and the "tracking and verification requirements", but not the "eligibility criteria" – are inconsistent with Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994. Mexico asserts that it challenged the amended tuna measure "as a whole"[187], and that it differentiated between the three different elements of the measure only in making its arguments regarding the legitimate regulatory distinction that is the focus of the second step in the analysis of "treatment no less favourable" under Article 2.1 of the TBT Agreement, and regarding the chapeau analysis under Article XX of the GATT 1994. According to Mexico, "it is the amended tuna measure that violates WTO provisions, … not individual elements of the measure considered in isolation".[188] Mexico requests us to modify the findings and conclusions of the Panel and find that the amended tuna measure as a whole is inconsistent with Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994.[189]

7.2. The United States maintains that Mexico's claim should be rejected. First, the United States contends that Mexico identifies no legal basis for its assertion that the Panel did not properly consider Mexico's claims of discrimination.[190] Second, the United States considers that the factual premise of Mexico's claim is wrong since Mexico did refer to the certification and tracking and verification requirements elsewhere in its submissions, notably in its arguments relating to detrimental impact under the first step of the analysis of "treatment no less favourable" under Article 2.1 of the TBT Agreement.[191] Third, the United States maintains that, whether the detrimental impact caused by the three elements is assessed together or separately, the Panel's analysis would have been the same.[192]

7.3. In addressing this claim by Mexico, we first recount the relevant findings from the panel and the Appellate Body in the original proceedings, as well as the relevant findings of the Panel in these Article 21.5 proceedings. In the original proceedings, the panel considered that the separate legal instruments challenged by Mexico – consisting of the DPCIA, the original implementing regulations, and the Hogarth ruling – together, set out the terms of the US dolphin-safe labelling regime, and therefore comprised a single measure for purposes of its analysis of Mexico's claims.[193] The Appellate Body made a similar statement in its report, further noting that the requirements set out in these separate legal instruments, together, "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".[194] Although both the original panel and the Appellate Body addressed different aspects of the conditions for access to the US dolphin-safe label under Article 2.1 of the TBT Agreement, including certain certification and tracking and verification requirements[195], they also each defined, and reached ultimate findings in respect of, a single measure consisting of "the US dolphin-safe labelling provisions".[196]

7.4. The Article 21.5 Panel addressed the scope and content of the amended tuna measure in two separate parts of its reasoning. At the outset of its Report, in discussing its jurisdiction under Article 21.5 of the DSU, the Panel considered it "clear" that the Appellate Body's conclusions and recommendations in the original proceedings were meant to apply to the original tuna measure "*as a whole*, including all its components".[197] The Panel also addressed the United States'

[186] Mexico's other appellant's submission, para. 66.
[187] Mexico's other appellant's submission, paras. 65-66.
[188] Mexico's other appellant's submission, para. 66.
[189] Mexico's Notice of Other Appeal, para. 5; other appellant's submission, paras. 71 and 78.
[190] United States' appellee's submission, para. 48.
[191] United States' appellee's submission, para. 50.
[192] United States' appellee's submission, para. 51.
[193] Original Panel Report, para. 7.24; Appellate Body Report, *US – Tuna II (Mexico)*, para. 2. See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 193: "[T]he US measure establishes a single and legally mandated set of requirements for making any statement with respect to the broad subject of 'dolphin-safety' of tuna products in the United States."
[194] Appellate Body Report, *US – Tuna II (Mexico)*, para. 172.
[195] See Original Panel Report, paras. 2.1-2.33; and Appellate Body Report, *US – Tuna II (Mexico)*, paras. 172-177.
[196] Original Panel Report, para. 7.26; Appellate Body Report, *US – Tuna II (Mexico)*, paras. 2 and 172, and fn 357 thereto). See also Original Panel Report, para. 8.1; and Appellate Body Report, *US – Tuna II (Mexico)*, paras. 407.
[197] Panel Report, paras. 7.11-7.12. (emphasis original)

argument that the distinctions drawn by the challenged elements of the amended tuna measure were unchanged from the original measure and therefore not subject to these Article 21.5 proceedings. In that analysis, the Panel stressed that, in finding that the original tuna measure lacked even-handedness, the Appellate Body "did not say that any one particular element of the regulatory scheme … was solely responsible for this lack of even-handedness."[198] Instead, it was "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."[199] In particular, the Panel considered that the Appellate Body's reference in the plural to "the difference in labelling conditions" and "different requirements" indicated that the Appellate Body's findings encompassed various distinctions embedded in the original tuna measure, including in respect of the requirements pertaining to certification and tracking and verification.[200] On the basis of this analysis, the Panel concluded that it was faced with the legal question of whether the amended tuna measure, including the 2013 Final Rule, brings the United States into compliance with WTO law, and that it had jurisdiction to consider all of Mexico's claims, including as they relate to the eligibility criteria and the certification and tracking and verification requirements.[201]

7.5. Subsequently, in examining Mexico's claim under Article 2.1 of the TBT Agreement, the Panel stated that its task was "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."[202] Noting Mexico's explanation that such an analysis focuses "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"[203], the Panel considered that Mexico had identified three "central regulatory distinctions" whose design and application give rise to less favourable treatment, namely:

a. the "eligibility criteria", defined as "[t]he 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";

b. the "certification requirements", defined as "[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"; and

c. the "tracking and verification requirements", defined as "[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".[204]

7.6. Mexico referred to these collectively as "the difference in labelling conditions and requirements", and maintained that this difference means that "all like US tuna products and most tuna products of other countries have access to the dolphin-safe label", whereas "the amended tuna measure denies access to this label for most Mexican tuna products."[205] The Panel also recalled the United States' view that any detrimental impact results only from the eligibility criteria, and that the certification and tracking and verification requirements are not relevant because they "do not cause the detrimental impact that was the basis for the DSB's recommendations and rulings".[206]

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[198] Panel Report, para. 7.33.

[199] Panel Report, para. 7.33. See also para. 7.117. The Panel also considered and rejected the United States' contention that the compliance proceedings should be limited to evaluating the 2013 Final Rule. The Panel concluded that its task was "to determine whether the amended tuna measure, including the 2013 Final Rule, brings the United States into compliance" with the WTO covered agreements. (Ibid., para. 7.24)

[200] Panel Report, paras. 7.35-7.37 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, paras. 284 and 298).

[201] Panel Report, para. 7.43.

[202] Panel Report, para. 7.97.

[203] Panel Report, para. 7.98 (quoting Mexico's first written submission to the Panel, para. 235).

[204] Panel Report, para. 7.98 (quoting Mexico's first written submission to the Panel, para. 236).

[205] Panel Report, para. 7.99 (quoting Mexico's second written submission to the Panel, para. 112).

[206] Panel Report, para. 7.101 (quoting United States' second written submission to the Panel, para. 76).

7.7. The Panel considered that Mexico's argumentation on the detrimental impact caused by the certification and tracking and verification requirements "developed" over the course of its written submissions.[207] Although the Panel noted Mexico's contention that it is the differences in labelling conditions and requirements of the measure that "together"[208] deny Mexican products competitive opportunities, the Panel considered that "Mexico's argumentation throughout these proceedings made clear that different elements of the amended tuna measure negatively affect Mexican tuna in different ways."[209] The Panel then summarized its understanding of the parties' arguments and the structure of the analysis that it would follow, thusly:

> [B]oth 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.[210]

7.8. In the remainder of its Report, the Panel proceeded to undertake separate analyses, and to make separate findings, in respect of each of: the "eligibility criteria"; the "different certification requirements"; and the "different tracking and verification requirements".

7.9. We make several observations about the nature of Mexico's claim of error on appeal and how it relates to the analytical approach that was adopted by the Panel.

7.10. First, we note Mexico's contention that it identified and addressed the three different elements of the measure as relevant to the second step of the analysis under Article 2.1 of the TBT Agreement (namely, whether any detrimental impact stems exclusively from a legitimate regulatory distinction), rather than to the first step of that analysis (namely, whether the measure at issue modifies the conditions of competition to the detriment of imported products). According to Mexico, the Panel confused Mexico's arguments relating to these two different steps of the analysis and wrongly characterized Mexico's identification of the regulatory distinctions that were relevant for the second step of the analysis under Article 2.1 as arguments relating to the detrimental impact of the amended tuna measure.[211] Although Mexico claims, generally, that the Panel erred by making discrete findings of consistency and inconsistency in respect of the three elements of the measure, instead of in respect of the measure as a whole, we understand that Mexico is principally targeting the Panel's decision to analyse three distinct forms of detrimental impact and to segment its analysis of them.[212]

7.11. We further note that the Panel's decision to segment its analysis and separately address the three elements of the amended tuna measure had repercussions beyond its detrimental impact analysis. Indeed, the Panel also segmented its consideration of the three elements of the amended tuna measure for purposes of the second step of its Article 2.1 analysis, namely, the assessment of whether the detrimental impact stems exclusively from a legitimate regulatory distinction. In

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[207] Panel Report, para. 7.102. According to the Panel, although Mexico focused on one form of detrimental impact in its first written submission, in its second written submission, Mexico "elaborated on and clarified" its arguments on detrimental impact and, in doing so, "clearly identifie[d] a distinct type of detrimental impact … caused by the different certification and tracking and verification requirements". (Ibid., paras. 7.104-7.105, respectively (referring to Mexico's second written submission to the Panel, para. 117)) In the Panel's view, Mexico's arguments reflect "a clear and cognizable claim of detrimental impact *separate from* the detrimental impact identified by Mexico as the result of the eligibility criteria". (Ibid., para. 7.105 (emphasis original))

[208] Panel Report, paras. 7.105 and 7.107 (quoting Mexico's first written submission to the Panel, para. 223; and second written submission to the Panel, para. 113, respectively).

[209] Panel Report, para. 7.105.

[210] Panel Report, para. 7.108.

[211] Mexico's other appellant's submission, para. 68 (referring to Panel Report, para. 7.105).

[212] Mexico confirmed at the oral hearing that its claim regarding the "measure as a whole" focuses on and is most closely tied to the Panel's analysis of detrimental impact.

addition, the Panel similarly segmented its analysis concerning Mexico's claims under Articles I:1 and III:4 of the GATT 1994, as well as the United States' affirmative defence under Article XX. Thus, the Panel divided every stage of its analysis under the substantive obligations of the TBT Agreement and the GATT 1994 into three parts relating to the "eligibility criteria", the "different certification requirements", and the "different tracking and verification requirements."[213]

7.12. In addition, the Panel also made *discrete findings* regarding the conformity of *each element* with the applicable legal obligation. Thus, the Panel found that 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 other countries, and are thus not inconsistent with Article 2.1 of the TBT Agreement.[214] Conversely, the Panel separately found that each set of "certification requirements" and "tracking and verification requirements" accord less favourable treatment to Mexican tuna and tuna products than that accorded to like products from the United States and other countries, in violation of Article 2.1 of the TBT Agreement.[215] Similarly, the Panel made three discrete findings that each element of the amended tuna measure is inconsistent with Articles I:1 and III:4 of the GATT 1994.[216] Finally, the Panel made discrete findings with respect to each of the three elements of the amended tuna measure under subparagraph (g) and the chapeau of Article XX of the GATT 1994. Although the Panel found that each element of the amended tuna measure was provisionally justified under Article XX(g), it found that the "eligibility criteria" meet the requirements of the chapeau, whereas the "different certification requirements" and the "different tracking and verification requirements" do not.[217] Thus, the Panel found the "eligibility criteria", but not the "certification requirements" or "tracking and verification requirements", to be justified under Article XX. At no point in its Report did the Panel reach a finding of consistency or inconsistency of the amended tuna measure more broadly, or as a whole, with a substantive obligation of the WTO covered agreements.[218]

7.13. We observe that analysing a measure in a segmented manner may raise concerns when the constituent parts of the measure are interrelated and operate in an integrated way. In *EC – Asbestos*, the Appellate Body criticized the panel's approach of examining the measure at issue in two separate stages by focusing first on the prohibitions of the measure, before examining the measure's exceptions. Because the scope of the prohibitions of that measure "can only be understood in light of the exceptions", and because "the exceptions in the measure would have no autonomous legal significance in the absence of the prohibitions", the Appellate Body concluded that the measure should have been examined "as an integrated whole".[219] In *EC – Seal Products*, the Appellate Body noted that the issue of how best to characterize a measure at issue that consists of several different elements is an issue of "particular significance" in cases where the inclusion or exclusion of certain elements in the definition of the measure "can affect the legal characterization, or substantive analysis of the measure".[220] Noting that the panel had found that the relevant legal instruments in that dispute operated in conjunction with each other, that the permissive and the prohibitive elements of the measure were intertwined, and that the parties had agreed that the measure at issue should be treated as a single measure, the Appellate Body "consider[ed] it appropriate to draw conclusions regarding the legal characterization of the EU Seal Regime as a whole on the basis of an integrated analysis of the constituent parts of the measure".[221] The Appellate Body went on to consider that it was only the combined operation of

[213] See Panel Report, sections 7.5.2 (Article 2.1 of the TBT Agreement), 7.6.1.2 (Article I:1 of the GATT 1994), 7.6.2.2 (Article III:4 of the GATT 1994), and 7.7.3.3 (chapeau of Article XX of the GATT 1994).

[214] Panel Report, para. 8.2.a.

[215] Panel Report, paras. 8.2.b and 8.2.c.

[216] Panel Report, para. 8.3.

[217] Panel Report, paras. 8.4-8.5.

[218] We note, however, that the Panel nevertheless recommends that the DSB request the United States "to bring its measure … 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." (Panel Report, para. 8.6)

[219] Appellate Body Report, *EC – Asbestos*, para. 64. The Appellate Body also made similar observations about the measure at issue in *Brazil – Retreaded Tyres*, stating that the panel "might have opted for a more holistic approach to the measure at issue by examining the two elements of [the measure] that relate to retreaded tyres *together*." The Appellate Body noted, however, that the panel's analytical approach was not appealed, and therefore examined the issues appealed on the basis of that approach. (Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 122-127 (emphasis original))

[220] Appellate Body Reports, *EC – Seal Products*, para. 5.20.

[221] Appellate Body Reports, *EC – Seal Products*, para. 5.20.

the various aspects of the measure at issue that gave rise to findings of discrimination under Articles I:1 and III:4 of the GATT 1994.[222]

7.14. As a general matter, we do not see that it is necessarily inappropriate for a panel, in analysing the conformity of a measure with obligations under the WTO covered agreements, to proceed by assessing different elements of the measure in a sequential manner. Indeed, such an approach may, depending on the nature of the measure at issue, be useful, or in some instances critical, to understanding how that measure is designed and applied. In some instances, it may even be unobjectionable for a panel to reach separate findings of inconsistency with respect to separate elements of a measure, for instance, where the elements of the measure are separable, such that they do not depend on each other in substance or in operation.

7.15. Other types of measures, however, may not be so easily parsed, and the approach taken in scrutinizing such measures must not lead to the isolated consideration of a particular element, or particular elements, of a measure in a manner that undermines the legal analysis or leads to a legal conclusion that would have differed had that element been assessed in relation to other relevant elements of the measure. In scenarios where the elements of a measure are interrelated, and certain elements cannot be properly understood without reference to other elements of the measure, such a segmented approach may create artificial distinctions constituting legal error. We also see that, depending on the nature of the legal obligation at issue, a segmented approach may raise concerns when a panel fails to make an overall assessment that synthesizes its reasoning or intermediate conclusions concerning related elements of a measure at issue so as to reach a proper finding of consistency or inconsistency in respect of that measure.

7.16. In our view, there are various "connections" between the different elements of the amended tuna measure that are relevant to the regulatory distinctions examined by the Panel. We observe, for instance, that the original panel and the Appellate Body found that the objectives of the US dolphin-safe labelling regime are, first, "ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins", and, second, "contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins".[223] These are also the objectives of the amended tuna measure.[224] Thus, like the original measure, the amended tuna measure establishes a labelling regime consisting of various elements that are aimed at fulfilling the same objectives.

7.17. In addition to sharing a common purpose, the elements of the amended tuna measure are also highly interconnected. For instance, the two substantive conditions for access to the dolphin-safe label – namely, the conditions of "no setting on dolphins" and "no dolphins killed or seriously injured" – are both defined by, and verified through, the associated certification and tracking and verification requirements. For all covered fisheries, compliance with these conditions is demonstrated through the provision of certain certifications.[225] The measure also establishes a programme for the tracking of tuna that is based on the substantive conditions and that depends, *inter alia*, on the certifications that must accompany tuna products derived from tuna meeting these conditions throughout the catch and subsequent processing of such tuna.[226] In our view, these various provisions underscore the interrelated nature of the different elements of the amended tuna measure examined by the Panel. As the original panel and the Appellate Body

[222] Appellate Body Reports, *EC – Seal Products*, paras. 5.188-5.189.

[223] Appellate Body Report, *US – Tuna II (Mexico)*, para. 325 (quoting Original Panel Report, paras. 7.401, 7.413, and 7.425).

[224] Panel Report, para. 7.523.

[225] See Section 1385(d)(1)-(2) of the DPCIA; and Sections 216.91 and 216.92 of the implementing regulations. Section 216.91(a)(1) of the implementing regulations, for example, identifies three conditions that must be met for the dolphin-safe label to be used for tuna products containing tuna caught in the ETP large purse-seine fishery, the first of which is that "the documentation requirements for dolphin-safe tuna under §216.92 and 216.93 are met".

[226] As can be seen from our above description of the measure at issue, many of the tracking and verification requirements pertain to satisfaction of the "no dolphins killed or seriously injured" condition, although certain such requirements, including those relating to verification, audit, and spot checks of records, as well as through provision of the Form 370 by non-US vessels, also concern a demonstration or verification that the "no setting on dolphins" condition has been met in respect of purse-seine fisheries. See also Section 1385(f) of the DPCIA, which requires the issuance of regulations to implement the statutory requirements, "including regulations to establish a tracking and verification program that provides for the effective tracking of tuna labelled under [Section 1385(d)]".

noted, the existence of the substantive conditions of "no setting on dolphins" and "no dolphins killed or seriously injured" would be meaningless in the absence of requirements that enforce compliance with such standards.[227] Under these circumstances, we do not consider that the substantive conditions for gaining access to the dolphin-safe label can be properly understood without reference to the certification and tracking and verification requirements that define, and demonstrate compliance with, those very conditions.

7.18. At several points in its analysis, the Panel acknowledged the interrelationships between the various elements of the amended tuna measure. As we have noted, in discussing its jurisdiction under Article 21.5, the Panel confirmed that it would examine the amended tuna measure as a whole, including its varying regulatory requirements.[228] In addition, after noting that the Appellate Body's findings encompassed various distinctions embedded in the original tuna measure, including the certification and tracking and verification requirements, the Panel stated that the US dolphin-safe labelling regime "necessarily includes" not only the certification requirements, but also the various documentation requirements constituting "the mechanisms by which compliance with that standard is monitored and demonstrated".[229] The Panel subsequently underscored not only that the amended tuna measure, and in particular 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", but that, in addition, the tracking and verification mechanisms "are central aspects of the tuna measure, working together with the substantive certification requirements".[230] On that basis, the Panel disagreed with the United States that the tracking and verification requirements are "separable" from the certification rules set out in the 2013 Final Rule.[231]

7.19. In the light of this understanding by the Panel of the manner in which the various elements of the amended tuna measure interrelate, it is not clear to us why the Panel considered it appropriate to conduct its subsequent analysis in a segmented manner that addressed particular elements of the measure in isolation from other related elements. For instance, in its consideration of the "eligibility criteria", the Panel adopted a particularly limited focus by examining only the substantive condition that tuna products not be derived from tuna caught on a trip involving setting on dolphins. As we have noted, however, tuna products that meet this condition are eligible for the dolphin-safe label only if they also meet *another* substantive condition, namely, that no dolphins were killed or seriously injured in the sets in which the tuna were caught. By focusing only on the criteria related to the "no setting on dolphins" condition, the Panel's analysis excluded consideration of whether the products concerned also meet the "no dolphins killed or seriously injured" condition. Similarly, in its analysis of the "certification requirements" and "tracking and verification requirements", the Panel considered that such requirements "are relevant only to tuna eligible and intended to receive the dolphin-safe label" – that is, only to "tuna [not] caught by setting on dolphins".[232] In so proceeding, the Panel did not assess how the certification and tracking and verification requirements, which the Panel itself considered to be an integral part of the overall measure, interrelate with each other and with the substantive conditions for access to the dolphin-safe label. The Panel's approach is even more surprising given its earlier conclusion that the tracking and verification requirements are not "separable" from the certification requirements set out in the 2013 Final Rule. Although the Panel stated that it would "indicate the connections between these distinctions where relevant"[233], we do not see that the Panel, in its analysis of whether the amended tuna measure brought the United States into conformity with provisions of the TBT Agreement and the GATT 1994, explained the "connections" between the different elements of the measure giving rise to the distinctions examined by the Panel.

7.20. We further recall that the original tuna measure, like the amended tuna measure, contained provisions relating to qualifying fishing methods, certification, and tracking and verification. While the amended tuna measure has introduced certain changes, as explained in our description of the

[227] In the original proceedings, the Appellate Body upheld the original panel's reasoning that the imposition of a substantive requirement that no dolphins be killed or seriously injured outside the ETP would not be practically relevant "if it is assumed that it cannot be verified". (Appellate Body Report, *US – Tuna II (Mexico)*, para. 294 (quoting Original Panel Report, para. 7.541))

[228] Panel Report, para. 7.33.

[229] Panel Report, fn 125 to para. 7.37.

[230] Panel Report, para. 7.40.

[231] Panel Report, paras. 7.40-7.41.

[232] Panel Report, para. 7.143.

[233] Panel Report, para. 7.108.

measure at issue, these have not altered the overall architecture of the US dolphin-safe labelling regime by somehow undermining the existence of interrelationships among its constituent elements. If anything, the changes reflected in the amended tuna measure serve to reinforce the nature of those interrelationships. The Panel, however, did not adopt an analytical approach to the measure similar to the one used by the panel and the Appellate Body in the original proceedings. In these circumstances, and given the Panel's statements regarding the need to examine the amended tuna measure as a whole and in an integrated manner, we would have expected some discussion by the Panel, during the course, or at the conclusion, of its segmented analysis, as to how the various findings related to one another, and on what basis the Panel proceeded to make discrete findings of consistency and inconsistency notwithstanding the interrelationships among the various elements of the measure.

7.21. In sum, although the Panel had, in discussing its jurisdiction under Article 21.5 of the DSU, emphasized the interlinkages between elements of the amended tuna measure, it subsequently conducted a segmented analysis that isolated consideration of each element of the measure without accounting for the manner in which the elements are interrelated, and without aggregating or synthesizing its analyses or findings relating to those elements before reaching its ultimate conclusions as to the consistency or inconsistency of the amended tuna measure. We recognize that a proper appreciation of the extent to which the interrelationships are relevant, and the extent to which a segmented analysis had a bearing on the outcome of the legal analysis, will be a function of the particular legal obligation under examination – in this case, those set out in Article 2.1 of the TBT Agreement and Articles I:1, III:4, and XX of the GATT 1994. At this stage of our Report, however, we see no merit in analysing the consequences of the Panel's segmented approach in the abstract. Rather, we will assess whether the Panel's approach amounted to, or led it to commit, legal error when we examine the specific claims on appeal that the participants have directed at the Panel's analysis and findings.

7.2 Article 2.1 of the TBT Agreement

7.22. The United States and Mexico each appeals certain aspects of the Panel's reasoning and findings under Article 2.1 of the TBT Agreement. Mexico requests us to reverse the Panel's finding that the eligibility criteria in the amended tuna measure are consistent with Article 2.1 of the TBT Agreement[234], whereas the United States seeks reversal of the Panel's findings that the different certification requirements and the different tracking and verification requirements in the amended tuna measure are inconsistent with Article 2.1 of the TBT Agreement.[235]

7.23. Our analysis is divided into three parts. First, we begin by recalling relevant jurisprudence on the legal standard to be applied under Article 2.1 of the TBT Agreement. Second, we consider the issues raised by the United States on appeal with regard to the Panel's application of Article 2.1 to the measure at issue, and in particular its analysis of whether the amended tuna measure, and the discrete sets of requirements set out therein, adversely modify the conditions of competition for Mexican tuna products in the US market. Third, we consider the respective claims of error raised by the United States and Mexico in connection with the Panel's analysis of whether the detrimental impact that it found the measure at issue to have on Mexican tuna products in the United States' market stems exclusively from a legitimate regulatory distinction. In this third part of our analysis, we begin by assessing the United States' claim that the Panel erred in its articulation of the legal standard under the second step of the "treatment no less favourable" analysis under Article 2.1, before turning to consider the various issues raised by the participants in connection with the Panel's application of the second step of the "treatment no less favourable" analysis under Article 2.1 to the amended tuna measure and to the discrete sets of requirements set out therein.

[234] Panel Report, para. 8.2.a.
[235] Panel Report, paras. 8.2.b and 8.2.c.

7.2.1 "Treatment no less favourable" under Article 2.1 of the TBT Agreement

7.24. Article 2 of the TBT Agreement addresses the "Preparation, Adoption and Application of Technical Regulations by Central Government Bodies", and its first paragraph provides that, "[w]ith respect to their central government bodies":

> 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.

7.25. Article 2.1 contains both a national treatment obligation and a most-favoured-nation treatment obligation. In order to establish a violation of either obligation, a complainant must demonstrate three elements: (i) that the measure at issue is a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement; (ii) that the relevant products are "like products"; and (iii) that the measure at issue accords less favourable treatment to the imported products than to the relevant group of like products.[236] As the United States' appeal with respect to the Panel's interpretation of Article 2.1 concerns only the third of these elements, we limit our summary below to recalling key aspects of the "treatment no less favourable" requirement in Article 2.1, as explained by the Appellate Body in previous reports.

7.26. In *US – Clove Cigarettes*, the Appellate Body identified a two-step analysis to be followed in examining whether the technical regulation at issue accords less favourable treatment to imported products under Article 2.1 of the TBT Agreement.[237] The Appellate Body indicated that the first step of the analysis focuses on whether the technical regulation at issue modifies the conditions of competition to the detriment of such imported products vis-à-vis like products of domestic origin and/or like products originating in any other country.[238] However, a finding that the measure at issue modifies the conditions of competition to the detriment of imported products is not sufficient to demonstrate less favourable treatment under Article 2.1.[239] Rather, a second step of analysis is needed, namely, an assessment of whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.[240] Where the detrimental impact caused by a technical regulation stems exclusively from a legitimate regulatory distinction, such technical regulation is not according less favourable treatment to imported products within the meaning of Article 2.1 of the TBT Agreement.

7.27. Regarding the first step in the analysis, the scope of the comparison to be undertaken in assessing whether there is less favourable treatment of imports depends on the products that a panel has found to be "like" for the purposes of Article 2.1.[241] Once the like products have been properly identified, Article 2.1 requires a panel to compare, on the one hand, the treatment accorded under the measure at issue to the "group" of like products imported from the complaining Member with, on the other hand, that accorded to the "group" of like domestic products and/or the "group" of like products originating in any other country.[242] In making this comparison, 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 detrimental impact finding.[243]

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[236] Appellate Body Reports, *US – Clove Cigarettes*, para. 87; *US – Tuna II (Mexico)*, para. 202.
[237] Appellate Body Report, *US – Clove Cigarettes*, paras. 182 and 215. See also Appellate Body Reports, *US – Tuna II (Mexico)*, para. 215; and *US – COOL*, para. 271.
[238] Appellate Body Report, *US – Clove Cigarettes*, para. 180. See also Appellate Body Reports, *US – Tuna II (Mexico)*, para. 215; and *US – COOL*, para. 268.
[239] Appellate Body Report, *US – Clove Cigarettes*, paras. 182 and 215. See also Appellate Body Reports, *US – Tuna II (Mexico)*, para. 215; and *US – COOL*, para. 271.
[240] Appellate Body Report, *US – Clove Cigarettes*, para. 182. See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 215.
[241] Appellate Body Report, *US – Clove Cigarettes*, para. 192.
[242] Appellate Body Reports, *US – Clove Cigarettes*, para. 193; *US – Tuna II (Mexico)*, para. 215; *US – COOL*, para. 268. See also *EC – Asbestos*, para. 100.
[243] Appellate Body Report, *US – Tuna II (Mexico)*, para. 225.

7.28. That there is a difference in treatment between products of different country origins is neither necessary, nor sufficient to establish detrimental impact.[244] By the same token, the application of formally identical legal provisions to imported and like products of different origins may nevertheless entail a detrimental impact on the competitive conditions for the imported products.[245] In examining whether a technical regulation has a *de facto* detrimental impact, a panel "must take into consideration 'the totality of facts and circumstances before it'"[246] and assess any "implications" for competitive conditions "discernible from the design, structure, and expected operation of the measure".[247] Such an examination must take account of all the relevant features of the market, which may include the particular characteristics of the industry at issue, the relative market shares in a given industry, consumer preferences, and historical trade patterns.[248] That is, a panel must examine the operation of the particular technical regulation at issue in the particular market in which it is applied.[249]

7.29. Article 2.1 of the TBT Agreement, like Articles I:1 and III:4 of the GATT 1994, protects the equality of competitive opportunities between like products rather than any particular volume of trade.[250] Therefore, a panel is not required under Article 2.1 to ground its legal conclusions on evidence of the actual trade effects of the technical regulation in the relevant market.[251] Nor is a panel limited, in analysing detrimental impact, to an examination of the operation of the technical regulation at issue within the confines of scenarios that are representative of current patterns of trade.[252] Rather, a party may make its case and a panel may reach conclusions concerning detrimental impact on the basis of evidence and arguments going to the "design, structure, and expected operation of the measure".[253] At the same time, a finding of detrimental impact cannot rest on simple assertion[254], and a panel should not "ascribe undue weight to the effect of a technical regulation in any hypothetical scenario".[255]

7.30. Turning to the second step of the "treatment no less favourable" analysis under Article 2.1 of the TBT Agreement, we note that the Appellate Body has emphasized that the specific context provided by other provisions of the TBT Agreement is instructive in understanding the expression "treatment no less favourable" under Article 2.1. The specific context provided by, in particular, Annex 1.1, Article 2.2, and the second, fifth, and sixth recitals of the preamble, "supports a reading that Article 2.1 does not operate to prohibit *a priori* any restriction on international trade".[256] The sixth recital sheds light on the meaning and ambit of the "treatment no less favourable" requirement in Article 2.1 by making clear that technical regulations may pursue

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[244] Appellate Body Reports, *Korea – Various Measures on Beef*, para. 137; *Thailand – Cigarettes (Philippines)*, para. 128; *Dominican Republic – Import and Sale of Cigarettes*, para. 96.

[245] We note that, in *Korea – Various Measures on Beef*, the Appellate Body considered that the GATT panel in *US – Section 337 Tariff Act* had persuasively explained that:

> On the one hand, contracting parties may apply to imported products *different* formal legal requirements if doing so would accord imported products more favourable treatment. On the other hand, it also has to be recognised that there may be cases where the application of formally *identical* legal provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them is in fact no less favourable.

(Appellate Body Report, *Korea – Various Measures on Beef*, para. 136 (quoting GATT Panel Report, *US – Section 337 Tariff Act*, BISD 36S/345, para. 5.11 (emphasis original)))

[246] Appellate Body Reports, *US – COOL*, para. 269 (quoting Appellate Body Report, *US – Clove Cigarettes*, para. 206).

[247] Appellate Body Reports, *US – COOL*, para. 269 (quoting Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 130).

[248] Appellate Body Reports, *US – COOL*, para. 269.

[249] Appellate Body Reports, *US – COOL*, para. 269.

[250] See Appellate Body Reports, *EC – Seal Products*, para. 5.82; *US – Clove Cigarettes*, para. 176; *China – Publications and Audiovisual Products*, para. 305; *Korea – Various Measures on Beef*, paras. 135-136; *Thailand – Cigarettes (Philippines)*, para. 126; *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:1, p. 109; and *Korea – Alcoholic Beverages*, para. 127; and Panel Reports, *US – COOL*, para. 7.571; *Colombia – Ports of Entry*, para. 7.236; and *Argentina – Hides and Leather*, para. 11.20.

[251] Appellate Body Reports, *US – COOL*, para. 325.

[252] Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.15.

[253] Appellate Body Reports, *US – COOL*, para. 269 (quoting Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 130).

[254] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215. (emphasis omitted)

[255] Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.16.

[256] Appellate Body Reports, *US – COOL*, para. 268. See also Appellate Body Reports, *US – Clove Cigarettes*, para. 171; and *US – Tuna II (Mexico)*, para. 212.

legitimate objectives but must not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination.[257] Article 2.1 should not be read to mean that any distinctions, in particular ones that are based *exclusively* on such particular product characteristics, or on particular processes and production methods, would *per se* constitute less favourable treatment within the meaning of Article 2.1.[258] Rather, some distinctions that entail detrimental impact may not amount to less favourable treatment under Article 2.1. This would be the case, in particular, where the detrimental impact on imports stems exclusively from a legitimate regulatory distinction.

7.31. In determining whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction, a panel must carefully scrutinize whether the technical regulation at issue is even-handed in its design, architecture, revealing structure, operation, and application in the light of the particular circumstances of the case.[259] The Appellate Body has pointed out that where a regulatory distinction is not designed and applied in an even-handed manner – because, for example, it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination – that distinction cannot be considered "legitimate", and thus the detrimental impact will reflect discrimination prohibited under Article 2.1.[260] Therefore, a measure that involves "arbitrary or unjustifiable discrimination" would not be designed and applied in an "even-handed manner". At the same time, the fact that a measure is designed in a manner that constitutes a means of arbitrary or unjustifiable discrimination is *not* the only way in which a measure may lack even-handedness, such that the detrimental impact cannot be said to stem exclusively from legitimate regulatory distinctions.

7.32. With respect to the burden of showing that a technical regulation is inconsistent with Article 2.1 of the TBT Agreement, as we have already explained, a finding that a technical regulation modifies the conditions of competition to the detriment of imported products is not sufficient to demonstrate less favourable treatment under Article 2.1[261] because a regulation that has a *de facto* detrimental impact on imports will not be inconsistent with Article 2.1 when such impact stems exclusively from a legitimate regulatory distinction.[262] With respect to the burden of demonstrating these elements of Article 2.1, in the original proceedings, the Appellate Body noted that it is well established that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.[263] 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.[264] Under Article 2.1, this means that a complainant must show that, under the technical regulation at issue, the treatment accorded to imported products is less favourable than that accorded to like domestic products or like products originating in any other country. Provided that it has shown detrimental impact, a complainant may, therefore, make a *prima facie* showing of less favourable treatment by, for example, adducing evidence and arguments showing that the measure is not even-handed, which would suggest that the measure is inconsistent with Article 2.1.[265] If, however, the respondent shows that the detrimental impact on imported products

[257] Appellate Body Reports, *US – Clove Cigarettes*, para. 173; *US – Tuna II (Mexico)*, para. 213. The sixth recital of the preamble of the TBT Agreement recognizes that a WTO Member may take measures necessary for, *inter alia*, the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that such measures "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade" and are "otherwise in accordance with the provisions of this Agreement".

[258] Appellate Body Reports, *US – Clove Cigarettes*, para. 169; *US – Tuna II (Mexico)*, para. 211; *US – COOL*, para. 268.

[259] Appellate Body Report, *US – Clove Cigarettes*, para. 182.

[260] Appellate Body Reports, *US – COOL*, para. 271.

[261] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 215; *US – Clove Cigarettes*, paras. 182 and 215; *US – COOL*, para. 271.

[262] Appellate Body Reports, *US – COOL*, para. 271; *US – Clove Cigarettes*, para. 182; *US – Tuna II (Mexico)*, para. 215.

[263] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 216; *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, p. 335; *US – COOL*, para. 272. The Appellate Body has indicated that, "where a regulatory distinction is not designed and applied in an even-handed manner – because, for example, it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination – that distinction cannot be considered 'legitimate', and thus the detrimental impact will reflect discrimination prohibited under Article 2.1." (Appellate Body Reports, *US – COOL*, para. 271)

[264] Appellate Body Report, *US – Tuna II (Mexico)*, para. 216.

[265] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 216; *US – Clove Cigarettes*, paras. 182 and 215.

stems exclusively from a legitimate regulatory distinction, it follows that the challenged measure is not inconsistent with Article 2.1.[266]

7.33. Of course, there is no set formula as to how a complainant must make out its case. Rather, the nature and scope of arguments and evidence required to establish a *prima facie* case will necessarily vary according to the facts of the case[267] and from measure to measure, provision to provision, and case to case.[268] Moreover, these rules and principles of WTO jurisprudence must not be applied in an unduly formalistic or mechanistic fashion[269], nor inhibit the substantive analysis that must be undertaken by a panel. In seeking to make out a claim of *de facto* discrimination under Article 2.1, a complainant may elect to rely on some or all of the same regulatory distinctions and evidence as to how they are designed and operate in the relevant market both to establish *de facto* detrimental impact and to show that the regulatory distinctions drawn under the technical regulation involve a lack of even-handedness. While the complaining party bears the burden of making its *prima facie* case, the responding party must prove the case it seeks to make in response[270], and each party bears the burden of substantiating the assertions that it makes.[271] In our view, having promulgated the technical regulation containing the regulatory distinctions that result in the detrimental impact, the responding Member will be best situated to adduce the arguments and evidence needed to explain why, contrary to the complainant's assertions, the technical regulation *is* even-handed and thus why the detrimental impact on imports stems exclusively from a legitimate regulatory distinction. Thus, the Appellate Body noted in the original proceedings that, although the burden of proof to show that the US dolphin-safe labelling provisions were inconsistent with Article 2.1 was on Mexico as the complainant, it was for the United States to support its assertion that its regime was "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the oceans.[272]

7.34. We are not certain that, in its discussion of the burden of proof under Article 2.1, the Panel fully recognized the responsibilities of both parties in this regard. To us, the Panel's reasoning seems to cast the burden of proof as an entirely binary issue. For example, the Panel stated that, on one possible understanding of the burden of proof, "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".[273] Alternatively, the Panel explained, the burden of proof might be allocated such that, if Mexico established detrimental impact, "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."[274] These statements are not in consonance with the Appellate Body's discussion of the burden of proof in the original proceedings and seem to reflect a mechanistic articulation of the function of

[266] Appellate Body Report, *US – Tuna II (Mexico)*, para. 216.
[267] Appellate Body Report, *US – Tuna II (Mexico)*, para. 216.
[268] Appellate Body Reports, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 134; *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 335; *US – Carbon Steel*, para. 157.
[269] For instance, "a panel is not obliged, in every instance, to make an explicit finding that a complaining party has met its burden to establish a *prima facie* case in respect of each element of a particular claim, or that the responding party has effectively rebutted a *prima facie* case. Thus, a panel is not required to make an explicit ruling that a complaining party has established a *prima facie* case of inconsistency before examining the responding party's defence and evidence." (Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 135 (referring to Appellate Body Reports, *Thailand – H-Beams*, para. 134; and *Korea – Dairy*, para. 145))
[270] Appellate Body Report, *Japan – Apples*, para. 154.
[271] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 283; *Japan – Apples*, para. 157; *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, p. 335; *EC – Hormones*, para. 98.
[272] Appellate Body Report, *US – Tuna II (Mexico)*, para. 283. The question before the Appellate Body was thus "whether the United States [had] demonstrated that this difference in labelling conditions is a legitimate regulatory distinction, and hence whether the detrimental impact of the measure stem[med] exclusively from such a distinction rather than reflecting discrimination." (Ibid., para. 284 (emphasis omitted))
[273] Panel Report, para. 7.59. (original emphasis)
[274] Panel Report, para. 7.236. See also para. 7.58.

the burden of proof[275], as well as an improper conflation of the burden and the standard of proof.[276]

7.35. Moreover, we have reservations about the reason given by the Panel for choosing the approach that it did, namely, that "in the present proceedings both parties agree" on the allocation of the burden of proof.[277] In the analysis leading up to its decision to adopt this approach, the Panel expressed its "uncertainty"[278] about what the Appellate Body had previously found with respect to the burden of proving less favourable treatment under Article 2.1. The Panel went on to set out in some detail the views of the parties and the third parties with respect to the allocation of the burden of proof, stating that it was "mindful that there may be systemic reasons for favouring"[279] an approach different from the one agreed upon by the parties, and then decided nevertheless to adopt the parties' agreed approach to allocating the burden of proof.[280] To us, an approach whereby a panel allocates the burden of proof under a provision of the covered agreements solely on the basis of the parties' agreement would not be consistent with its duty to interpret and apply such provision. We recognize that, in this context, the Panel stated that it was aware that it was not "bound by the legal interpretations offered by the parties or the third-parties".[281] Yet, it does appear to have been the parties' joint endorsement that ultimately induced the Panel to adopt the approach that it did. In any event, neither participant has challenged on appeal the Panel's approach to the burden of proof, and we will proceed on the basis of the Appellate Body's articulation of the applicable burden of proof as outlined in paragraphs 7.32 and 7.33 above.

7.2.2 Less favourable treatment – Detrimental impact

7.36. We now turn to the issue of whether the Panel erred in its analysis of whether the amended tuna measure modifies the conditions of competition to the detriment of Mexican tuna products in the US market.

7.37. The United States requests us to reverse the Panel's findings of detrimental impact with respect to the certification and tracking and verification requirements.[282] First, the United States claims that, by grounding its findings on the difference in costs and burdens imposed on tuna products originating inside and outside the ETP large purse-seine fishery, the Panel improperly made the case for Mexico, given that Mexico had not presented arguments and evidence concerning such costs and burdens in its written submissions.[283] Second, according to the United States, the Panel erred in finding that the certification and tracking and verification requirements impose different costs and burdens on tuna products derived from tuna caught inside the ETP large purse-seine fishery as compared to tuna products derived from tuna caught in other fisheries. Even assuming that any such differences exist, the United States claims that the Panel failed to explain how such different costs and burdens modify the conditions of competition to the detriment of Mexican tuna products in the light of the relevant features of the US market.[284] Rather, the Panel erred by reaching conclusions on detrimental impact "without making any factual findings" other than to establish the existence of different certification and tracking and verification

[275] The Panel stated, for example, that "according to the allocation of the burden of proof … it is for Mexico to show, *prima facie* and in the first instance, that the different [certification and] 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 [certification and] tracking and verification requirements in fact stem exclusively from a legitimate regulatory distinction." (Panel Report, para. 7.389. (emphasis original) See also paras. 7.195 and 7.236)

[276] Thus, for example, the Panel expressed concern that, if the burden of proving that detrimental impact does not stem exclusively from a legitimate regulatory distinction belongs to the respondent, then "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*." (Panel Report, para. 7.58 (emphasis added))

[277] Panel Report, para. 7.59.

[278] Panel Report, para. 7.51.

[279] Panel Report, para. 7.58.

[280] Panel Report, paras. 7.46-7.59.

[281] Panel Report, para. 7.59 (referring to Appellate Body Report, *EC – Tariff Preferences*, para. 105).

[282] United States' appellant's submission, paras. 92, 135, 287, and 332 (referring to Panel Report, paras. 7.162, 7.382, 8.2.b, and 8.2.c).

[283] United States' appellant's submission, paras. 136-144 and 288-295.

[284] United States' appellant's submission, paras. 145-155 and 314-319.

requirements.[285] Third, the United States submits that the Panel did not properly establish a genuine relationship between the certification and tracking and verification requirements under the amended tuna measure, on the one hand, and any detrimental impact on the competitive opportunities for Mexican tuna products, on the other hand. In its view, no such relationship exists. The amended tuna measure does not subject Mexican tuna products to its certification and tracking and verification requirements because those products are derived from tuna caught by setting on dolphins and are therefore disqualified from access to the dolphin-safe label from the outset. Further, the United States argues, since the certification and tracking and verification requirements for tuna products derived from tuna caught in the ETP large purse-seine fishery are mandated by the AIDCP, any detrimental impact on Mexican tuna products is not attributable to the amended tuna measure, but rather to Mexico's international obligations.[286]

7.38. Mexico, for its part, maintains that the question of whether the amended tuna measure modifies the conditions of competition to the detriment of its tuna products in the US market was settled by the panel and the Appellate Body in the original proceedings. In particular, Mexico recalls the Appellate Body's finding that the detrimental impact of the original tuna measure on Mexican tuna products was caused by the fact that most such products "contain tuna caught by setting on dolphins in the ETP and are therefore not eligible for a 'dolphin-safe' label", whereas "most tuna products from the United States and other countries that are sold in the US market contain tuna caught by other fishing methods outside the ETP and are therefore eligible for a 'dolphin-safe' label."[287] The amended tuna measure "does not change those aspects of the design and structure of the original tuna measure" that were found to cause detrimental impact.[288] In other words, the amended tuna measure continues to permit all US tuna products and most tuna products from other countries to have access to the dolphin-safe label, while it denies access to this label for most Mexican tuna products.[289] Therefore, in Mexico's view, the Appellate Body's findings, which have not been challenged by the parties in the current proceedings, "definitively establish" that the US dolphin-safe labelling regime modifies the competitive conditions in the US market to the detriment of Mexican tuna products. At the oral hearing, Mexico clarified that this argument relates to its claim on appeal, discussed in section 7.1 above, that the Panel erred in analysing the three sets of requirements under the amended tuna measure – the "eligibility criteria", the "certification requirements", and the "tracking and verification requirements" – separately, as opposed to focusing on the WTO-consistency of the measure as a whole.[290] According to Mexico, these three sets of requirements "operate together" to modify the competitive conditions in the US market to the detriment of Mexican tuna products.[291] Because the amended measure as a whole continues to have a detrimental impact on Mexican tuna products in the US market, Mexico argues that it neither sought to, nor needed to, establish "independent and complete *prima facie* cases" of detrimental impact "for each of the three [sets of] labelling conditions and requirements".[292]

7.39. As a third participant, the European Union echoes Mexico's view and contends that a detrimental impact assessment must focus on what is caused by the measure at issue as a whole – that is, the entire "set of relevant regulatory distinctions".[293] According to the European Union, the main aspects that led the original panel and the Appellate Body to find that the US dolphin-safe labelling regime has a detrimental impact on Mexican tuna products "remain unchanged".[294] In the European Union's view, the Panel should have taken into account the relevant findings from the original proceedings, and should have refrained from undertaking an

[285] United States' appellant's submission, para. 155 (quoting Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 138).

[286] United States' appellant's submission, paras. 167-184 and 327-331.

[287] Mexico's appellee's submission, para. 41 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 284).

[288] Mexico's appellee's submission, para. 43. See also para. 50.

[289] Mexico's appellee's submission, para. 44.

[290] Mexico's other appellant's submission, para. 66.

[291] Mexico's appellee's submission, para. 51.

[292] Mexico's appellee's submission, para. 48. See also paras. 107, 117, and 156.

[293] European Union's third participant's submission, para. 11. (emphasis omitted)

[294] European Union's third participant's submission, para. 12. The European Union points, in particular, to the "significant commercial value" of the dolphin-safe label in the US market; the "asymmetry" in treatment between tuna caught in the ETP large purse-seine fishery and tuna caught in other fisheries; and the "genuine and substantial relationship" between the original measure and the detrimental impact on Mexican tuna and tuna products – despite the intervention of some "private choices" on the part of US consumers and the Mexican fleet. (Ibid., paras. 9 and 12)

analysis of whether the certification and tracking and verification requirements, "considered in isolation", have a detrimental impact.[295] The "increased" certification and tracking and verification requirements bear only on the question of whether the amended tuna measure is even-handed.[296] In the light of the above, the European Union suggests that we declare the Panel's findings regarding the detrimental impact of the certification and tracking and verification requirements moot and of no legal effect.[297]

7.40. In addressing the issues raised by the participants on appeal, we begin by providing an overview of the panel and Appellate Body findings in the original proceedings concerning the detrimental impact of the original tuna measure, as well as the Panel's findings in these compliance proceedings concerning the detrimental impact of the amended tuna measure. We then examine whether the Panel erred in its analysis of whether the various elements constituting the amended tuna measure modify the conditions of competition to the detriment of Mexican tuna products in the US market within the meaning of Article 2.1.

7.2.2.1 The findings of detrimental impact in the original proceedings

7.41. Before the original panel, Mexico claimed that the original tuna measure modified the conditions of competition in the US market to the detriment of its tuna products because: (i) Mexican tuna products are derived almost exclusively from tuna caught in the ETP by setting on dolphins, and cannot therefore access the dolphin-safe label; (ii) US tuna products are derived from tuna caught outside the ETP using other fishing methods, and are thus eligible for access to the label; (iii) most consumers and retailers are sensitive to issues related to dolphin mortality and will not purchase tuna products that are not designated as "dolphin safe"; and (iv) most US canneries will not accept non-dolphin-safe tuna for processing.[298]

7.42. The original panel agreed with Mexico that the dolphin-safe label has "significant commercial value on the US market for tuna products", and that therefore access to such label constitutes an "advantage" on that market.[299] The original panel then considered whether the regulatory distinction drawn by the original tuna measure – whereby tuna products containing tuna caught by setting on dolphins could not access the dolphin-safe label, whereas tuna products containing tuna caught by other fishing methods were eligible for such label – modified the conditions of competition to the detriment of Mexican tuna products vis-à-vis like products from the United States and other countries. In its view, this regulatory distinction did not, *de jure*, place Mexican tuna products "at a disadvantage as compared to US and other imported tuna products"[300], because "any fleet operating anywhere in the world must comply with the requirement" not to set on dolphins.[301]

7.43. Turning to examine whether the original measure nonetheless had a *de facto* detrimental impact in the light of the fishing practices of the Mexican and other fishing fleets, the original panel noted that, since 1990, when the first version of the DPCIA was adopted, US vessels had gradually discontinued setting on dolphins to catch tuna in the ETP, whereas the Mexican fleet had not abandoned the use of such fishing technique.[302] Thus, the original panel considered that any difference in the relative competitive situations of Mexican and other tuna products was not attributable to the original measure, but was rather the result of the choices of private actors[303], including "Mexico's own fishing fleet and canners".[304] It further held that, for similar reasons, "[t]he existence of additional costs for some operators as a result of factors such as existing practices also does not necessarily … imply" a detrimental impact on the competitive conditions of such operators' products.[305] In the light of the above, the original panel was not persuaded that

[295] European Union's third participant's submission, para. 12. (emphasis omitted)
[296] European Union's third participant's submission, paras. 12, 17, 20, 24, and 47.
[297] European Union's third participant's submission, paras. 14, 17, 20, and 48.
[298] Original Panel Report, para. 7.253.
[299] Original Panel Report, paras. 7.289 and 7.291. This finding was not appealed. (See Appellate Body Report, *US – Tuna II (Mexico)*, para. 233)
[300] Original Panel Report, para. 7.311.
[301] Original Panel Report, para. 7.305.
[302] Original Panel Report, paras. 7.327-7.331.
[303] Original Panel Report, para. 7.334.
[304] Original Panel Report, para. 7.378.
[305] Original Panel Report, para. 7.342.

the original tuna measure modified the conditions of competition to the detriment of Mexican tuna products as compared to like products originating in the United States or in any other country.[306]

7.44. The Appellate Body noted that the panel had made the following factual findings: (i) "the Mexican tuna cannery industry is vertically integrated, and the major Mexican tuna products producers and canneries own their vessels, which operate in the ETP"; (ii) "at least two thirds of Mexico's purse seine tuna fleet fishes 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 US dolphin-safe labelling provisions"; (iii) "the US fleet currently does not practice setting on dolphins in the ETP"; and (iv) "as the practices of the US and Mexican tuna fleets currently stand, 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 is potentially eligible for the label".[307]

7.45. In the Appellate Body's view, such findings "clearly establish[ed]" that the lack of access to the dolphin-safe label of 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.[308] The Appellate Body stated that a detrimental impact determination does not hinge on whether imported products "could" somehow obtain market access "by complying with all applicable conditions", but rather on "whether the contested measure modifies the conditions of competition to the detriment of imported products".[309] The Appellate Body disagreed with the Panel that the different competitive situations of Mexican and other tuna products were not attributable to the original tuna measure, but rather to the choices of private actors. For the Appellate Body, the relevant question for assessing whether a genuine relationship exists between a measure and an adverse impact on competitive opportunities for imported products is whether "governmental action 'affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory'."[310] The Appellate Body took the view that it was the "governmental action" in the form of adoption and application of the original tuna measure that had modified the conditions of competition in the market to the detriment of Mexican tuna products, and thus that the detrimental impact flowed from the original measure.[311] In its opinion, "[t]he fact that the detrimental impact on Mexican tuna products may involve some element of private choice [did] not … relieve the United States of responsibility under the TBT Agreement."[312]

7.46. Based on the foregoing, the Appellate Body concluded that the original tuna measure did, indeed, modify the conditions of competition in the US market to the detriment of Mexican tuna products.[313] Later in its report, the Appellate Body summarized its conclusions on detrimental impact in the following terms:

> [T]he detrimental impact of the measure on Mexican tuna products is caused by the fact that most Mexican tuna products contain tuna caught by setting on dolphins in the ETP and are therefore not eligible for a "dolphin-safe" label, whereas most tuna products from the United States and other countries that are sold in the US market contain tuna caught by other fishing methods outside the ETP and are therefore eligible for a "dolphin-safe" label. The aspect of the measure that causes the 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.[314]

[306] Original Panel Report, para. 7.374.
[307] Appellate Body Report, *US – Tuna II (Mexico)*, para. 234 (quoting Original Panel Report, paras. 7.310, 7.314, and 7.316-7.317).
[308] Appellate Body Report, *US – Tuna II (Mexico)*, para. 235.
[309] Appellate Body Report, *US – Tuna II (Mexico)*, para. 221.
[310] Appellate Body Report, *US – Tuna II (Mexico)*, para. 236 (quoting Appellate Body Report, *Korea – Various Measures on Beef*, para. 149).
[311] Appellate Body Report, *US – Tuna II (Mexico)*, para. 239.
[312] Appellate Body Report, *US – Tuna II (Mexico)*, para. 239.
[313] Appellate Body Report, *US – Tuna II (Mexico)*, para. 240.
[314] Appellate Body Report, *US – Tuna II (Mexico)*, para. 284.

7.2.2.2 The Panel's findings

7.47. Before the Article 21.5 Panel, both Mexico and the United States indicated that the detrimental impact of the amended tuna measure is the same as that of the original measure. Mexico's principal argument with respect to detrimental impact was that "[t]he key elements of the design and structure of the measure that operated together to deny competitive opportunities … have not been changed."[315] In particular, the detrimental impact found by the panel and the Appellate Body in the original proceedings – namely, the disqualification of most Mexican tuna products from access to the dolphin-safe label, as opposed to the eligibility of most like products originating in the United States and in other countries for such label – continues to exist.[316] The United States, for its part, did not contest the Appellate Body's conclusions on detrimental impact in the original proceedings[317], which, in its view, focused on access to the dolphin-safe label in the light of "the fishing practices of the US and Mexican fleets".[318] According to the United States, the exclusion of tuna products derived from tuna caught by setting on dolphins "*is* the detrimental impact".[319] In the United States' opinion, the certification and tracking and verification requirements were "not relevant" to the Panel's detrimental impact analysis[320], because Mexican tuna products containing tuna caught by setting on dolphins would still be ineligible for the dolphin-safe label even if those requirements did not exist.[321]

7.48. The Panel took the view that Mexico's arguments concerning the detrimental impact of the amended tuna measure had "developed" over the course of the proceedings.[322] At first, Mexico had focused on the fact that the amended measure denies access to the dolphin-safe label to most Mexican tuna products, whereas all US tuna products and most like products from other countries have access to the label.[323] Subsequently, Mexico explained that it is "the absence of sufficient fishing method qualification, record keeping, verification and observer requirements" outside the ETP large purse-seine fishery that causes Mexican tuna products to "los[e] competitive opportunities to tuna products that may be inaccurately labelled as dolphin-safe".[324] For the Panel, Mexico's later arguments "constitute[d] a clear and cognizable claim of detrimental impact" that was "distinct" and "separate" from the type of detrimental impact that Mexico identified as resulting from the eligibility criteria.[325] While the eligibility criteria are "responsible for the fact that most Mexican tuna products are ineligible to receive the label", the certification and tracking and verification requirements provide a "competitive advantage" to non-Mexican tuna products.[326]

7.49. Accordingly, as discussed in section 7.1 above, the Panel segmented its assessment of the consistency of the amended tuna measure with Article 2.1 into three separate analyses, one for each of the three sets of requirements constituting the measure – the "eligibility criteria", the "different certification requirements", and the "different tracking and verification requirements".[327]

7.50. The Panel began by assessing the consistency with Article 2.1 of the "eligibility criteria" – i.e. the regulatory distinction between tuna products derived from tuna caught by setting on dolphins and tuna products derived from tuna caught by other fishing methods.[328] It observed that these criteria lay "at the very heart of the original proceedings".[329] For this first set of requirements, the Panel did not conduct a two-step analysis of: (i) whether the eligibility criteria have a detrimental impact on the competitive conditions for Mexican tuna products in the US market; and, if so, (ii) whether such detrimental impact stems exclusively from a legitimate

[315] Mexico's first written submission to the Panel, para. 223.
[316] Mexico's first written submission to the Panel, paras. 52, 315, and 329. See also e.g. Mexico's second written submission to the Panel, paras. 104, 203, and 220-221; opening statement at the Panel meeting, para. 50; and response to Panel question No. 7, paras. 20-21.
[317] See Panel Report, para. 7.446.
[318] United States' second written submission to the Panel, para. 68.
[319] United States' first written submission to the Panel, para. 223. (emphasis original)
[320] United States' second written submission to the Panel, para. 75.
[321] United States' first written submission to the Panel, para. 223.
[322] Panel Report, para. 7.102.
[323] Panel Report, para. 7.102 (referring to Mexico's first written submission to the Panel, para. 232).
[324] Panel Report, para. 7.104 (quoting Mexico's second written submission to the Panel, para. 117). (emphasis omitted)
[325] Panel Report, para. 7.105. (emphasis omitted)
[326] Panel Report, para. 7.105. (emphasis omitted)
[327] Panel Report, para. 7.108.
[328] Panel Report, section 7.5.2.2.
[329] Panel Report, para. 7.118.

regulatory distinction. Rather, it took the view that, as an Article 21.5 panel, it ought 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."[330] The Panel understood the Appellate Body in the original proceedings to have "clearly found" that the United States is entitled to treat setting on dolphins differently from other fishing methods[331] and that, therefore, the disqualification from the dolphin-safe label of tuna caught by setting on dolphins, coupled with the qualification for the label of tuna caught by other fishing methods, is not inconsistent with Article 2.1.[332] The Panel did not consider it appropriate to "re-open this inquiry" and, instead, stated that it would "respect and reaffirm" the Appellate Body's finding that, "to the extent that they modify the conditions of competition in the US market to the detriment of Mexican … tuna products, the eligibility criteria are even-handed, and, accordingly, are not inconsistent with Article 2.1 of the TBT Agreement."[333]

7.51. The Panel then moved on to assess, in turn, the consistency with Article 2.1 of the "different certification requirements"[334] and the "different tracking and verification requirements".[335] For each of these sets of requirements, the Panel did conduct a two-step analysis aimed at establishing: (i) whether the set of requirements in question has a detrimental impact on the competitive conditions of Mexican tuna products in the US market; and, if so, (ii) whether such detrimental impact stems exclusively from a legitimate regulatory distinction.

7.52. In examining whether the different "certification requirements" – i.e. the requirement that certifications be made by both captains and observers in the ETP large purse-seine fishery, as opposed to the requirement of captain certification only for "all other fisheries" – give rise to detrimental impact on Mexican tuna products in the US market, the Panel grounded its reasoning on the costs of implementing observer coverage. It noted the United States' recognition that "observer coverage involves the expenditure of significant resources"[336], as well as the parties' acknowledgement that "the costs of implementing observer coverage can be significant."[337] In the light of the above, the Panel found that, by not requiring independent observer coverage in fisheries other than the ETP large purse-seine fishery, the certification requirements "impose a lesser burden" on tuna products derived from tuna caught in those other fisheries.[338] Having so found, the Panel considered it unnecessary to also "make a definitive finding"[339] on Mexico's allegation that the certification requirements "make it more likely that tuna caught outside the ETP large purse seine fishery will be inaccurately labelled".[340] Albeit seeing "some merit" in Mexico's allegation, the Panel opined that "a definitive finding on this point would require a complex and detailed analysis of all of the various factors that may lead to tuna being inaccurately labelled."[341]

7.53. Based on the foregoing, the Panel concluded that the certification requirements modify the conditions of competition to the detriment of Mexican tuna products in the US market.[342]

7.54. Subsequently, the Panel addressed the alleged detrimental impact of the "tracking and verification requirements" under the amended tuna measure – i.e. the different "record-keeping and verification requirements" for tuna products containing tuna caught in the ETP large purse-seine fishery and for tuna products containing tuna caught in other fisheries.[343] The Panel

[330] Panel Report, para. 7.119.
[331] Panel Report, para. 7.122. See also para. 7.123.
[332] Panel Report, para. 7.126.
[333] Panel Report, para. 7.126.
[334] Panel Report, section 7.5.2.4.
[335] Panel Report, section 7.5.2.5.
[336] Panel Report, para. 7.162 (referring to United States' first written submission to the Panel, paras. 265-266).
[337] Panel Report, para. 7.162 (referring, *inter alia*, to United States' and Mexico's responses to Panel questions Nos. 48-50). In particular, the Panel noted that the United States had acknowledged that the cost of establishing and maintaining observer programmes "'impose[s] [an] enormous barrier to entry' into the US tuna market, and may cost hundreds of millions of dollars." (Ibid. (quoting United States' response to Panel question No. 49, para. 266))
[338] Panel Report, para. 7.162.
[339] Panel Report, para. 7.169.
[340] Panel Report, para. 7.163.
[341] Panel Report, para. 7.169.
[342] Panel Report, para. 7.179.
[343] Panel Report, para. 7.98 (referring to Mexico's first written submission to the Panel, para. 236).

found that the tracking and verification requirements for tuna products originating in the ETP large purse-seine fishery, which are largely mandated by the AIDCP, bring with them "strict obligations"[344] aimed at ensuring the segregation of tuna caught without killing or seriously injuring dolphins from tuna caught in sets involving dolphin mortality or serious injury throughout the whole production process – including storage on board fishing vessels, unloading at port, brokering through intermediaries, trans-shipment, partial processing into loins, and canning.[345] With respect to tuna products derived from tuna caught outside the ETP large purse-seine fishery, the Panel took note of the United States' explanations as to how the amended tuna measure provides for verification that there has been segregation between dolphin-safe and non-dolphin-safe tuna. The Panel found that the United States ensures that tuna has been properly tracked and verified primarily through cannery audits – including spot checks – aimed at acquiring "the documents that track particular lots received by the canneries from the vessel trip on which the tuna was caught."[346] Canneries are also required to submit monthly reports containing information about the tuna received and processed, including dolphin-safe status, weight, ocean of capture, gear type used, type of catcher vessel, trip dates, carrier name, unloading dates, place of unloading, and, if the tuna products are to be labelled as dolphin safe, the required certifications.[347] Other forms of control on the part of US authorities include retail spot checks – which work "in essentially the same way as cannery audits"[348] – and inspections on the high seas, in US waters, or at US ports.[349]

7.55. The Panel held that the tracking and verification requirements applied inside and outside the ETP large purse-seine fishery, respectively, present "crucial differences" in terms of "depth, accuracy, and degree of government oversight".[350] In terms of depth, the Panel found that the system applied to the ETP large purse-seine fishery allows the trace-back of tuna "all the way to *the particular set* in which the tuna was caught and *the particular well in which it was stored*".[351] Conversely, the system applied to other fisheries allows the trace-back of tuna only "to the *vessel* and trip on which it was caught".[352] As for accuracy, the Panel found that, in respect of the ETP large purse-seine fishery, the TTFs and the relevant certifications accompany particular batches of tuna "throughout the fishing and production process, from the point of catch right through to the point of retail".[353] In contrast, for tuna harvested in other fisheries, the United States had not shown how the relevant certifications are kept with particular batches of tuna up until the tuna reaches the cannery.[354] Finally, as regards government oversight, the Panel took the view that, in respect of the ETP large purse-seine fishery, information concerning every stage of tuna harvest and processing is made available to the competent authorities by sending them copies of the TTFs and notifying them whenever ownership of tuna changes.[355] Conversely, for tuna harvested in other fisheries, the competent authorities receive information on the origin and history of the tuna only from the canneries themselves – through the mandatory monthly reports or audits and spot checks – and are thus not able to go "behind the documents" and appraise the veracity of such information.[356]

7.56. In the light of the above, the Panel concluded that the tracking and verification system applied to tuna caught in fisheries other than the ETP large purse-seine fishery presents some "major gaps in coverage"[357], which "strongly suggest[]" that the system in question is

[344] Panel Report, para. 7.296.
[345] Panel Report, paras. 3.47-3.52.
[346] Panel Report, para. 7.308 (quoting United States' response to Panel question No. 44, para. 240).
[347] Panel Report, para. 7.303.
[348] Panel Report, para. 7.312.
[349] Panel Report, para. 7.307.
[350] Panel Report, para. 7.354. (emphasis omitted)
[351] Panel Report, para. 7.355. (emphasis original)
[352] Panel Report, para. 7.356. (emphasis original) In this respect, the Panel reviewed two exhibits that, according to the United States, show that the tracking and verification system applied to fisheries other than the ETP large purse-seine fishery allows tuna to be traced back to the specific set in which the tuna was caught and the specific well in which it was stored. The Panel disagreed that such exhibits show that it is possible to trace tuna back as far as the United States contended. Rather, it took the view that the system only allows tracing tuna back to the trip during which it was harvested. (Ibid., paras. 7.357-7.359)
[353] Panel Report, para. 7.360.
[354] Panel Report, para. 7.361.
[355] Panel Report, para. 7.364.
[356] Panel Report, para. 7.365.
[357] Panel Report, para. 7.369 (quoting Mexico's comments on United States' response to Panel question No. 43, para. 172).

"significantly less burdensome" than the system in place for tuna caught inside the ETP large purse-seine fishery.[358] Having made such a finding, the Panel did not consider it necessary to further examine Mexico's allegation that the differences in the two sets of tracking and verification requirements make it more likely that tuna products derived from tuna caught outside the ETP large purse-seine fishery will be incorrectly labelled. While the Panel did see "some merit" in Mexico's allegation, it took the view that a definitive finding on this point would require "a detailed technical analysis of the system's effective operation".[359]

7.57. Based on the foregoing, the Panel found that the tracking and verification requirements modify the conditions of competition in the US market to the detriment of Mexican tuna products.[360]

7.58. In each of its two analyses of detrimental impact, the Panel addressed the United States' argument that any detrimental impact suffered by Mexican tuna products because of the certification and tracking and verification requirements applied to tuna products derived from tuna caught in the ETP large purse-seine fishery "stems from the AIDCP regime" rather than from the amended tuna measure, with the consequence that there is no "genuine relationship" between the measure and any detrimental impact on competitive opportunities for Mexican tuna products.[361] The Panel found that, while the AIDCP imposes certain certification and tracking and verification requirements on the ETP large purse-seine fishery, "it has nothing to say" about analogous requirements applicable to other fisheries.[362] The amended tuna measure, by contrast, imposes certain certification and tracking and verification requirements on the ETP large purse-seine fishery and different such requirements on other fisheries. Thus, the Panel reasoned that "[i]t is the amended tuna measure" that, within the same regulatory framework, "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."[363] In the Panel's view, the fact that one element of the regulatory distinction – i.e. the requirements applicable to the ETP large purse-seine fishery – is mandated by international obligations does not detract from a conclusion that the distinction as a whole is attributable to "the design and structure of the amended tuna measure itself".[364]

7.2.2.3 Whether the Panel erred in its analysis of the detrimental impact of the amended tuna measure

7.59. At the outset of our review of the Panel's detrimental impact analysis, we recall that, in examining whether a technical regulation entails *de facto* detrimental impact, a panel must take into consideration "the totality of facts and circumstances before it" and assess any implications for competitive conditions "discernible from the design, structure, and expected operation of the measure."[365] Such examination must also "take account of all the relevant features of the market, which may include the particular characteristics of the industry at issue, the relative market shares in a given industry, consumer preferences, and historical trade patterns" – that is, "the operation of the particular technical regulation at issue in the particular market in which it is applied."[366] Thus, a panel conducting a *de facto* detrimental impact analysis under Article 2.1 of the TBT Agreement ought to take into account both the design and structure of the measure at issue and the way in which the measure operates (or can be expected to operate) in the light of the relevant features of the market concerned.

7.60. We further recall that, as was found in the original proceedings and as both parties have acknowledged in these compliance proceedings, access to the dolphin-safe label constitutes an

[358] Panel Report, paras. 7.369-7.370.
[359] Panel Report, para. 7.372.
[360] Panel Report, para. 7.382.
[361] Panel Report, para. 7.171 (quoting United States' first written submission to the Panel, paras. 226 and 295).
[362] Panel Report, para. 7.177.
[363] Panel Report, para. 7.177.
[364] Panel Report, para. 7.177. See also para. 7.294.
[365] Appellate Body Reports, *US – COOL*, para. 269 (quoting, respectively, Appellate Body Reports, *US – Clove Cigarettes*, para. 206; and *Thailand – Cigarettes (Philippines)*, para. 130).
[366] Appellate Body Reports, *US – COOL*, para. 269 (referring to Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.119; and Appellate Body Reports, *Korea – Various Measures on Beef*, para. 145; and *US – Tuna II (Mexico)*, paras. 233-234).

"advantage" on the US market for tuna products by virtue of that label's "significant commercial value".[367]

7.61. In section 7.1 above, we expressed the view that it is only through the design and operation of all its labelling conditions combined that the amended tuna measure establishes access to the dolphin-safe label for tuna products sold in the US market. Indeed, different labelling conditions may affect access to the dolphin-safe label for groups of like tuna products in different ways. For instance, while the disqualification of tuna products derived from tuna caught by setting on dolphins means that most Mexican tuna products are not eligible for the dolphin-safe label[368], other elements of the amended tuna measure – such as the new certification and tracking and verification requirements imposed outside the ETP large purse-seine fishery by virtue of the 2013 Final Rule – may also exclude some tuna products of US or other origin from access to the label. The various sets of requirements under the amended tuna measure may have varying degrees of significance for the question of whether Mexican tuna products are detrimentally affected, such that it may be appropriate to unbundle the different elements and examine them in a sequential manner. However, we do not consider that an examination of the detrimental impact of the amended tuna measure could be properly conducted without also taking account of the interrelationship among those elements and addressing the manner in which they operate together to modify the conditions of competition in the US market for tuna products.

7.62. We do not see that the Panel considered such interrelationship in its examination. Instead, the Panel conducted a segmented analysis for each of the "eligibility criteria"[369], the "different certification requirements"[370], and the "different tracking and verification requirements".[371] In setting out those separate analyses, the Panel took the view that the type of detrimental impact caused by the sets of certification and tracking and verification requirements is of a "distinct" and "separate" nature from the detrimental impact caused by the eligibility criteria.[372] In particular, the Panel referred to Mexico's statement that the eligibility criteria "are responsible for the fact that most Mexican tuna products are ineligible to receive the label".[373] Conversely, the Panel identified the nature of the detrimental impact flowing from the different certification requirements and from the different tracking and verification requirements as the "competitive advantage" that is accorded to tuna products derived from tuna caught outside the ETP large purse-seine fishery, in the form of the lesser costs and burdens that the amended tuna measure imposes on such tuna products, as compared to those that it imposes on tuna products derived from tuna caught within the ETP large purse-seine fishery.[374] After having conducted these three segmented analyses, the Panel did not seek to synthesize them or to examine more holistically the implications that the combined operation of the different sets of requirements might have had for its analysis of the detrimental impact of the amended tuna measure on Mexican tuna products.

7.63. In our view, the Panel's analytical approach overlooks that the detrimental impact resulting from the amended tuna measure cannot properly be examined through isolated analyses of the detrimental impact associated with discrete sets of requirements under that measure. Since all of the conditions for access to the dolphin-safe label may bear on such detrimental impact[375], a proper assessment of the detrimental impact of the amended tuna measure on Mexican tuna products calls for an examination of the manner in which the different labelling conditions under the measure operate together in a way that affects the conditions of competition for Mexican tuna products in the US market.

7.64. We further recall that, as pointed out in paragraph 5.9 above, "Article 21.5 proceedings do not occur in isolation from the original proceedings"; rather, "both proceedings form part of a

[367] Original Panel Report, paras. 7.289 and 7.291. See also Panel Report, para. 7.424.
[368] See Original Panel Report, para. 7.317; and Appellate Body Report, *US – Tuna II (Mexico)*, para. 234.
[369] Panel Report, section 7.5.2.2.2.
[370] Panel Report, section 7.5.2.4.1.
[371] Panel Report, section 7.5.2.5.1.
[372] Panel Report, para. 7.105. (emphasis omitted)
[373] Panel Report, para. 7.105 (referring to Mexico's second written submission to the Panel, para. 117).
[374] Panel Report, para. 7.105.
[375] As the Panel itself recognized, the US dolphin-safe labelling regime necessarily includes not only the "substantive … requirement[s]", but also the various certification and tracking and verification requirements constituting the mechanisms by which compliance with those substantive requirements is "monitored and demonstrated". (Panel Report, fn 125 to para. 7.37)

continuum of events".[376] A panel's examination of a measure taken to comply must take due account of the findings by the original panel and the Appellate Body adopted by the DSB.[377] Thus, for example, in setting out the analytical scope of its detrimental impact analysis, the panel in *US – COOL (Article 21.5 – Canada and Mexico)* stated that it would "follow the original panel's approach".[378] On that basis, the compliance panel assessed whether the measure taken to comply with the recommendations and rulings of the DSB modified the detrimental impact that was found to exist in the original proceedings.[379]

7.65. Similarly, we believe that the analytical approach to detrimental impact employed by the original panel and the Appellate Body constitutes relevant background for a proper assessment of the detrimental impact of the amended tuna measure. Such an assessment might usefully build on, or take as its starting point, the Appellate Body's finding in the original proceedings that the detrimental impact of the original tuna measure was "caused by the fact that most Mexican tuna products contain tuna caught by setting on dolphins in the ETP and are therefore not eligible for a 'dolphin-safe' label", whereas "most tuna products from the United States and other countries that are sold in the US market contain tuna caught by other fishing methods outside the ETP and are therefore eligible for a 'dolphin-safe' label."[380] In the original proceedings, the original panel and the Appellate Body focused on access to the dolphin-safe label. In doing so, they grounded their assessments on the regulatory distinction whereby tuna products derived from tuna caught by setting on dolphins were disqualified from access to the dolphin-safe label, whereas tuna products derived from tuna caught by other fishing methods qualified for such label, which was the regulatory distinction at the core of Mexico's challenge.[381] At the same time, the Appellate Body acknowledged the interlinkages between the various elements of the US dolphin-safe labelling regime when it stated that the aspect of the original tuna measure that caused the detrimental impact on Mexican tuna products was "the *difference in labelling conditions*" for tuna products containing tuna caught by setting on dolphins, on the one hand, and for tuna products containing tuna caught by other fishing methods, on the other hand.[382]

7.66. Thus, it seems to us that the findings of detrimental impact by the original panel and the Appellate Body reinforce that a proper assessment of the detrimental impact of the amended tuna measure on Mexican tuna products calls for an examination of the manner in which the different labelling conditions under the measure operate together. Such an analysis should also encompass consideration of whether these conditions operate in a way that produces the same, or that modifies, the detrimental impact that was found to exist in the original proceedings. For instance, the Panel could have explained the extent to which the certification and tracking and verification requirements introduced by the 2013 Final Rule for tuna products originating outside the ETP large purse-seine fishery had the effect of reducing (or increasing) access to the dolphin-safe label for

[376] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 136 (referring to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 121). See also Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 386.

[377] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 136 (referring to Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 142; *Mexico – Corn Syrup (Article 21.5 – US)*, para. 121; *US – FSC (Article 21.5 – EC II)*, para. 61; *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 68 and 77; and *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 102).

[378] Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.66.

[379] Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.68-7.175.

[380] Appellate Body Report, *US – Tuna II (Mexico)*, para. 284.

[381] See Original Panel Report, para. 7.253; and Appellate Body Report, *US – Tuna II (Mexico)*, para. 284.

[382] Appellate Body Report, *US – Tuna II (Mexico)*, para. 284. (emphasis added) Elsewhere in its report, the Appellate Body noted the original panel's findings that, for tuna products originating outside the ETP large purse-seine fishery, no certifications were required that no dolphins had been killed or seriously injured in the nets where the tuna was caught. (See ibid., para. 292 (referring to Original Panel Report, para. 7.561)) The Appellate Body also upheld the original panel's finding that the imposition of a substantive requirement that no dolphins be killed or seriously injured outside the ETP would not be practically relevant "if it is assumed that it cannot be verified". (Ibid., para. 294 (quoting Original Panel Report, para. 7.541))

such tuna products.[383] On that basis, the Panel could have examined whether the combined operation of the different labelling conditions under the amended tuna measure narrowed (or broadened) the detrimental impact of the regulatory differences in treatment of Mexican tuna products *as compared to* like products of US or other origin, in terms of access to the dolphin-safe label.

7.67. We observe that, in setting out its analysis of the consistency with Article 2.1 of the "eligibility criteria", the Panel did recognize the importance of the findings made by the panel and the Appellate Body in the original proceedings.[384] However, in the remainder of its discussion of the eligibility criteria, the Panel limited itself to "respect[ing] and reaffirm[ing]" the Appellate Body's alleged finding that the regulatory distinction between tuna products derived from tuna caught by setting on dolphins and tuna products derived from tuna caught by other fishing methods is "even-handed" and therefore "not inconsistent with Article 2.1".[385] In other words, the Panel did *not* refer to the Appellate Body's findings under the *first* step of the analysis of less favourable treatment, i.e. concerning the detrimental impact of this regulatory distinction. Nor did the Panel conduct its own assessment of whether the disqualification from the dolphin-safe label of tuna products derived from tuna caught by setting on dolphins, coupled with the qualification for the label of tuna products derived from tuna caught by other fishing methods, detrimentally affects the competitive opportunities of Mexican tuna products in the US market.[386]

7.68. The Panel's approach is somewhat surprising given that both Mexico and the United States indicated to the Panel that, under the amended tuna measure, as under the original tuna measure, most Mexican tuna products are still being excluded from access to the dolphin-safe label, whereas most like products from the United States and other countries are still eligible for access to such label.[387] In this regard, it is not clear to us that, as the Panel contends, Mexico's position on detrimental impact "developed"[388] over the course of the proceedings to encompass allegations of separate and distinct detrimental impact flowing from "the absence of sufficient fishing method qualification, record keeping, verification and observer requirements" outside the ETP large purse-seine fishery.[389] We further note that, on appeal, neither Mexico nor the United States considers that the Panel's analyses of the detrimental impact of the certification requirements and the tracking and verification requirements were warranted or necessary given the findings of detrimental impact by the original panel and the Appellate Body.

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[383] Given that only four months elapsed between the adoption of the 2013 Final Rule on 9 July 2013 and Mexico's initiation of these Article 21.5 proceedings on 15 November 2013, it may have been difficult for the parties to produce empirical evidence showing the changes in the levels or proportions of tuna products originating outside the ETP large purse-seine fishery that are able to access the dolphin-safe label. We note, nevertheless, that both parties did adduce evidence regarding the levels of dolphin mortality and serious injury in fisheries other than the ETP large purse-seine fishery. The Panel might have been able to rely on this evidence to draw some conclusions regarding the extent to which the additional requirements in the amended tuna measure have disqualified from access to the dolphin-safe label tuna products that would have been able to access the label under the original tuna measure.

[384] Panel Report, para. 7.118. The Panel found it "appropriate" 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". (*Ibid.*, para. 7.119)

[385] Panel Report, para. 7.126. We address this portion of the Panel's reasoning in more detail in section 7.2.3.2.2 of this Report.

[386] We note that, in the portion of its Report where it examined the consistency of the "eligibility criteria" with Articles I:1 and III:4 of the GATT 1994, the Panel did consider that the regulatory distinction between tuna products derived from tuna caught by setting on dolphins and tuna products derived from tuna caught by other fishing methods "has the effect of denying [Mexican] tuna products a valuable market advantage (that is, access to the dolphin-safe label)", thus modifying the conditions of competition to the detriment of such products. (Panel Report, para. 7.447. See also para. 7.498) The Panel, however, did not complement this finding with an assessment of the amount of tuna products from the United States and other countries that are excluded from access to the label by virtue of the new certification and tracking and verification requirements in force outside the ETP large purse-seine fishery.

[387] Mexico's first written submission to the Panel, paras. 223-224; United States' first written submission to the Panel, para. 215. See also Panel Report, para. 7.446.

[388] Panel Report, paras. 7.102.

[389] Panel Report, paras. 7.104 (quoting Mexico's second written submission to the Panel, para. 117 (emphasis omitted)). Indeed, as the Panel explicitly acknowledged, "the core" of Mexico's argumentation on detrimental impact is that, "under the amended tuna measure, the majority of Mexican tuna and tuna products … 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 … are eligible." (Ibid., para. 7.152)

7.69. Having identified these general concerns regarding the Panel's segmented approach to detrimental impact, we now turn to consider the analytical approach that the Panel used in conducting its discrete analyses of detrimental impact based on the costs and burdens associated with the certification requirements and the tracking and verification requirements.

7.70. The Panel considered that the certification and tracking and verification requirements "are relevant only to tuna eligible and intended to receive the dolphin-safe label" – that is, only to tuna not caught by setting on dolphins.[390] Accordingly, the Panel compared the costs and burdens that the different certification and tracking and verification requirements entail for, on the one hand, Mexican tuna products derived from tuna caught *other than by setting on dolphins*, and, on the other hand, tuna products of US or other origin derived from tuna caught *other than by setting on dolphins*.[391] We recall that, for the purposes of both the original and these compliance proceedings, "Mexican tuna products are 'like' tuna products of United States' origin and tuna products originating in any other country"[392], whether those products are, or are not, derived from tuna caught by setting on dolphins. Thus, by limiting its comparison to the treatment accorded to tuna products that are "eligible" for the dolphin-safe label, the Panel's analyses of the respective costs and burdens flowing from the different certification and tracking and verification requirements focused on a *subset* of the products found to be "like" in this dispute.

7.71. In considering the propriety of the Panel's approach, we recall that the product scope for a detrimental impact comparison depends on the products that a panel has found to be "like" for the purposes of Article 2.1.[393] Once the "like" products have been properly identified, Article 2.1 requires a panel to compare, on the one hand, the treatment accorded under the measure at issue to the "group" of like products imported from the complaining Member with, on the other hand, that accorded to the "group" of like domestic products and/or the "group" of like products originating in all other countries.[394] This is not to say that a finding of detrimental impact requires that *all* products imported from the complaining Member be treated less favourably than *all* like domestic products and/or *all* like products originating in other countries. However, in our view, a panel may not artificially limit its analysis to only subsets of the relevant groups of like products in a manner that risks skewing the proper comparison for purposes of determining detrimental impact.

7.72. We also note that, in assessing whether the original tuna measure had a detrimental impact on Mexican tuna products in the US market, the original panel and the Appellate Body compared the treatment accorded to the group of Mexican tuna products with that accorded to the groups of like US products and like products from other countries, in order to assess the relative positions of these product groups in respect of access to the dolphin-safe label.[395] Given the particular characteristics of the amended tuna measure, and in the light of the facts and circumstances of this dispute, we consider that, in order to reach its conclusions on detrimental impact, the Panel was called upon to compare the treatment that the labelling conditions under the amended tuna measure accord to the *group* of Mexican tuna products, on the one hand, with the treatment accorded to the *groups* of like tuna products from the United States and other countries, on the other hand. Indeed, a proper identification of the product groups to be compared was germane to all the steps of the Panel's analysis under Article 2.1, including the assessment of whether the amended tuna measure modifies the conditions of competition to the detriment of Mexican tuna

[390] Panel Report, para. 7.143.

[391] We recall that most Mexican tuna products derive from tuna caught in the ETP large purse-seine fishery, whereas most like products from the United States and other countries derive from tuna caught in other fisheries.

[392] Appellate Body Report, *US – Tuna II (Mexico)*, para. 202. See also Panel Report, para. 7.71.

[393] See Appellate Body Report, *US – Clove Cigarettes*, para. 192.

[394] See Appellate Body Report, *US – Clove Cigarettes*, para. 193 (referring to Appellate Body Report, *EC – Asbestos*, para. 100). See also Appellate Body Reports, *US – Tuna II (Mexico)*, para. 215; and *US – COOL*, para. 268.

[395] See Original Panel Report, para. 7.295; and Appellate Body Report, *US – Tuna II (Mexico)*, paras. 234 and 284.

products in the US market and, if so, whether such a detrimental impact stems exclusively from a legitimate regulatory distinction.[396]

7.73. This does not imply that the Panel's conclusions of detrimental impact had to rest on a finding that the certification and tracking and verification requirements impose additional costs and burdens on *every* Mexican tuna product, or on the *entire* group of Mexican tuna products, as compared to *every* like product, or on the *entirety* of the groups of like products from the United States and other countries. Indeed, there may well be instances in which an examination of the treatment accorded to a portion of a relevant group of like products will suffice to support a finding that such a product group is detrimentally affected by the technical regulation at issue.[397] We note, however, that, elsewhere in its Report, the Panel referred to Mexico's statement that "most" Mexican tuna products are still excluded from access to the dolphin-safe label[398] as "virtually all of Mexico's purse seine tuna fleet continues to fish in the ETP by setting on dolphins".[399] These statements suggest that very few, if any, Mexican tuna products are "eligible" for the dolphin-safe label and therefore subject to any additional costs and burdens flowing from the certification and tracking and verification requirements. The Panel did not explain why an analysis of the treatment that the amended tuna measure accords to this category of tuna products had explanatory force for, and could properly support, a finding that the *group* of Mexican tuna products is detrimentally affected by the certification and tracking and verification requirements.[400]

7.74. Accordingly, we have difficulty identifying the basis on which the Panel thought it appropriate to limit its analysis to a subset of the product groups that have been found to be "like" in this dispute. By focusing exclusively on the costs and burdens imposed by the certification and tracking and verification requirements on only "eligible" Mexican tuna products, the Panel artificially skewed the proper comparison for purposes of determining detrimental impact, rather than grounding its analysis on a full comparison of the relevant groups of like products in the light of the particular facts and circumstances of this dispute.

7.75. Based on the foregoing, we conclude that the Panel employed an incorrect analytical approach to assessing whether the amended tuna measure has a detrimental impact on Mexican tuna products in the US market. First, by undertaking a segmented analysis of each of the three sets of requirements under the amended tuna measure, the Panel failed to recognize and take account of the interlinkages between the disqualification of tuna products derived from tuna caught by setting on dolphins, on the one hand, and the certification and tracking and verification requirements, on the other hand, and to conduct a holistic assessment of how those various labelling conditions adversely affect the conditions of competition for Mexican tuna products in the US market as compared to like tuna products from the United States and other countries. Because it adopted such a segmented approach, the Panel failed to assess meaningfully the extent to which the detrimental impact that was found to exist in the original proceedings might have been altered by the changes introduced by the amended tuna measure. Second, in analysing the detrimental impact of the certification and tracking and verification requirements, the Panel engaged in a

[396] In our view, there may be circumstances in which an analysis of detrimental impact grounded on a comparison between inappropriate groups of products might, in turn, prevent a panel from properly conducting the second step of its analysis as to whether a measure accords less favourable treatment within the meaning of Article 2.1.

[397] For instance, in the original proceedings, the Appellate Body concluded that the fact that "most" Mexican tuna products were excluded from access to the dolphin-safe label sufficiently warranted a finding that the original tuna measure had a detrimental impact on the competitive opportunities of Mexican tuna products in the US market. (Appellate Body Report, *US – Tuna II (Mexico)*, paras. 234-235) In order to reach such a conclusion, the Appellate Body did not find it necessary to assess the treatment accorded by the original measure to *every* Mexican tuna product as compared to *every* like product of US or other origin.

[398] Panel Report, para. 7.105 (referring to Mexico's second written submission to the Panel, para. 117).

[399] Panel Report, para. 7.444 (quoting Mexico's first written submission to the Panel, para. 227). The United States, for its part, does not contest the Panel's reference to Mexico's argument and stresses that, in recent years, Mexico has not exported any tuna products derived from tuna caught other than by setting on dolphins to the United States. (See United States' appellant's submission, paras. 176 and 329 (referring to Mexico's response to Panel question No. 57, paras. 146 and 155)). We note that the original panel found that, as of 2009, Mexican tuna products accounted for only 1% of the US market for imported tuna products, and an even smaller percentage of the total US market. (Original Panel Report, para. 7.355)

[400] We recall that, as the Appellate Body has cautioned, a panel should not "ascribe undue weight to the effect of a technical regulation in any hypothetical scenario". (Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.16 (emphasis omitted))

comparison of the treatment accorded to subsets of the relevant groups of like products, instead of comparing the treatment accorded to the *group* of Mexican tuna products with that accorded to the *groups* of like products of US or other origin, without identifying a proper basis for doing so.

7.76. For the reasons set out above, we find that the Panel erred in its analysis of whether the amended tuna measure has a detrimental impact on Mexican tuna products in the US market within the meaning of Article 2.1 of the TBT Agreement. Having found error in the Panel's analysis, we do not consider it necessary to rule on the United States' claims on appeal that: (i) the Panel improperly made the case for Mexico by grounding its findings of detrimental impact with respect to the certification and tracking and verification requirements on the different costs and burdens imposed by such requirements on suppliers of tuna products operating inside and outside the ETP large purse-seine fishery[401]; (ii) the Panel erred in finding a difference in costs and burdens stemming from the certification and tracking and verification requirements and in failing to explain how any such difference modifies the conditions of competition to the detriment of Mexican tuna products[402]; and (iii) the Panel did not properly establish a genuine relationship between the certification and tracking and verification requirements and any detrimental impact on Mexico's competitive opportunities in the US market.[403]

7.2.3 Less favourable treatment – Stems exclusively from a legitimate regulatory distinction

7.77. The United States challenges the Panel's articulation of the legal test under Article 2.1 of the TBT Agreement for determining whether the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction. In addition, the United States and Mexico each raises certain claims of error under the second step of the analysis of less favourable treatment in connection with the Panel's application of the law to the facts in its analysis of the eligibility criteria, the certification requirements, and the tracking and verification requirements set out in the amended tuna measure. Before addressing the participants' claims with respect to the Panel's application of Article 2.1, we turn to analyse the United States' challenge to the Panel's articulation of the "treatment no less favourable" standard under Article 2.1 of the TBT Agreement.

7.2.3.1 Whether the Panel erred in its interpretation of Article 2.1 and its articulation of the legal standard for determining whether the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction

7.78. The United States argues that the Panel erred in its understanding of Article 2.1 of the TBT Agreement and articulated an incorrect legal standard for determining whether the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction.[404] In particular, the Panel wrongly indicated that the question in the second part of the analysis of less favourable treatment under Article 2.1 is "whether 'detrimental treatment is explained by, or at least reconcilable with, the objectives pursed by the measure at issue.'"[405] The United States explains that "[t]he second step of the Article 2.1 analysis is not a single-factor test based on whether a 'rational connection' exists between the detrimental impact and the objectives of the measure but an analysis of whether the regulatory distinctions that account for the detrimental impact 'are designed and applied in an even-handed manner.'"[406] In support of its position, the United States points to the Appellate Body's explanation that "the question for determining whether the 'detrimental impact stems exclusively from legitimate regulatory distinctions' is whether the regulatory distinctions that account for that detrimental impact 'are

[401] United States' appellant's submission, paras. 136-144 and 288-295.
[402] United States' appellant's submission, paras. 145-155 and 314-319.
[403] United States' appellant's submission, paras. 167-184 and 327-330.
[404] The United States puts forward this argument in challenging three aspects of the Panel's analysis: (i) the Panel's finding that the certification requirements do not stem exclusively from a legitimate regulatory distinction; (ii) the Panel's finding that the determination provisions do not stem exclusively from a legitimate regulatory distinction; and (iii) the Panel's finding that the tracking and verification requirements do not stem exclusively from a legitimate regulatory distinction. Since all three challenges are premised on the same contention by the United States, we examine them together. (United States' appellant's submission, paras. 25, 36, 192, 257, 264, and 334)
[405] United States' appellant's submission, para. 192 (quoting Panel Report, para. 7.196).
[406] United States' appellant's submission, para. 36 (quoting Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.92; and referring to Appellate Body Reports, *US – COOL*, para. 271).

designed and applied in an even-handed manner such that they may be considered "legitimate" for the purposes of Article 2.1.'"[407] The United States adds that, in the context of this dispute, the Appellate Body has been clear that this question should be answered through an assessment of whether the requirement "is even-handed in the manner in which it addresses the risks to dolphins arising from different fishing methods in different areas of the ocean."[408] The United States accepts that the objectives of the measure, and an inquiry into whether the detrimental impact can be reconciled with those objectives, are not necessarily irrelevant to the analysis. For the United States, however, in this dispute, such considerations are relevant as part of the analysis of whether the regulatory distinction is "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the oceans.[409] "Even-handedness" is the appropriate inquiry to determine whether the detrimental impact stems exclusively from legitimate regulatory distinction, and, in the United States' view, an inquiry into "calibration" is not a separate test from "even-handedness". Rather, the original proceedings show that the Appellate Body used the analytical tool of "calibration" in its *application* of the "even-handedness" standard. The United States adds that the Panel's analysis of the certification requirements, however, suggests that the Panel wrongly considered that the legal standard under Article 2.1 prohibits an evaluation of different risks.

7.79. Mexico contends that "the question of whether the regulatory distinction that accounts for the detrimental impact is designed and applied in an even-handed manner" and "the question of whether the detrimental impact caused by the regulatory distinction can be explained by, or reconciled with, the objectives of the measure at issue" are "not mutually exclusive".[410] Rather, the latter question is a factor that may be relevant in resolving the first question. In particular, Mexico argues that the legal test under Article 2.1 of the TBT Agreement focuses on whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction, that is, whether the relevant regulatory distinction is "even-handed". This does not mean that all like products must always be treated identically, but rather that there must be a rational, objective, and non-discriminatory basis for distinguishing among products.[411] Thus, Mexico adds, the test for determining whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence.[412]

7.80. According to Mexico, the jurisprudence developed by the Appellate Body in interpreting Article 2.1 of the TBT Agreement and Article XX of the GATT 1994 does not include a "calibration" test.[413] Rather, Mexico points out, the term "calibration" was introduced by the United States in the original proceedings when it argued that the original tuna measure was "calibrated" to the risk that dolphins may be killed or seriously injured when tuna was caught.[414] Mexico further argues that the notion of "calibration" is not equivalent to the notions of "even-handedness" or "arbitrary or unjustifiable". In response to questioning at the oral hearing, Mexico added that, even if "calibration" may be one way to assess whether a regulatory distinction involves arbitrary or unjustifiable discrimination, such an examination is not appropriate in the present dispute, in particular, given that the amended tuna measure does not incorporate or reflect any concept of "calibration". Mexico added that, in any event, an assessment into whether the measure at issue is "calibrated" must be done in the light of the design and architecture of the measure, as well as the circumstances surrounding the measure.

7.81. In order to assess the United States' claim on appeal, we first identify the test articulated by the Panel for assessing "treatment no less favourable" under Article 2.1 of the TBT Agreement. Then, we turn to analyse the central question raised in the United States' claim, namely, whether

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[407] United States' appellant's submission, para. 192 (quoting Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.92).

[408] United States' appellant's submission, para. 192 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 232).

[409] United States' appellant's submission, para. 193 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 297).

[410] Mexico's appellee's submission, para. 125.

[411] Mexico's appellee's submission, para. 61.

[412] Mexico's appellee's submission, para. 62 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226).

[413] Mexico's appellee's submission, para. 60.

[414] Mexico's appellee's submission, para. 59 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 282).

the test articulated by the Panel regarding the second step of the "treatment no less favourable" requirement under Article 2.1 reflects and is consistent with the proper legal standard under that provision, as identified by the Appellate Body. Our analysis in the present subsection is limited to assessing the Panel's interpretation and articulation of the legal standard. We address the issue of whether the Panel incorrectly *applied* the legal test in the subsections that follow, which deal with the various claims of error raised by both the United States and Mexico in this regard.

7.82. In identifying the second step of the "treatment no less favourable" requirement under Article 2.1 of the TBT Agreement, the Panel recalled that, in line with Appellate Body jurisprudence, panels must examine whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflects discrimination against the group of imported products.[415] The Panel stated that:

> ... 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 [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".[416]

7.83. The Panel highlighted the similarity between this language and that of the chapeau of Article XX of the GATT 1994, and posed the question of whether this meant that panels should draw on the jurisprudence elaborated under the chapeau in interpreting and applying Article 2.1 of the TBT Agreement, noting that this issue was "highly contested by the parties".[417] The Panel, first, indicated that it could not agree with the United States that the provisions set out in Article 2.1 and the chapeau of Article XX "are entirely different".[418] In the Panel's view, 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 TBT Article 2.1."[419] The Panel considered that the Appellate Body thus "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."[420] The Panel also understood the Appellate Body's ruling in *EC – Seal Products* to mean that, while the tests under Article 2.1 and the chapeau of Article XX are not identical and should not be conflated, there are nevertheless important similarities and overlaps between them, and thus that the Appellate Body jurisprudence developed in the context of one provision may be used to interpret similar concepts in the other.[421]

7.84. The Panel proceeded to make two further interpretative points. First, the Panel stated that, in considering whether detrimental impact caused by a technical regulation reflects "arbitrary discrimination", it could consider, *inter alia*, whether the detrimental treatment can be reconciled with, or is rationally related to, the policy pursued by the measure at issue. In so doing, the Panel adopted a test of "arbitrary or unjustifiable discrimination" that has previously been used by the Appellate Body – for example, in *EC – Seal Products* – to assess the conformity of a measure with the requirements of the chapeau of Article XX of the GATT 1994. In the Panel's view, even if the analysis under Article 2.1 may involve examination of more than just the existence or not of "arbitrary discrimination", using such an analysis to determine whether a technical regulation involves arbitrary discrimination "may help the Panel determine whether the detrimental impact

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[415] Panel Report, para. 7.73 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 215).

[416] Panel Report, para. 7.79 (quoting the sixth recital of the preamble of the TBT Agreement and referring to Appellate Body Report, *US – Clove Cigarettes*, para. 94).

[417] Panel Report, para. 7.80.

[418] Panel Report, paras. 7.83 and 7.87 (quoting United States' second written submission to the Panel, para. 84).

[419] Panel Report, para. 7.87 (referring to Appellate Body Reports, *US – Clove Cigarettes*, para. 173; and *US – COOL*, para. 268).

[420] Panel Report, para. 7.87.

[421] Panel Report, para. 7.90. The Panel further considered that the Appellate Body's approach in *US – Clove Cigarettes* "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." (Ibid., para. 7.92 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 225))

complained of … stems exclusively from a legitimate regulatory distinction".[422] Second, the Panel expressed its understanding that the concept of "even-handedness" is not a separate criterion required under Article 2.1, but rather "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".[423] For the Panel, determining whether a measure is even-handed can help 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 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.[424] The Panel also stated that it viewed the notion of even-handedness as directing a panel's attention to the "fit" or "fairness" of a technical regulation, and as broader than the concept of "arbitrary discrimination".[425]

7.85. In sum, the Panel stated that, in determining whether the detrimental impact stems exclusively from a legitimate regulatory distinction, it could consider whether the detrimental treatment can be reconciled with, or is rationally related to, the objectives pursued by the measure at issue.[426] However, the Panel did *not*, as the United States suggests, indicate that this is a "single-factor test" that should always and exclusively be used for assessing whether detrimental impact stems exclusively from a legitimate regulatory distinction.[427] To the contrary, the Panel explicitly stated that such an analysis "may help" in determining whether the relevant distinction involves "arbitrary discrimination".[428] The Panel further qualified the role of this inquiry by pointing out that examining whether a measure involves "arbitrary discrimination" is *one way* of demonstrating that a measure is not even-handed, but that ascertaining whether the detrimental impact stems exclusively from a legitimate regulatory distinction "may involve examination of more than just the existence (or not) or 'arbitrary discrimination'".[429]

7.86. Having described the relevant Panel findings, we turn to assess whether, as alleged by the United States, they amount to an erroneous articulation of the "treatment no less favourable" requirement under Article 2.1 of the TBT Agreement. In our view, in challenging the Panel's finding that the relevant test under the second step of a "less favourable treatment" analysis may involve assessing whether the detrimental treatment can be reconciled with, or is rationally related to, the objectives pursued by the measure, the United States is also challenging the Panel's statement that the Appellate Body "clearly intended" for panels to apply the "treatment no less favourable" requirement in Article 2.1 in the light of the jurisprudence developed in the context of the chapeau of Article XX.[430]

7.87. We begin by noting that, having posed the question as to how panels should undertake the second step of the "treatment no less favourable" analysis under Article 2.1 of TBT Agreement[431], the Panel turned, in the very next paragraph of its Report, to the question of whether it could rely upon the jurisprudence relating to the chapeau of Article XX of the GATT 1994.[432] In contrast, when seeking to ascertain the analysis required under Article 2.1, the Appellate Body has first looked to more immediate context for that provision.[433] As set out above, the Appellate Body has emphasized that the specific context provided by other provisions of the TBT Agreement – notably, Annex 1.1, Article 2.2, and the second, fifth, and sixth recitals of the preamble – is instructive in understanding the expression "treatment no less favourable" under Article 2.1. This specific context "supports a reading that Article 2.1 does not operate to prohibit *a priori* any restriction on

[422] Panel Report, para. 7.91.
[423] Panel Report, para. 7.93.
[424] Panel Report, para. 7.94.
[425] Panel Report, paras. 7.95-7.96.
[426] Panel Report, para. 7.91.
[427] United States' appellant's submission, para. 36.
[428] Panel Report, para. 7.91.
[429] Panel Report, para. 7.91. See also para. 7.96.
[430] Panel Report, para. 7.87.
[431] Panel Report, para. 7.79.
[432] Panel Report, para. 7.80.
[433] Appellate Body Reports, *US – Clove Cigarettes*, para. 173; *US – Tuna II (Mexico)*, para. 213; *US – COOL*, para. 268; *EC – Seal Products*, para. 5.124.

international trade".[434] In particular, the sixth recital sheds light on the meaning and ambit of the "treatment no less favourable" requirement in Article 2.1 by making clear that technical regulations may pursue legitimate objectives, but must not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination.[435]

7.88. At the same time, given that the sixth recital of the preamble of the TBT Agreement serves as relevant context for understanding Article 2.1, and the language of that recital has important commonalities with the chapeau of Article XX of the GATT 1994, the jurisprudence under the chapeau of Article XX is not irrelevant to understanding the content of the second step of the "treatment no less favourable" requirement under Article 2.1 of the TBT Agreement. Indeed, previous Appellate Body decisions concerning one provision of a covered agreement may shed light on a proper understanding of the scope and meaning of a different provision in another agreement where the same or similar language is used in both provisions[436], provided always that due account is taken of more immediate context, and of the function of each provision.

7.89. We recall that, in *EC – Seal Products*, the Appellate Body indicated that "there are important parallels between the analyses under Article 2.1 of the TBT Agreement and the chapeau of Article XX."[437] Prominent among them is the fact that the concepts of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and a "disguised restriction on trade" are found both in the chapeau of Article XX and in the sixth recital of the preamble of the TBT Agreement. Yet, "there are significant differences between the analyses under Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994"[438], and the legal standards applicable under the two provisions differ.[439] Article 2.1 imposes affirmative obligations on Members in respect of their technical regulations. By contrast, Article XX establishes exceptions to obligations under the GATT 1994, and the function of its chapeau "is to maintain a balance between a Member's right to invoke the exceptions under the subparagraphs of Article XX and the substantive rights of the other Members under the various other provisions of the GATT 1994."[440]

7.90. We can see that the Panel recognized both these similarities and differences. It noted, for example, the Appellate Body's statement that "important parallels" exist between the chapeau of Article XX and the "treatment no less favourable" requirement under Article 2.1. Moreover, the Panel explicitly acknowledged that, "while the tests in the chapeau of Article XX and Article 2.1 of the TBT Agreement overlap, they are not identical."[441] In the Panel's view, "[w]hereas 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

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[434] Appellate Body Reports, *US – COOL*, para. 268. See also Appellate Body Reports, *US – Clove Cigarettes*, para. 172; and *US – Tuna II (Mexico)*, para. 212.

[435] Appellate Body Reports, *US – Clove Cigarettes*, para. 173; *US – Tuna II (Mexico)*, para. 213. The sixth recital of the preamble of the TBT Agreement recognizes that a WTO Member may take measures necessary for, *inter alia*, the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, 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" and are "otherwise in accordance with the provisions of this Agreement".

[436] For instance, the Appellate Body has highlighted that, in view of the similarities between the language of Article XIV of the GATS and Article XX of the GATT 1994, previous decisions under each provision may be relevant in understanding the scope and meaning of the other. (Appellate Body Reports, *US – Gambling*, para. 291; *China – Publications and Audiovisual Products*, fn 452 to para. 239)

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

[438] Appellate Body Reports, *EC – Seal Products*, para. 5.311.

[439] The Appellate Body explained that:

> [u]nder Article 2.1 of the TBT Agreement, a panel has to examine whether the detrimental impact that a measure has on imported products stems exclusively from a legitimate regulatory distinction rather than reflecting *discrimination* against the group of imported products. Under the chapeau of Article XX, by contrast, the question is whether a measure is applied in a manner that would constitute a means of *arbitrary* or *unjustifiable discrimination* between countries where the same conditions prevail.

(Appellate Body Reports, *EC – Seal Products*, para. 5.311 (emphasis original))

[440] Appellate Body Reports, *EC – Seal Products*, para. 5.312 (referring to Appellate Body Report, *US – Shrimp*, para. 156).

[441] Panel Report, para. 7.89.

solely on whether a measure is applied in an arbitrarily or unjustifiably discriminatory manner (or is a disguised restriction on international trade)."[442]

7.91. These considerations suggest to us that, while the Panel jumped quickly to the chapeau of Article XX and certain jurisprudence relating to that provision in seeking guidance as to the proper legal test for the second step in the analysis of "treatment no less favourable" under Article 2.1 of the TBT Agreement, the Panel was not wrong to seek such guidance. Previous decisions under Article XX of the GATT 1994, particularly regarding the notion of "arbitrary or unjustifiable discrimination", may provide useful insight as to how the same concept should be understood in the context of the second step of the "treatment no less favourable" analysis under Article 2.1 of the TBT Agreement.

7.92. As regards the specific insight that the Panel drew from the jurisprudence under the chapeau of Article XX, we recall that, in the context of its analysis of Article XX, in *EC – Seal Products*, the Appellate Body stated that "[o]ne 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."[443] This was the test adopted by the Panel for purposes of the second step of its "treatment no less favourable" analysis under Article 2.1 of the TBT Agreement, to which the United States now objects. In the context of the chapeau of Article XX, the Appellate Body has explained that the reason why the assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure is that it is difficult to understand "how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX".[444] The same considerations, in our view, are valid in the context of the second step of the analysis of "treatment no less favourable" under Article 2.1 of the TBT Agreement. For the reasons set out above, and in particular the reference in the sixth recital of the preamble of the TBT Agreement to "arbitrary and unjustifiable discrimination", the Panel's adoption of this test as part of its "treatment no less favourable" analysis does not, in itself, appear to us to be problematic.

7.93. Of course, in *EC – Seal Products*, the Appellate Body also noted that, depending on the nature of the measure at issue and the circumstances of the case at hand, additional factors – beyond the question of whether the discrimination can be reconciled with the policy objective – could also be relevant to the analysis of whether the discrimination is arbitrary or unjustifiable.[445] In a similar manner, the Panel expressly stated that, in considering whether the detrimental impact caused by a technical regulation reflects arbitrary discrimination, it might "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".[446] Thus, the Panel correctly and explicitly recognized that merely inquiring into whether the detrimental impact of the amended tuna measure can be reconciled with the objectives of that measure might not, alone, be sufficient to ascertain whether the amended tuna measure discriminates against Mexican tuna products in an arbitrary or unjustifiable manner. In other words, and as already explained, the Panel did not characterize this legal test as a "single-factor test"[447], or as an exclusive means of assessing whether discrimination is arbitrary or unjustifiable.

7.94. In this connection, we further recall that *one* of the ways to determine whether the detrimental impacted caused by a technical regulation is even-handed and therefore stems exclusively from a legitimate regulatory distinction is by examining whether the regulatory distinction is designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination.[448] Therefore, as set out above, a measure that involves arbitrary or unjustifiable

[442] Panel Report, para. 7.89 (referring to Appellate Body Reports, *EC – Seal Products*, para. 5.311). (emphasis original)
[443] Appellate Body Reports, *EC – Seal Products*, para. 5.306 (referring to Appellate Body Reports, *US – Shrimp*, para. 165; and *Brazil – Retreaded Tyres*, paras. 227-228 and 232).
[444] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227. See also Appellate Body Reports, *EC – Seal Products*, para. 5.306.
[445] Appellate Body Reports, *EC – Seal Products*, para. 5.321.
[446] Panel Report, para. 7.91. (emphasis added)
[447] United States' appellant's submission, paras. 36, 54, 416, and 432.
[448] Appellate Body Reports, *US – COOL*, para. 271.

discrimination would not be designed or applied in an even-handed manner. At the same time, an examination of whether a measure is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination is not the *only* way to assess whether a measure lacks even-handedness. Similarly, the Panel explicitly acknowledged that an examination into arbitrary or unjustifiable discrimination is not the only means to determine whether a measure lacks even-handedness.[449]

7.95. As the above considerations show, a panel does not err by assessing whether the detrimental impact can be reconciled with, or is rationally related to, the policy pursued by the measure at issue, so long as, in doing so, it does not preclude consideration of other factors that may also be relevant to the analysis. In the present case, we do not see that the Panel's *articulation* of the legal standard precluded such consideration.

7.96. Moreover, as indicated above, in determining whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction, a panel must carefully scrutinize whether the technical regulation at issue is even-handed in its "design, architecture, revealing structure, operation, and application" in the light of the "particular circumstances of the case".[450] We note that the Panel correctly indicated that the concept of "even-handedness" is not a separate criterion in the assessment of the second step of the "treatment no less favourable" requirement under Article 2.1; rather, "even-handedness" is the central concept for determining whether the identified detrimental treatment stems exclusively from a legitimate regulatory distinction.[451] In a situation where the detrimental impact caused by a technical regulation stems exclusively from a legitimate regulatory distinction, it must be concluded that such a technical regulation does not accord less favourable treatment to imported products and is therefore consistent with Article 2.1 of the TBT Agreement.

7.97. With regard to the relationship between the notions of "even-handedness" and "arbitrary or unjustifiable discrimination", the Panel stated that, while "even-handedness" may overlap with the concept of "arbitrary discrimination", both terms are "conceptually distinct". For the Panel, while a showing of arbitrary discrimination is one way of demonstrating that a measure is not even-handed, 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, is wider than those that could give rise to a finding of arbitrary discrimination.[452] In this regard, a regulatory distinction cannot be said to be designed and applied in an even-handed manner if "it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination".[453] While an examination of whether a technical regulation constitutes a means of arbitrary or unjustifiable discrimination and thus is not even-handed must be conducted in the light of the "particular circumstances of the case"[454], it is likely that this assessment involves consideration of the nexus between the regulatory distinctions found in the measure and the measure's policy objectives, including by examining whether the requirements imposed by the measure are disproportionate in the light of the objectives pursued.[455]

7.98. At this juncture, we consider it important to recall that, in the original proceedings, the United States sought to explain that its measure was even-handed and that the detrimental impact did stem exclusively from a legitimate regulatory distinction by introducing the notion of "calibration". In particular, the United States contended that its measure was even-handed because the distinctions that it drew between different tuna fishing methods and different areas of the oceans could be explained or justified by differences in the risks associated with such fishing methods and areas of the oceans. This, in turn, led the Appellate Body in the original proceedings to examine the legitimacy of the original measure's regulatory distinctions through the lens of the concept of "calibration" relied upon by the United States. We emphasize that the Appellate Body's use of the terms "even-handed" and "calibrated" did not constitute different legal tests, since the

[449] Panel Report, paras. 7.91 and 7.96.
[450] Appellate Body Report, *US – Clove Cigarettes*, para. 182.
[451] Panel Report, para. 7.93 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 215).
[452] Panel Report, para. 7.96.
[453] Appellate Body Reports, *US – COOL*, para. 271.
[454] Appellate Body Report, *US – Clove Cigarettes*, para. 182.
[455] For instance, we recall that, in *US – COOL*, the Appellate Body found the informational requirements imposed on upstream producers under the COOL measure to be "disproportionate" as compared to the level of information communicated to consumers through the mandatory retail labels. (Appellate Body Reports, *US – COOL*, para. 347)

entire inquiry by the Appellate Body revolved around whether the United States had properly substantiated its argument that the original tuna measure was even-handed, and thus not inconsistent with Article 2.1, because it was "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the oceans.

7.99. On the basis of the foregoing discussion, we find that the United States has not established that the Panel erred in recognizing the relevance of the concept of "arbitrary or unjustifiable discrimination" in the chapeau of Article XX of the GATT 1994, or in identifying an examination of whether the detrimental treatment can be reconciled with, or is rationally related to, the measure's objectives as potentially "helpful" for purposes of the second step of the analysis of "treatment no less favourable" under Article 2.1 of the TBT Agreement.

7.100. At the same time, we also wish to express doubts about certain aspects of the Panel's articulation of the legal test for the "treatment no less favourable" requirement under Article 2.1 of the TBT Agreement. As noted, we find it somewhat odd that, after identifying the relevant interpretative question under Article 2.1, the Panel turned first to determine whether it could rely on the jurisprudence developed under Article XX of the GATT 1994, rather than turning to assess the jurisprudence on Article 2.1 itself, including the relevance of the sixth recital of the preamble of the TBT Agreement and the role of the "even-handedness" test.[456] Indeed, the Panel's discussion of the test of even-handedness is brief and is located at the very end of the subsection setting out its understanding of the legal test under Article 2.1 of the TBT Agreement.[457] Moreover, albeit brief, many of the statements made by the Panel regarding its understanding of "even-handedness" are quite sweeping in nature.[458]

7.101. It is also surprising that, in this part of its reasoning, the Panel made little reference to the original Appellate Body report in this dispute[459], and did not acknowledge or discuss the concept of "calibration" advanced by the United States, and used by the Appellate Body as a means of testing the even-handedness of the original tuna measure.[460] In taking account of the United States' arguments, the concept of "calibration" was used by the Appellate Body in the original proceedings to assess compliance with Article 2.1. In these compliance proceedings, the United States has defended its dolphin-safe labelling regime from the claim raised by Mexico under Article 2.1 of the TBT Agreement in terms similar to those that it used in the original proceedings. In the light of these considerations, as is explained in more detail below, there is a special relevance in these Article 21.5 proceedings in conducting an assessment of whether, under the amended tuna measure, the differences in labelling conditions for tuna products containing tuna caught by large purse-seine vessels in the ETP, on the one hand, and for tuna products containing tuna caught in other fisheries, on the other hand, are "calibrated" to the differences in the likelihood that dolphins will be adversely affected in the course of tuna fishing operations by different vessels, using different fishing methods, in different areas of the oceans.

7.102. Having addressed the United States' challenge to the Panel's *articulation* of the legal standard for the second step in an analysis of "treatment no less favourable" under Article 2.1 of the TBT Agreement, we examine below whether the Panel erred in its *application* of this provision. In particular, we consider whether the Panel, having correctly recognized that the second step of the "treatment no less favourable" analysis is not focused *solely* on "arbitrary or unjustifiable discrimination" and that "even-handedness" may call for an examination of other elements, took account of all the relevant elements in the particular circumstances of this case in assessing whether the amended tuna measure's detrimental impact on Mexican tuna products stems exclusively from a legitimate regulatory distinction.

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[456] Panel Report, paras. 7.79-7.80.

[457] Panel Report, section 7.5.1.

[458] For instance, the Panel stated that the term "'even-handedness' directs attention to what can perhaps best be called the 'fairness' of a technical regulation. … 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." (Panel Report, para. 7.96)

[459] We note, in particular, that, in the section addressing the legal test under Article 2.1 of the TBT Agreement, the Panel made only a few references to the Appellate Body report in the original proceedings in the footnotes to paragraphs 7.73-7.79 of its Report.

[460] The Panel did, nonetheless, express the view that, "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". (Panel Report, para. 7.95 (emphasis original))

7.2.3.2 Whether the Panel erred in its assessment of whether the detrimental impact of the amended tuna measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction

7.2.3.2.1 Preliminary observations

7.103. We begin by making certain preliminary observations regarding the analytical approach taken by the Panel in its assessment of whether the detrimental impact of the amended tuna measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction. Our observations relate to several of the issues that we have already discussed in this Report. We consider, specifically: the Panel's segmented analytical approach; the test that it employed in assessing "even-handedness"; and the extent to which the analytical approach that it adopted relied upon, and took "due cognizance" of, the findings in the original proceedings that were adopted by, and became part of the recommendations and rulings of, the DSB.

7.104. As already explained, the Panel adopted a segmented approach and assessed the amended tuna measure on a "distinction-by-distinction basis".[461] Pursuant to this approach, the Panel separately considered the consistency of the following three sets of labelling conditions with Article 2.1 of the TBT Agreement: (i) the eligibility criteria; (ii) the certification requirements; and (iii) the tracking and verification requirements. With respect to the eligibility criteria, the Panel did not itself conduct the two-step analysis required for assessing less favourable treatment under Article 2.1. Instead, the Panel relied upon the Appellate Body's findings in the original proceedings, which it understood as having "settled" that the disqualification of all tuna products derived from tuna caught by setting on dolphins from access to the dolphin-safe label, while allowing those products derived from tuna caught by other fishing methods to qualify for such access, is "even-handed, and accordingly … not inconsistent with Article 2.1".[462] This meant, according to the Panel, that it had to examine "only the regulatory regime that currently applies to *those* other fishing methods, which are qualified to catch dolphin-safe tuna".[463] The Panel then proceeded, for each of the sets of certification and tracking and verification requirements, to conduct its own analysis of less favourable treatment. In the second step of these analyses, the Panel found that the certification[464] and tracking and verification[465] requirements are not even-handed and, therefore, cannot be said to stem exclusively from a legitimate regulatory distinction. Thus, the Panel found each of these two sets of requirements to be inconsistent with Article 2.1.[466]

7.105. We have already expressed the view that, like the original tuna measure, the amended tuna measure has established a labelling regime comprised of various elements that work together towards the objectives pursued by the measure. We have also noted that, in discussing its jurisdiction under Article 21.5 of the DSU, the Panel itself emphasized the interlinkages between elements of the amended tuna measure, and stated that it would indicate and analyse these connections where relevant. We will examine below whether the Panel's segmented analysis of the even-handedness of each of the eligibility criteria, the certification requirements, and the tracking and verification requirements reflects and accounts for the manner in which the various elements of the amended tuna measure are interrelated.

7.106. We also recall that, in the preceding subsection of this Report, we found that the United States has not established that the Panel erred in recognizing the relevance of the concept of "arbitrary or unjustifiable discrimination" in the chapeau of Article XX of the GATT 1994, or in identifying an examination of whether the detrimental treatment can be reconciled with, or is

[461] Panel Report, para. 7.108.
[462] Panel Report, para. 7.126. See also paras. 7.127 and 8.2.a.
[463] Panel Report, para. 7.128. (emphasis original) The Panel also considered whether Mexico had submitted new evidence in these Article 21.5 proceedings that would undermine the finding from the original proceedings that, in the view of the Panel, served as the basis for the Appellate Body's determination that Article 2.1 of the TBT Agreement permits the United States to disqualify tuna caught by setting on dolphins from ever being labelled as dolphin-safe; namely, that no fishing method other than setting on dolphins has effects on dolphins as consistently harmful as those caused by setting on dolphins. (Ibid., para. 7.130 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 289)) The Panel found "that Mexico ha[d] 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." (Ibid., para. 7.135)
[464] Panel Report, paras. 7.233 and 7.246.
[465] Panel Report, paras. 7.400 and 7.402.
[466] Panel Report, paras. 8.2.b and 8.2.c.

rationally related to, the measure's objectives as potentially "helpful" for purposes of the second step of the analysis of "treatment no less favourable" under Article 2.1 of the TBT Agreement. The Panel did not use such an inquiry with respect to the eligibility criteria; rather, the Panel mainly relied on its understanding of the Appellate Body's analysis of the even-handedness of the original tuna measure. The Panel did, however, use such an inquiry in analysing the even-handedness of the different certification and tracking and verification requirements. At the outset of its consideration of the certification requirements, the Panel explicitly reiterated its view 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 [pursued] by the measure at issue."[467] The Panel was ultimately persuaded by Mexico that the different certification requirements are not even-handed because "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."[468] In analysing the different tracking and verification requirements, the Panel was persuaded that there is no rational or obvious connection between the amended tuna measure's imposition of a lighter burden on tuna caught outside the ETP large purse-seine fishery and the goals of the amended tuna measure[469], and found that none of the explanations provided by the United States suggested otherwise.[470] This analysis supplied the basis for the Panel's finding that the tracking and verification "system currently in place under the amended tuna measure is not even-handed, and therefore does not stem exclusively from a legitimate regulatory distinction."[471]

7.107. In both of these analyses, the Panel referred, generally, to the "goals" or "objectives" of the amended tuna measure. Elsewhere in its Report[472], the Panel identified these objectives to be twofold – ensuring that US consumers are not misled about the dolphin-safe status of their tuna products, and contributing to the protection of dolphins. We nevertheless note that, in assessing whether "a particular instance of detrimental treatment is reconcilable with or explicable by reference to the objectives" of the measure[473], the Panel's reasoning with respect to each of the sets of certification requirements, and tracking and verification requirements relies predominantly on the first of these objectives. Moreover, we have already explained that the Panel identified this test as "a relevant consideration"[474] that may "help"[475] to determine whether the distinctions drawn involve arbitrary discrimination, while also acknowledging that an inquiry into whether a distinction constitutes arbitrary or unjustifiable discrimination is not the only means to determine whether a measure lacks even-handedness such that the detrimental treatment cannot be said to stem exclusively from a legitimate regulatory distinction.[476] Yet, we do not see that, in its analysis of the certification and tracking and verification requirements, the Panel took account of other considerations, employed additional tests, or analysed other dimensions (e.g. protection of dolphins from observed and unobserved harms) of "even-handedness" before reaching its conclusions in respect of the certification and tracking and verification requirements.

[467] Panel Report, para. 7.196.

[468] Panel Report, para. 7.233. Pointing to the amended tuna measure's goal of "ensuring that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins", Mexico argued that, because captain certification of the dolphin-safe status of tuna is less reliable than observer certification, the amended tuna measure's system of captain self-certification in respect of tuna caught outside the ETP large purse-seine fishery "does not bear a rational connection to", and is "entirely inconsistent" and "irreconcilable" with, such objective. (Ibid., para. 7.181 (quoting Mexico's second written submission to the Panel, paras. 3, 194, and 195))

[469] Panel Report, para. 7.392. The Panel did not, in this part of its analysis, specifically identify to which objective(s) of the amended tuna measure it was referring. Nevertheless, the Panel's reference, in the preceding paragraph (para. 7.391), to Mexico's concerns about the greater likelihood that tuna caught in all fisheries other than the ETP large purse-seine fishery will be incorrectly labelled as dolphin-safe, seems to suggest that it was referring to the goal of "ensuring that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins". (Ibid., para. 7.181 (quoting Mexico's second written submission to the Panel, para. 3))

[470] Panel Report, para. 7.400.

[471] Panel Report, para. 7.401.

[472] Panel Report, paras. 7.134 and 7.523. See also Appellate Body Report, *US – Tuna II (Mexico)*, paras. 242, 302, and 325.

[473] Panel Report, para. 7.390.

[474] Panel Report, para. 7.390.

[475] Panel Report, para. 7.91.

[476] Panel Report, paras. 7.91 and 7.93.

7.108. In this connection, as we have already explained, in the original proceedings, the United States defended the original tuna measure by arguing that it was "calibrated", that is, that the distinctions drawn between different tuna fishing methods and different areas of the oceans could be explained or justified by the differences in risk associated with such fishing methods and areas of the oceans.[477] This, in turn, led the Appellate Body to address the question of whether the original measure's detrimental impact on Mexican tuna products stemmed exclusively from a legitimate regulatory distinction by testing the "even-handedness" of the original tuna measure using the concept of "calibration". Ultimately, the Appellate Body compared, on the one hand, the existence of risks to dolphins associated with the fishing method of setting on dolphins within the ETP, which were fully addressed by the labelling conditions under the original tuna measure with, on the other hand, the existence of risks of mortality or serious injury of dolphins in all fisheries other than the ETP large purse-seine fishery, which were unaddressed, given the absence of any requirement under the original tuna measure to certify the dolphin-safe status in terms of mortality or serious injury of tuna caught outside the ETP by non-purse-seine vessels.[478] Having done so, the Appellate Body reached the conclusion that the United States had failed to show that its measure was "'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean", and thus that it had not demonstrated that the original tuna measure was even-handed "in the relevant respects".[479]

7.109. With respect to the manner in which the rules on the allocation of the burden of proof under Article 2.1 were applied in the original proceedings, we note that the Appellate Body considered first whether Mexico had made a *prima facie* case establishing that the original tuna measure modifies competitive conditions to the detriment of Mexican tuna products and found that it had. It then proceeded to analyse whether that detrimental impact reflected discrimination or stemmed exclusively from a legitimate regulatory distinction. The Appellate Body stated in its Report that, although the burden of proof to show that the US dolphin-safe labelling provisions were inconsistent with Article 2.1 was on Mexico as the complainant, it was for the United States to support its assertion that its dolphin-safe labelling provisions were "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the oceans.[480]

7.110. The Appellate Body recalled the reasons why the original panel was "not persuaded" that the United States had demonstrated that the requirements of the US dolphin-safe labelling provisions were "calibrated", referring to key evidence presented, and key arguments substantiated, by the parties.[481] The Appellate Body noted that the United States had presented "extensive evidence and arguments", and the original panel made "uncontested findings, to the effect that the fishing method of setting on dolphins causes observed and unobserved adverse effects on dolphins."[482] It also noted that the original panel appeared to have accepted the United States' argument that "the fishing technique of setting on dolphins is particularly harmful to dolphins."[483] While the original panel agreed with the United States that "certain fishing techniques seem to pose greater risks to dolphins than others"[484], it 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 under AIDCP monitoring."[485] Referring to evidence and arguments submitted by Mexico, the original panel found that there were "clear indications that the use of certain tuna fishing techniques *other*

[477] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 282-284.
[478] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 292 and 296-297. The Appellate Body also referred to the original panel's findings that, with respect to purse-seine vessels fishing outside the ETP, the only requirement under the original tuna measure was to provide a captain's certification that there had been "no setting on dolphins" during the relevant trip.
[479] Appellate Body Report, *US – Tuna II (Mexico)*, para. 297.
[480] Appellate Body Report, *US – Tuna II (Mexico)*, para. 283.
[481] Appellate Body Report, *US – Tuna II (Mexico)*, para. 285 (quoting Original Panel Report, para. 7.559).
[482] Appellate Body Report, *US – Tuna II (Mexico)*, para. 287.
[483] Appellate Body Report, *US – Tuna II (Mexico)*, para. 289.
[484] Appellate Body Report, *US – Tuna II (Mexico)*, para. 288 (quoting Original Panel Report, para. 7.438).
[485] Appellate Body Report, *US – Tuna II (Mexico)*, para. 288 (quoting Original Panel Report, para. 7.617).

than setting on dolphins may also cause harm to dolphins"[486], and agreed with Mexico that risks from other fishing methods are not insignificant and do, under some circumstances, rise to the same level as the risk from setting on dolphins.

7.111. On the basis of these considerations, the Appellate Body concluded that "the United States ha[d] not demonstrated that the difference in labelling conditions [was] 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean", that "the detrimental impact of the US measure on Mexican tuna products stem[med] exclusively from a legitimate regulatory distinction," and that the measure was "even-handed in the relevant respects".[487] In the light of all the above, the Appellate Body reached overall conclusions on what the participants had established, or failed to establish, under Article 2.1. It considered that Mexico had "established a *prima facie* case that the US 'dolphin-safe' labelling provisions modif[ied] the conditions of competition in the US market to the detriment of Mexican tuna products and [were] not even-handed in the way in which they address[ed] the risks to dolphins arising from different fishing techniques in different areas of the ocean".[488] However, the Appellate Body considered that the United States had not "met its burden of rebutting this *prima facie* case" because it had not "justified as non-discriminatory under Article 2.1 the different requirements … for access to the US 'dolphin-safe' label."[489] The Appellate Body thus concluded that the United States had not "demonstrated that the detrimental impact of the US measure on Mexican tuna products stem[med] exclusively from a legitimate regulatory distinction."[490]

7.112. We reiterate that these Article 21.5 proceedings form part of a continuum, such that due cognizance must be accorded to the recommendations and rulings made by the DSB in the original proceedings, based on the adopted findings of the Appellate Body and original panel.[491] In their submissions to the Panel, both the United States and Mexico advanced arguments relating to the respective risks to dolphins associated with different methods of fishing inside and outside the ETP. Mexico sought to establish that tuna fishing methods other than setting on dolphins have substantial adverse effects and that dolphins face risks of mortality or serious injury from tuna fishing outside the ETP that are equal to or greater than those posed to dolphins by fishing within the ETP.[492] For its part, the United States contended that the changes incorporated into the amended tuna measure through the 2013 Final Rule responded directly to the lack of calibration that the Appellate Body found to be responsible for the lack of even-handedness of the original tuna measure. In making its arguments, the United States relied on the findings from the original proceedings, as well as additional evidence, to establish that setting on dolphins in the ETP is "particularly harmful" to dolphins, and that the risks associated with such a tuna fishing method are greater than those associated with fishing methods that are not disqualified from access to the dolphin-safe label under the amended tuna measure.

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[486] Appellate Body Report, *US – Tuna II (Mexico)*, para. 247 (quoting Original Panel Report, para. 7.520, in turn referring to National Marine Fisheries Service, *An Annotated Bibliography of Available Literature Regarding Cetacean Interactions with Tuna Purse-Seine Fisheries Outside of the Eastern Tropical Pacific Ocean*, Administrative Report LJ 96 20 (November 1996) (Original Panel Exhibit US-10), p. 38; and National Research Council, *Dolphins and the Tuna Industry* (National Academy Press: Washington, D.C., 1992) (Original Panel Exhibit MEX-2), pp. 37 and 98 (emphasis original)).

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

[488] Appellate Body Report, *US – Tuna II (Mexico)*, para. 298.

[489] Appellate Body Report, *US – Tuna II (Mexico)*, para. 298.

[490] Appellate Body Report, *US – Tuna II (Mexico)*, para. 298.

[491] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 136 (referring to Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 142; *Mexico – Corn Syrup (Article 21.5 – US)*, para. 121; *US – FSC (Article 21.5 – EC II)*, para. 61; *US – Softwood Lumber IV (Article 21.5 – Canada)*, paras. 68 and 77; and *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 102).

[492] Panel Report, paras. 7.111-7.112 (referring to Mexico's second written submission to the Panel, paras. 248 and 263). Mexico did not advance these arguments to show that the amended tuna measure is not "calibrated", but rather in support of its argument that the qualification for "dolphin-safe" status of tuna caught outside the ETP using such tuna fishing methods is inconsistent with the objectives of the amended tuna measure. Indeed, Mexico disputed the relevance of the concept of "calibration" to the analysis of the even-handedness of the amended tuna measure. In Mexico's view, such concept is "inconsistent with the primary objective of the measure in question, which is concerned with the accuracy of information provided to consumers." (Mexico's second written submission to the Panel, para. 173) For Mexico, "[t]una is either dolphin-safe or it is not – eligibility for the dolphin-safe label cannot be viewed as a relative assessment." (Ibid.)

7.113. Having made these preliminary observations, and bearing them in mind, we proceed to examine the three separate parts of the Panel's analysis and findings in the light of the specific claims of error raised by the participants in this appeal.

7.2.3.2.2 The eligibility criteria

7.114. Mexico argues that the Panel erred in its analysis of the eligibility criteria when assessing the consistency of the amended tuna measure with Article 2.1 of the TBT Agreement. In particular, Mexico contends that the Panel erred in finding that, in the original dispute, the Appellate Body "settled" the issue of even-handedness with respect to the granting of eligibility for the dolphin-safe label to tuna products containing tuna caught by fishing methods other than setting on dolphins.[493]

7.115. Before addressing Mexico's claim of error on appeal, we describe the main findings by the Panel regarding the eligibility criteria in the amended tuna measure.

7.2.3.2.2.1 The Panel's findings

7.116. The Panel began by posing the question of what, precisely, had been "definitively settled" by the Appellate Body in the original proceedings regarding the eligibility criteria.[494] For the Panel, it was "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."[495] In the Panel's view, "the Appellate Body clearly found that setting on dolphins causes observed and unobserved harm to dolphins."[496] The Panel further explained its understanding that "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'"[497], and emphasized that it was "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."[498] On this basis, the Panel "reaffirm[ed] 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".[499] The Panel added that the original tuna measure was considered WTO-inconsistent, "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".[500]

7.117. Next, the Panel stated that, in the original proceedings, the Appellate Body answered the question of whether the failure of the US labelling regime to disqualify *other* methods of tuna fishing necessarily deprived the original tuna measure of even-handedness. In the Panel's view, the Appellate Body found that the disqualification of tuna caught by setting on dolphins, together with the qualification of tuna caught by other fishing methods, is not inconsistent with Article 2.1 of the TBT Agreement. The Panel thus considered this issue to be "settled" and proceeded to "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

[493] Mexico's other appellant's submission, para. 91 (referring to Panel Report, paras. 7.117-7.135).
[494] Panel Report, para. 7.119.
[495] Panel Report, para. 7.120.
[496] Panel Report, para. 7.122.
[497] Panel Report, para. 7.122 (quoting Original Panel Report, para. 7.504). (emphasis original)
[498] Panel Report, para. 7.122.
[499] Panel Report, para. 7.123.
[500] Panel Report, para. 7.123. (emphasis original)

criteria are even-handed, and accordingly are not inconsistent with Article 2.1 of the TBT Agreement".[501]

7.2.3.2.2.2 Whether the Panel erred by misreading the findings of the Appellate Body in the original proceedings

7.118. Mexico asserts that the Panel erred in finding that the Appellate Body had already "settled" in the original dispute the issue of "even-handedness" concerning the granting of eligibility for the dolphin-safe label to tuna products containing tuna caught by fishing methods other than setting on dolphins. Mexico stresses that the analysis of even-handedness under Article 2.1 of the TBT Agreement "is complicated both legally and factually" and that the Appellate Body did not undertake the "rigorous assessment" required to assess the even-handedness of the granting of the eligibility for the dolphin-safe label to tuna products containing tuna caught by other fishing methods.[502] Nor, according to Mexico, did the Appellate Body make the findings of even-handedness or consistency with Article 2.1 that the Panel imputed to it.[503] Rather, in Mexico's view, the findings of the Appellate Body related to the issue of disqualification of tuna caught by setting on dolphins from accessing the dolphin-safe label and did *not* address the granting of the dolphin-safe label to tuna products containing tuna caught by other fishing methods.[504] Therefore, Mexico emphasizes that this issue was not "definitively settled".[505]

7.119. The United States responds that, contrary to Mexico's assertions, the Panel correctly concluded that the Appellate Body had already rejected that the United States could not distinguish between different fishing methods consistently with Article 2.1 of the TBT Agreement. The United States contends that Mexico wrongly argues that the Appellate Body's "even-handedness" analysis was limited to the disqualification of tuna caught by setting on dolphins and did not cover the eligibility of tuna caught by other fishing methods. According to the United States, that issue was "squarely before"[506] the Appellate Body in the original proceedings. Therefore, the United States asserts that the Panel did not err in finding that the issue was "definitively settled" in the original proceedings, given that the central question for the Appellate Body was whether the challenged measure was "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the oceans.[507]

7.120. To address this claim of error by Mexico, we must first recall the main findings made by the Appellate Body in the original dispute.

7.121. Having found that the original tuna measure modified the conditions of competition in the US market to the detriment of Mexican products, the Appellate Body turned to assess whether the detrimental impact reflected discrimination and, in particular, whether the measure at issue was "calibrated" to the risks to dolphins. The Appellate Body began by noting that the United States had argued before the original panel that, "to the extent that there are any differences in criteria that must be satisfied in order to substantiate 'dolphin-safe' claims, they are 'calibrated' to the risk that dolphins may be killed or seriously injured when tuna is caught".[508] The Appellate Body pointed out that "[t]he aspect of the measure that causes the 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."[509] Therefore, the Appellate Body

[501] Panel Report, para. 7.126. The Panel noted that the Appellate Body ultimately found that the original tuna measure was inconsistent with Article 2.1. However, according to the Panel, such finding was not because the United States disqualified tuna caught by setting on dolphins from accessing the dolphin-safe label, but rather because the regulatory regime imposed by the United States on tuna fishing methods *other* than setting on dolphins did not sufficiently address the risks posed to dolphins by those methods. (Ibid., para. 7.127 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 298)) The Panel then went on to examine a range of exhibits that both parties had referred to in the course of arguing about this issue and indicated that the new evidence presented in these Article 21.5 proceedings "merely supports the conclusion reached by the panel and the Appellate Body in the original proceedings". (Ibid., para. 7.135)

[502] Mexico's other appellant's submission, para. 93.

[503] Mexico's other appellant's submission, para. 92.

[504] Mexico's other appellant's submission, para. 90.

[505] Mexico's other appellant's submission, para. 93 (quoting Panel Report, para. 7.119).

[506] United States' appellee's submission, para. 63. (emphasis omitted)

[507] United States' appellee's submission, para. 64.

[508] Appellate Body Report, *US – Tuna II (Mexico)*, para. 282. (fn omitted)

[509] Appellate Body Report, *US – Tuna II (Mexico)*, para. 284.

considered that the question before it was whether the United States had demonstrated "that *this* difference in labelling conditions is a legitimate regulatory distinction, and hence whether the detrimental impact of the measure stem[med] exclusively from such a distinction rather than reflecting discrimination."[510]

7.122. In addressing this question, the Appellate Body recalled and relied upon a number of findings made by the original panel. These included: that "the fishing method of setting on dolphins causes observed and unobserved adverse effects on dolphins"[511]; that "these adverse effects [were] fully addressed in the measure at issue"[512]; and that "the use of certain tuna fishing techniques *other* than setting on dolphins may also cause harm to dolphins'."[513] The Appellate Body highlighted that, while the original panel "accepted the United States' argument that the fishing technique of setting on dolphins is particularly harmful to dolphins", it "did not agree with the United States … that the risks to dolphins from other fishing techniques are insignificant and do not under some circumstances rise to the same level as the risks from setting on dolphins."[514] In the view of the Appellate Body, these findings formed the basis for the original panel's concerns about the way in which the original tuna measure addressed the potential adverse effects on dolphins from the use of fishing techniques other than setting on dolphins outside the ETP.[515] Like the original panel, the Appellate Body concluded that the original tuna measure did *not* address adverse effects on dolphins resulting from the use of fishing methods predominantly employed by fishing fleets supplying the United States' and other countries' tuna producers, because there was no requirement for certification that no dolphins had been killed or seriously injured applicable to fisheries outside the ETP.[516] Rather, the only requirement that the original tuna measure applied to vessels fishing outside the ETP was, in respect of tuna caught by purse-seine vessels, to provide a certification by the captain that setting on dolphins had *not* taken place. The Appellate Body agreed with the original panel that this requirement did not address risks to dolphins resulting from fishing methods other than setting on dolphins.[517]

7.123. For these reasons, the Appellate Body concluded that "the United States ha[d] 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, [was] 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean."[518] Consequently, the Appellate Body considered that the United States had not rebutted Mexico's *prima facie* case that "the US 'dolphin-safe' labelling provisions modify the conditions of competition in the US market to the detriment of Mexican tuna products and are not even-handed in the way in which they address the risks to dolphins arising from different fishing techniques in different areas of the ocean."[519]

7.124. As can be seen from the above, the Appellate Body did *not* make the findings attributed to it by the Panel. Although the Panel stated that it was "reaffirm[ing]" the Appellate Body's findings, the Appellate Body report contains no statement that the United States is "entitled" to disqualify tuna caught by setting on dolphins "from ever being labelled as dolphin-safe", much less that "the eligibility criteria are even-handed, and accordingly are not inconsistent with Article 2.1 of the TBT Agreement".[520] Indeed, the Panel does not refer to any paragraph(s) in the Appellate Body

[510] Appellate Body Report, *US – Tuna II (Mexico)*, para. 284. (emphasis original) The Appellate Body stated that it would examine to what extent the panel's findings shed light on the question of "whether 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, [were] calibrated to the likelihood that dolphins would be adversely affected in the course of tuna fishing operations in the respective conditions". (Ibid., para. 286)

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

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

[513] Appellate Body Report, *US – Tuna II (Mexico)*, para. 288 (quoting Original Panel Report, para. 7.520 (emphasis original; fn omitted)).

[514] Appellate Body Report, *US – Tuna II (Mexico)*, para. 289. (fns omitted)

[515] Appellate Body Report, *US – Tuna II (Mexico)*, para. 289.

[516] Appellate Body Report, *US – Tuna II (Mexico)*, para. 289 (referring to Original Panel Report, para. 7.532).

[517] Appellate Body Report, *US – Tuna II (Mexico)*, para. 292 (referring to Original Panel Report, para. 7.561).

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

[519] Appellate Body Report, *US – Tuna II (Mexico)*, para. 298.

[520] Panel Report, paras. 7.123 and 7.126.

report that contain these alleged findings. Importantly, and as the Panel acknowledged, the Appellate Body found the original tuna measure to *lack* even-handedness and, for that reason, to be *inconsistent* with Article 2.1 of the TBT Agreement.[521]

7.125. As we have already explained, and as the term itself implies, "even-handedness" is a relational concept, and must be tested through a comparative analysis. Regulatory distinctions by definition treat groups of products differently. Thus, the even-handedness of a measure and a regulatory distinction drawn thereunder cannot properly be appreciated through an examination of how they treat a single group of products or production methods. Rather, it is only through scrutiny of the treatment accorded to all the groups that are being compared that a proper assessment of even-handedness can be made.

7.126. In some parts of its reasoning, the Panel seemed to be aware of the relational and comparative nature of the analysis of whether the amended measure is calibrated and even-handed. The Panel noted that, in the original proceedings, the Appellate Body's finding of inconsistency with Article 2.1 was made not because the United States disqualified tuna caught by setting on dolphins from accessing the dolphin-safe label, but rather because the regulatory regime imposed by the United States on tuna fishing methods *other* than setting on dolphins did not sufficiently address the risks posed to dolphins by those methods.[522] However, it does not follow from the Appellate Body's findings in the original dispute that the measure's "disqualification" of products containing tuna caught in the ETP by setting on dolphins could be – or was – assessed for consistency with Article 2.1 in isolation from the requirements applied with respect to other fishing methods that also cause harm to dolphins in other fisheries. As noted, in order to assess whether the regulatory distinctions drawn under a measure are even-handed, the treatment of both groups between which the measure's regulatory treatment differs has to be appreciated. Whether a regulatory distinction that involves a denial of access to the dolphin-safe label in respect of setting on dolphins is even-handed depends not only on how the risks associated with this method of fishing are addressed, but also on whether the risks associated with other fishing methods in other fisheries are addressed, commensurately with their respective risk profiles, in the labelling conditions that apply in respect of tuna caught in such other fisheries. By finding that the issue of disqualifying setting on dolphins had been "settled" in the original proceedings, the Panel precluded a proper relational and comparative analysis of the regulatory distinctions and the treatment of both groups of products (i.e. those that are ineligible for access to the label under the amended measure and those that are eligible for such access).

7.127. The same is true when, as was the case with the changes introduced to the dolphin-safe labelling regime through the measure taken to comply (the 2013 Final Rule), a measure is modified in a way that affects the treatment of only one of the two groups subject to that distinction. Following such modification, the even-handedness of the regulatory treatment and relevant distinctions must be assessed anew. The legal significance of the changed treatment afforded to one group of products cannot properly be understood by examining that group in isolation. Rather, answering the question of whether the detrimental impact stems exclusively from a legitimate regulatory distinction also requires consideration of the unchanged regulatory treatment accorded to the other group.

7.128. To us, the Panel's statements are all the more surprising given that they do not seem entirely consonant with the way in which the Panel itself described the findings of the Appellate Body in an earlier section of the Panel Report. As explained in section 7.1 of this Report, in considering the scope of its jurisdiction, the Panel stressed that the Appellate Body "did not say that any one particular element" of the dolphin-safe labelling regime was "solely responsible" for the original tuna measure's lack of even-handedness.[523] The Panel observed that "[i]t 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", but added that this "may very well have been a consequence of the way the case was argued by the parties".[524] In any event, the Panel explained,

[521] Panel Report, para. 7.127 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 298).

[522] Panel Report, para. 7.127 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 298). As we have noted, the Panel found that the original tuna measure was considered WTO-inconsistent, not because it disqualified tuna caught by setting on dolphins from accessing the dolphin-safe label, but because the measure *was not even-handed with respect to other methods of fishing*, which may also cause harm to dolphins. (Ibid., para. 7.123)

[523] Panel Report, para. 7.33.

[524] Panel Report, para. 7.38.

it was "the tuna measure as a whole, with its varying regulatory requirements, that was found [by the Appellate Body] to be inconsistent with Article 2.1 of the TBT Agreement."[525] In particular, the Panel considered that the Appellate Body's reference in the plural to "the difference in labelling conditions" and "different requirements" indicated that the Appellate Body's findings encompassed various distinctions embedded in the original tuna measure, including in respect of the requirements pertaining to certification and tracking and verification.[526]

7.129. We do not see how, in the light of the Appellate Body's findings, the Panel formed the view that the Appellate Body report in the original proceedings had "settled": (i) that the United States can disqualify tuna caught by setting on dolphins from ever accessing the dolphin-safe label[527]; and (ii) 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.[528] In particular, the Appellate Body did not assess the questions identified by the Panel independently from each other. Nor does the Appellate Body report either state or imply that these issues had been "settled", especially in the categorical manner in which the Panel described them. Rather, in assessing whether the measure at issue was "calibrated", the Appellate Body scrutinized and compared 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. Therefore, it is only through an examination of the treatment accorded to *both* of the groups that are being compared that a proper assessment of the even-handedness of the measure at issue can be made.

7.130. We further observe that the Panel's decision, in addressing the eligibility criteria under the amended tuna measure, to focus on the aspects that it considered the Appellate Body had already "settled" appeared to prevent it from engaging in a full exploration of the central question in these compliance proceedings, namely, whether the changes introduced by the United States through the amended tuna measure suffice to bring that measure into compliance with the recommendations and rulings of the DSB concerning Article 2.1 of the TBT Agreement.

7.131. In sum, the Appellate Body report contains no finding that the United States is entitled "to disqualify tuna caught by that method from ever being labelled as dolphin-safe"[529], or that the original proceedings "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."[530] Accordingly, the Panel's "reaffirm[ation]" of the supposed "finding" of the Appellate Body that "the eligibility criteria are even-handed, and accordingly are not inconsistent with Article 2.1 of the TBT Agreement", is incorrect.[531] For the foregoing reasons, we find that the Panel erred in finding that the Appellate Body "settled" the issue of the even-handedness of the eligibility criteria in the original proceedings.

7.2.3.2.3 The certification and tracking and verification requirements

7.132. The United States claims that the Panel erred in reaching findings that the detrimental impact caused by the certification requirements, and the tracking and verification requirements, does not stem exclusively from a legitimate regulatory distinction. As a result of these alleged errors, the United States seeks reversal of the Panel's ultimate findings that: (i) the certification requirements accord less favourable treatment to Mexican 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 (ii) the tracking and verification requirements accord less favourable treatment to Mexican tuna products than that accorded to like products from the

[525] Panel Report, para. 7.33. See also para. 7.117. The Panel also considered and rejected the United States' contention that the compliance proceedings should be limited to evaluating the 2013 Final Rule. The Panel concluded that its task was to determine whether the amended tuna measure, including the 2013 Final Rule, brings the United States into compliance with the WTO covered agreements. (Ibid., para. 7.24)

[526] Panel Report, paras. 7.35-7.37 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, paras. 284 and 298, respectively).

[527] Panel Report, para. 7.123.

[528] Panel Report, para. 7.126.

[529] Panel Report, para. 7.123.

[530] Panel Report, para. 7.126.

[531] Panel Report, para. 7.126.

United States and to like products originating in any other country, in violation of Article 2.1 of the TBT Agreement.[532]

7.133. The United States appeals two main aspects of the Panel's assessment of the even-handedness of the certification requirements. First, the United States submits that the Panel erred in finding that the different certification requirements lack even-handedness because captains may not necessarily and always have the technical skills to certify that no dolphins were killed or seriously injured, and this may result in inaccurate information being passed to consumers, in contradiction with the objectives of the amended tuna measure. Second, the United States argues that the Panel erred in finding that the determination provisions prove that the detrimental impact caused by the certification requirements does not stem exclusively from a legitimate regulatory distinction.[533] We address the United States' challenge to the Panel's analysis of the determination provisions in the next subsection of this Report. Following that subsection, we deal with claims raised by the participants under Article 11 of the DSU in connection with the Panel's analysis of the even-handedness of the different certification requirements.

7.134. In this subsection of our Report, we address the claims of error raised by the United States in respect of the first part of the Panel's analysis of the even-handedness of the different certification requirements, and in respect of the Panel's analysis of the even-handedness of the different tracking and verification requirements. We begin by providing a summary of the relevant Panel findings, first with respect to the even-handedness of the different certification requirements and, second, with respect to the different tracking and verification requirements.

7.2.3.2.3.1 The Panel's findings

The different certification requirements

7.135. With respect to the different certification requirements, Mexico submitted to the Panel that, like the original tuna measure, the amended tuna measure lacks even-handedness, because it fully addresses the risks posed to dolphins by setting on dolphins in the ETP, but does not fully address the risk posed by other fishing methods in other fisheries. Mexico highlighted that, within the ETP large purse-seine fishery, the required certifications must be provided both by the captain of the vessel and by an independent on-board observer, but, outside that fishery, the certifications need be provided only by the captain. The Panel expressed the view that Mexico's claim that the different certification requirements are not even-handed rested on the "fundamental factual premise" that captains' certifications are "inherently unreliable" and "meaningless"[534] for two main reasons: (i) 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 (ii) captains lack the technical expertise necessary to certify accurately that no dolphins were killed or seriously injured, and therefore their certifications do not ensure that tuna labelled as "dolphin safe" in fact meet the statutory and regulatory requirements.

7.136. In considering the first of these assertions, the Panel was of the view that "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."[535] The Panel considered that the arguments and evidence submitted by Mexico were not sufficient to rebut this presumption[536], and noted that the United States' alternative understanding of the economic incentives facing captains seemed equally plausible.[537] The Panel was thus not convinced

[532] United States' appellant's submission, paras. 135, 188, 194, 287, and 335 (referring to Panel Report, paras. 8.2.a and 8.2.b).
[533] United States' appellant's submission, para. 787.
[534] Panel Report, para. 7.198 (quoting Mexico's first written submission to the Panel, paras. 285 and 295).
[535] Panel Report, para. 7.208.
[536] Panel Report, para. 7.209.
[537] Panel Report, para. 7.210. The United States argued before the Panel that, contrary to Mexico's position, vessel captains have economic incentives *not* to lie on their dolphin-safe declarations, because canneries would stop doing business with them and because of possible civil and criminal penalties. (Ibid., para. 7.202)

that relying on captains' certifications outside the ETP large purse-seine fishery deprives the amended tuna measure of even-handedness.[538]

7.137. Next, in assessing Mexico's argument that captains may not have the necessary technical expertise to certify accurately that no dolphins were killed or seriously injured, the Panel considered it useful to compare 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.[539] Having examined the evidence concerning the kinds of tasks performed by observers, the Panel concluded that this evidence "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."[540] Next, the Panel analysed the evidence regarding the tasks generally expected of captains and was not convinced that certifying dolphin mortality or serious injury is the kind of task generally expected of captains, or that captains necessarily have the skills to certify whether dolphins have been killed or seriously injured.[541] For these reasons, the Panel held that "the United States ha[d] 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"[542], because "the United States ha[d] not explained why its measure assumes that captains have at their disposal the skills necessary to ensure accurate certification."[543] Accordingly, the Panel reasoned that captain certification of the dolphin-safe status of tuna "may result in inaccurate information being passed to consumers, in contradiction with the objectives of the amended tuna measure".[544] The Panel therefore found that "the different certification requirements are not even-handed, and so cannot be said to stem exclusively from a legitimate regulatory distinction."[545]

7.138. Subsequently, the Panel set out to "sketch" how it would analyse the even-handedness of the certification requirements if the United States, rather than Mexico, bore the burden of proof with respect to the second step of the analysis of "treatment no less favourable" under Article 2.1.[546] The Panel accepted 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."[547] In doing so, the Panel clarified that it did not understand the United States to have taken the position that such observer certifications are required in the ETP large purse-seine fishery but not in other fisheries "because the risk of dolphin mortality or serious injury is somehow less important in other fisheries".[548] Rather, according to the Panel, the United States explained the different certification requirements as due to "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, [and that 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 nets set."[549] In contrast, because the nature and degree of the interaction between dolphins and tuna fishers using other fishing methods in other oceans is "different in quantitative and qualitative 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".[550]

7.139. The Panel considered that Mexico's evidence was not sufficient to rebut the United States' argument that the special and unique risks to dolphins posed in the ETP large purse-seine fishery justify the different certification requirements applied to the ETP large purse-seine fishery and other fisheries.[551] On this basis, the Panel observed that it "would find that the United States ha[d] made a *prima facie* case that the different certification requirements stem exclusively from a

[538] Panel Report, para. 7.211.
[539] Panel Report, para. 7.213.
[540] Panel Report, para. 7.218.
[541] Panel Report, para. 7.225.
[542] Panel Report, para. 7.233.
[543] Panel Report, para. 7.234.
[544] Panel Report, para. 7.233.
[545] Panel Report, para. 7.233.
[546] Panel Report, paras. 7.235-7.236.
[547] Panel Report, para. 7.238.
[548] Panel Report, para. 7.240.
[549] Panel Report, para. 7.240.
[550] Panel Report, para. 7.240. (fns omitted)
[551] Panel Report, para. 7.241.

legitimate regulatory distinction".[552] However, the Panel then pointed out that, since the United States had not rebutted the evidence submitted by Mexico concerning the complexity of certifying the dolphin-safe status of a tuna catch, it "would find that the United States ha[d] 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".[553] In the absence of such explanation, the Panel felt "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 requirements cannot be said to be even-handed, and as such to stem *exclusively* from a legitimate regulatory distinction.[554] One of the panelists was unable to agree with the reasoning and conclusions of the Panel's majority.[555]

The different tracking and verification requirements

7.140. In assessing the even-handedness of the different tracking and verification requirements, the Panel began its analysis by recalling that it was for Mexico to show *prima facie* that the different tracking and verification requirements are *not* even-handed.[556] Then, the Panel expressed its agreement with 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."[557] The Panel found that Mexico had 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."[558]

7.141. The Panel disagreed with the arguments put forward by the United States to rebut this showing. First, the Panel considered that the United States' argument that the tracking and verification requirements are origin neutral was not responsive to the point that the differences in the requirements are inconsistent with the objectives pursued by the amended tuna measure.[559] Second, the Panel disagreed with the United States' argument that the tracking and verification requirements simply reflect international commitments undertaken by the United States and Mexico under the AIDCP, because this does not explain why the amended tuna measure contains a regulatory distinction whose effect is to impose a significantly lighter compliance burden on tuna caught in some fisheries than on tuna caught in others.[560]

7.142. The Panel also did not accept the United States' explanation that the tracking and verification requirements are different because of the higher degree of risk to dolphins in the ETP large purse-seine fishery. This higher risk "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".[561] For the Panel, the different risk profiles of different fisheries may explain regulatory differences concerning

[552] Panel Report, para. 7.245.
[553] Panel Report, para. 7.246.
[554] Panel Report, para. 7.246.
[555] This panelist did not join in the analysis of the Panel majority as set out in paragraphs 7.233-7.246 of the Panel Report. Instead, in a separate opinion, this panelist expressed the view that 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. Since neither captain nor observer certifications are capable of detecting *every* instance of dolphin mortality or serious injury, a certain degree or margin of error is necessarily tolerated. This panelist emphasized that, provided that the tolerated margin of error is "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 that fishery are not the same does not deprive the amended tuna measure of even-handedness. In this panelist's view, the United States had put forward evidence sufficient to show that the risks in all 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. (See Panel Report, paras. 7.264-7.283)
[556] Panel Report, para. 7.389. The Panel also recalled that 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 of whether that detrimental treatment stems exclusively from a legitimate regulatory distinction. (Ibid., para. 7.390)
[557] Panel Report, para. 7.392.
[558] Panel Report, para. 7.392.
[559] Panel Report, paras. 7.394-7.395.
[560] Panel Report, paras. 7.396-7.397.
[561] Panel Report, para. 7.398. (emphasis original)

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 they do not explain the different tracking and verification requirements, since such requirements apply only *after* the tuna has been caught. Finally, while the Panel agreed that the United States is free to pursue its objectives at a level it considers appropriate, the Panel pointed out that this principle "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".[562]

7.143. For these reasons, the Panel found that the United States had not rebutted Mexico's *prima facie* showing that the different tracking and verification requirements do not stem exclusively from a legitimate regulatory distinction, and therefore found that these requirements accord less favourable treatment to Mexican tuna products, in contravention of Article 2.1 of the TBT Agreement.[563]

7.2.3.2.3.2 Whether the Panel erred by failing to examine whether the different certification and tracking and verification requirements are "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the oceans

7.144. The United States argues that the Panel erred and applied an incorrect legal standard in failing to consider whether the different sets of certification and tracking and verification requirements are each "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the oceans.[564] The United States highlights that, in contrast, the panelist who wrote a separate opinion on one part of the certification requirements correctly recognized that the issue of calibration is determinative, and that "the analysis of whether the [different] requirements are calibrated to the differing risk profiles of the different fisheries lay 'at the very heart of the even-handedness analysis [] in this case.'"[565] In the United States' view, unlike the Panel majority's analysis of the certification requirements and the Panel's analysis of the tracking and verification requirements, the analysis by the panelist who wrote a separate opinion is consistent with the Appellate Body's guidance in the original proceedings.[566]

7.145. The United States considers that the "central question" for the Appellate Body was whether the relevant regulatory distinction was "even-handed in the manner in which it addresse[d] the risks to dolphins arising from different fishing methods in different areas of the ocean."[567] Moreover, the United States indicates that it relied on the Appellate Body's "calibration" analysis in designing its measure taken to comply with the DSB's recommendations and rulings. The United States adds that, apart from the opinion of the panelist who wrote a separate opinion, the Panel "erred in not similarly taking the Appellate Body's guidance [on calibration] into account".[568] The United States also highlights that, even in the original proceedings, the Appellate Body's "calibration" analysis also related to the certification requirements themselves. In particular, the Appellate Body noted that an observer requirement "may be appropriate in circumstances in which

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[562] Panel Report, para. 7.399.

[563] Panel Report, para. 7.400. Having made its finding that the different tracking and verification requirements under the amended tuna measure are not even-handed, and therefore do not stem exclusively from a legitimate regulatory distinction, the Panel indicated that it would reach the same conclusion if the burden of proof were to be allocated to the United States. In such scenario, the Panel explained, it would find that the United States had not made a *prima facie* case that the different tracking and verification requirements stem exclusively from a legitimate regulatory distinction. (Ibid., para. 7.402)

[564] United States' appellant's submission, paras. 196 and 334.

[565] United States' appellant's submission, para. 198 (quoting Panel Report, para. 7.276). See also United States' appellant's submission, para. 340.

[566] The United States, in particular, refers to the following reasons by the panelist who wrote a separate opinion:

> [T]he 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.

(United States' appellant's submission, para. 204 (quoting Panel Report, para. 7.282))

[567] United States' appellant's submission, para. 340 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 232). See also ibid., para. 200.

[568] United States' appellant's submission, para. 205. (fn omitted)

dolphins face higher risks of mortality or serious injury".[569] Thus, for the United States, the Appellate Body has already accepted the "critical principle" that "a WTO Member is not required to impose the *same* requirements for all Members – but may impose different requirements to address different risks".[570]

7.146. The United States points out, in this regard, that the Panel "did, in fact, conclude that the ETP large purse seine fishery has a different 'risk profile' for dolphin harm than other fisheries do".[571] According to the United States, it is thus entirely appropriate to set different requirements for tuna produced in the ETP large purse-seine fishery than for tuna produced in other fisheries.[572] Therefore, "the fact that the [requirements applicable to the ETP large purse-seine fishery and all other fisheries] *are* different – and *may* have different rates of accuracy – cannot, standing alone, be a basis on which to find that the difference in the regimes is not even-handed where the risk profiles between the ETP large purse seine fishery and all other fisheries are so dramatically different."[573] The United States adds that the differences in the applicable requirements are "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the oceans.[574]

7.147. Furthermore, with respect to the tracking and verification requirements, the United States disagrees with the Panel that a "calibration" analysis is not legally relevant to whether the regulatory distinction is even-handed because such requirements apply after the tuna has already been caught. The United States argues that, for purposes of the "calibration" analysis, it is immaterial when any degree of inaccuracy is introduced into the system (i.e. at the initial designation of the set as dolphin safe or non-dolphin safe, or in the subsequent tracking of the tuna). For the United States, the fact that there is so much more tuna harvested where a dolphin has been killed or seriously injured in one fishery compared to other fisheries provides a basis for treating that fishery differently.[575] Consequently, the United States submits that the tracking and verification requirements of the amended tuna measure are consistent with Article 2.1 of the TBT Agreement.

7.148. Mexico makes three main arguments in response. First, Mexico disagrees that "calibrated" is equivalent to "even-handed" or "not arbitrary or unjustifiable", and disputes that the Appellate Body jurisprudence on Article 2.1 includes a "calibration test". Second, Mexico contends that the amended tuna measure does not incorporate any concept of "calibration". Third, Mexico disagrees that there are relevant differences between the ETP and other ocean regions that could justify any regulatory distinctions in the certification requirements and the tracking and verification requirements.[576] Mexico argues that the Panel correctly concluded that the different certification requirements and the different tracking and verification requirements evidence a lack of even-handedness, such that the detrimental impact caused by the amended tuna measure's different labelling conditions cannot be said to stem exclusively from a legitimate regulatory distinction.

7.149. Mexico argues that it cannot be even-handed for the amended tuna measure to permit a higher proportion of incorrect dolphin-safe information with respect to tuna caught in allegedly low-risk fisheries outside the ETP than for tuna caught in the allegedly high-risk ETP large purse-seine fishery. Thus, the "calibration" that the United States proposes is clearly arbitrary, unjustifiable, and lacking in even-handedness because it results in inaccurate and misleading information, in direct contradiction with the measure's objectives.[577]

7.150. With respect to the different certification requirements, Mexico asserts that the Panel correctly found that they lack even-handedness because captains may not necessarily always have the technical skills required for accurate dolphin-safe certification. Since, according to Mexico, the

[569] United States' appellant's submission, para. 201 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, fn 612 to para. 296).
[570] United States' appellant's submission, para. 202. (emphasis original)
[571] United States' appellant's submission, paras. 197 and 338 (referring to Panel Report, paras. 7.240-7.242, 7.278, and 7.398).
[572] United States' appellant's submission, para. 339.
[573] United States' appellant's submission, para. 341. (emphasis original)
[574] United States' appellant's submission, para. 342.
[575] United States' appellant's submission, para. 344.
[576] Mexico's appellee's submission, para. 58.
[577] Mexico's appellee's submission, para. 175.

United States does not disagree that captain certifications are less accurate than AIDCP-approved observer certifications, "[i]t is therefore uncontested that requiring only captains' certifications for tuna caught outside the ETP large purse seine fishery results in a 'margin of error', meaning that at least some tuna products containing non-dolphin-safe tuna caught outside the ETP are being incorrectly labelled as dolphin safe in the U.S. market."[578] Since, in Mexico's view, the amended tuna measure's objective of "ensuring that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins" is "absolute", it follows that this difference in the certification requirements is "arbitrary, unjustifiable and lacking in even-handedness".[579]

7.151. Mexico also disagrees with the United States' argument that the different tracking and verification requirements are even-handed because they are "calibrated" to the risks to dolphins posed by different fishing methods in different fisheries. Mexico highlights that, as the Panel properly found, the risk profile of harm to dolphins is no longer a relevant consideration after the tuna has been harvested and stored aboard a fishing vessel. Therefore, in Mexico's view, there is no nexus between the different tracking and verification requirements and the allegedly different risk profiles of harm to dolphins from different fishing methods in different areas of the oceans.[580] Mexico also rejects the United States' position that, "[f]or purposes of the calibration analysis, it is immaterial *when* any degree of inaccuracy is introduced into the system".[581]

7.152. In our view, these claims of error by the United States raise several issues. The first issue that we have to examine is whether, in applying the second step of the "treatment no less favourable" requirement under Article 2.1 of the TBT Agreement, the Panel was required to assess whether the certification and tracking and verification requirements in the amended tuna measure are "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the oceans. If the Panel was required to do so, a related issue is whether the Panel in fact undertook such an analysis. In addressing these issues, we also need to give consideration to the questions of whether the even-handedness of each set of requirements could properly be assessed separately and in isolation from the other elements of the amended tuna measure and, if so, whether the appropriateness or nature of the approach adopted in order to assess such even-handedness would differ as between the different elements of the amended tuna measure.

7.153. We have already undertaken some analysis relevant to the first issue when we addressed the United States' appeal of the Panel's articulation of the legal standard to be applied in the second step of an assessment of whether a technical regulation accords less favourable treatment under Article 2.1 of the TBT Agreement. We noted that, in determining whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction, the "particular circumstances" of the case may inform the appropriate way in which to assess even-handedness in that specific case. While acknowledging the potential utility to the even-handedness assessment of an inquiry into whether the detrimental impact, and the explanations given for it, can be reconciled with, or are rationally related to, the policy pursued by the measure at issue, we explained that this is one possible examination that could be undertaken to determine whether a regulatory distinction is arbitrary or unjustifiable and thus not even-handed under Article 2.1. Yet, taking too narrow an approach to such an inquiry could lead a panel into error. To appreciate properly whether a measure is even-handed, an inquiry into the nexus between the regulatory distinctions found in the measure and the measure's policy objective may have to encompass also, or to be supplemented by, consideration of whether the differences in the treatment accorded to different groups of products by virtue of those distinctions, and the resulting detrimental impact, are disproportionate in the light of the objective pursued.[582]

7.154. We also explained above that an assessment of the "calibration" of a measure and the regulatory distinctions that it draws is not, in and of itself, a generally applicable test of whether detrimental impact stems exclusively from a legitimate regulatory distinction. Rather, this term is nomenclature from the original proceedings that was used by the United States, and employed by the Appellate Body, to test whether the original tuna measure was even-handed. Indeed, the

[578] Mexico's appellee's submission, para. 123.
[579] Mexico's appellee's submission, para. 129. Mexico argues that the amended tuna measure's objective in no way allows some level of "acceptable" mortality or serious injury in the dolphin-safe information. (Ibid.)
[580] Mexico's appellee's submission, paras. 173-174.
[581] Mexico's appellee's submission, para. 173 (quoting United States' appellant's submission, para. 344 (emphasis original)).
[582] Appellate Body Reports, *US – COOL*, para. 347.

Appellate Body found in the original proceedings that "the United States ha[d] 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, [was] 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean."[583] It followed from this that "the United States ha[d] not demonstrated that the detrimental impact of the US measure on Mexican tuna products stem[med] exclusively from a legitimate regulatory distinction."[584] The Appellate Body added that, "[i]n these circumstances, [it was] not persuaded that the United States ha[d] demonstrated that the measure [was] *even-handed* in the relevant respects."[585]

7.155. These passages, in our view, demonstrate that the Appellate Body's assessment of "even-handedness" in the original proceedings was focused on the question of whether the original tuna measure was "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the oceans. They further show that this question was answered through a comparison of the conditions of access to the dolphin-safe label for tuna products derived from tuna caught within the ETP large purse-seine fishery, on the one hand, with those applied to tuna products derived from tuna caught outside that fishery by fishing methods other than setting on dolphins, on the other hand. By engaging with the United States' arguments as it did, the Appellate Body accepted the premise that such regime will not violate Article 2.1 if it is properly "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the oceans.[586] This, in turn, indicates that, in the context of the original proceedings, the Appellate Body considered appropriate an analysis involving: first, an identification of whether different tuna fishing methods in different areas of the oceans pose different risks to dolphins; and, second, examination of whether, in the light of these risks, the different treatment created by the relevant regulatory distinction shows that, as between different groups, the treatment accorded to each group is commensurate with the relevant risks, taking account of the objectives of the measure. This assessment was conducted in order to determine whether or not the original US dolphin-safe labelling regime was even-handed.

7.156. We also consider it appropriate for WTO Members to seek guidance in the reasoning set out in adopted Appellate Body and panel reports when seeking to bring their inconsistent measures into compliance with their obligations under the covered agreements. Indeed, this contributes to the security and predictability of the multilateral trading system, as well as to the prompt settlement of disputes. In these compliance proceedings, the United States has defended its dolphin-safe labelling regime from the claim raised by Mexico under Article 2.1 of the TBT Agreement by explaining why the distinctions drawn under the amended tuna measure stem exclusively from a legitimate regulatory distinction in terms very similar to those that it used in the original proceedings. The United States has argued that, to the extent that there is detrimental impact on Mexican tuna products, by virtue of the differences in the labelling conditions for tuna products containing tuna caught inside and outside the ETP large purse-seine fishery, such differences are explained by, or "calibrated" to, the different risks to dolphins arising from different fishing methods in different areas of the oceans.[587] Before the Panel, the United States also submitted extensive arguments and evidence seeking to show that the different risks associated with different fisheries explain the differential treatment accorded under the amended tuna measure.

7.157. These considerations suggest to us that the Panel's inquiry in these Article 21.5 proceedings should have included an assessment of whether, under the amended tuna measure, the differences in labelling conditions for tuna products containing tuna caught in the ETP large purse-seine fishery, on the one hand, and for tuna products containing tuna caught in other

[583] Appellate Body Report, *US – Tuna II (Mexico)*, para. 297.
[584] Appellate Body Report, *US – Tuna II (Mexico)*, para. 297.
[585] Appellate Body Report, *US – Tuna II (Mexico)*, para. 297. (emphasis added)
[586] We also agree with the United States that acceptance of such an approach is implicit in the Appellate Body's statement that requiring certification by an observer, rather than by a captain, "may be appropriate in circumstances in which dolphins face higher risks of mortality or serious injury". (United States' appellant's submission, para. 201 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, fn 612 to para. 296))
[587] United States' appellant's submission, paras. 195-196.

fisheries, on the other hand, are "calibrated" to the likelihood that dolphins would be adversely affected in the course of tuna fishing operations in the different fisheries.[588]

7.158. Having reached this preliminary conclusion, we next examine more specifically the inquiry that the Panel did undertake, including the question of whether such analysis encompassed an evaluation and comparison of the different risks to dolphins associated with different fishing methods in different oceans. As we have indicated, the Panel explained 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 [pursued] by the measure at issue."[589] The Panel found that the different certification requirements are not even-handed because "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."[590] In analysing the different tracking and verification requirements, the Panel found that there is no rational or obvious connection between the amended tuna measure's imposition of a lighter burden on tuna caught outside the ETP large purse-seine fishery and the objectives of the amended tuna measure, and that none of the explanations provided by the United States suggested otherwise.[591] On these bases, the Panel found that the certification and tracking and verification requirements in place under the amended tuna measure are not even-handed, and therefore do not stem exclusively from a legitimate regulatory distinction.[592]

7.159. In our view, the manner in which the Panel applied the legal standard to ascertain the even-handedness of the certification and tracking and verification requirements presents certain difficulties. The first and most important of these arises from the segmented analysis adopted by the Panel. As we have indicated, the certification and tracking and verification requirements work together with the substantive conditions of the amended tuna measure to limit access to the dolphin-safe label. This means, in our view, that it is only when the conditions of access are viewed together that the nexus between the regulatory distinctions found in the measure and the measure's policy objectives can be understood. Assessing these discrete sets of requirements in isolation from the other elements of the measure may thus hinder a comprehensive analysis of the design and structure of the measure and how it pursues its objectives. Moreover, the Panel's segmented analysis of the amended tuna measure also appears to have led the Panel to overlook that, at least when *compared* to the original tuna measure, the amended tuna measure as a whole furthers the objectives of providing information to consumers and protecting dolphins from harms arising from tuna fishing. For these reasons, we consider that the Panel's decision to adopt a segmented analytical approach prevented it from properly applying the legal standard that it articulated.

7.160. We next consider whether, notwithstanding that it did not explicitly engage with the explanations provided by the United States for the differences in the respective sets of certification and tracking and verification requirements, the Panel's analyses of the even-handedness of these requirements in fact reflect that it did assess and take due account of the different risks associated with tuna fishing in different fisheries. If, for example, the Panel established that the risks posed to dolphins in the different fishing areas and by the different fishing methods are the same, then it may properly have reached the conclusion that treating them differently is not "even-handed". If, however, the Panel considered that the risk profiles are different, then further inquiry would have been needed into whether the regulatory distinctions drawn by the amended tuna measure, and the resulting detrimental impact, could be explained as commensurate with the different risks associated with tuna fishing in different oceans and using different fishing methods.

7.161. In its analysis of the eligibility criteria, the Panel found that there is a difference in the nature of the risks posed to dolphins by the fishing method of setting on dolphins, as opposed to other fishing methods. In particular, the Panel stated that it agreed 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

[588] Appellate Body Report, *US – Tuna II (Mexico)*, para. 286.
[589] Panel Report, para. 7.196.
[590] Panel Report, para. 7.233.
[591] Panel Report, paras. 7.392 and 7.400.
[592] Panel Report, paras. 7.233 and 7.401.

fisheries are producing the same level of unobserved harms".[593] In reaching this finding, the Panel appears to have focused solely on its understanding that the *unobserved* harms differed as between setting on dolphins and other fishing methods. On this basis, the Panel found that the new evidence did not overcome or contradict the finding from the original proceedings that setting on dolphins causes a level of unobserved harms to dolphins that is not found with other fishing methods. By focusing solely on its understanding that the *unobserved* harms differed between setting on dolphins and other fishing methods, the Panel did not consider the relative risks posed by the relevant fishing methods in respect of *observed* mortality or serious injury, and therefore did not resolve the questions of the overall levels of risk in the different fisheries and how they compare to each other. However, it was precisely this kind of examination that was the focus of the Appellate Body's analysis in the original proceedings, which revolved around an assessment of the US dolphin-safe labelling provisions in the light of the overall levels of risk in the relevant fisheries, including risks of both observed and unobserved harms. Indeed, we recall that, in its conclusion, the Appellate Body emphasized that "the US measure *fully* addresse[d] the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it d[id] 'not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP'."[594] Therefore, we do not consider that, in examining the eligibility criteria, the Panel's analysis reflects that it did assess and take due account of the different risks associated with tuna fishing in different oceans and using different fishing methods in a way that would have enabled it properly to evaluate the parties' arguments regarding the even-handedness of the amended tuna measure's regulatory distinctions.

7.162. In assessing the certification and tracking and verification requirements, the Panel stated that it considered these two regulatory distinctions to be relevant "only to tuna eligible and intended to receive the dolphin-safe label".[595] Accordingly, in the Panel's view, "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."[596] We understand from this that, as it did in analysing the detrimental impact of each of the three distinctions, the Panel's analyses of the even-handedness of the certification and tracking and verification requirements involved, in each case, a comparison of the treatment accorded to tuna products derived from tuna caught in the ETP large purse-seine fishery other than on a trip involving setting on dolphins, on the one hand, with that accorded to tuna products containing tuna caught outside the ETP large purse-seine fishery other than on a trip involving setting on dolphins, on the other hand. As explained below, however, it is not entirely clear whether the Panel considered, for purposes of these analyses, that the respective risks to dolphins posed in these fisheries compared was the same, different, or simply not relevant to its analyses. Nor did the Panel explicitly indicate whether it considered the respective risks to dolphins identified by the original panel, and "reaffirm[ed]"[597] by this Panel, in its analysis of the eligibility criteria, to also be relevant in analysing the even-handedness of the certification and tracking and verification requirements.

7.163. In examining the different certification requirements, the Panel devoted most of its reasoning to a comparison of the different tasks carried out by observers in the ETP and captains, as well as their respective expertise, training, and education for purposes of providing certifications. In particular, the Panel based its finding that "the different certification requirements are not even-handed" on the conclusion that "captains may not necessarily and always have the technical skills required to certify that no dolphins were killed or seriously injured" and that "this may result in inaccurate information being passed to consumers, in contradiction with the objectives of the amended tuna measure."[598] The Panel's reasoning includes only limited references to the risks to dolphins in the relevant fisheries, and does not address whether, in the light of the risk profiles, the different treatment created by the relevant regulatory distinctions show that, as between different groups, the treatment accorded to each group is explained by, and appropriately tailored to, the relevant risks. Having identified the "key problem with the amended tuna measure" as being that "the United States has not explained why its measure assumes that captains have at their disposal the skills necessary to ensure accurate certification", the Panel

[593] Panel Report, para. 7.135 (quoting United States' first written submission to the Panel, para. 113 (emphasis original)).
[594] Appellate Body Report, *US – Tuna II (Mexico)*, para. 297 (quoting Original Panel Report, para. 7.544). (emphasis original)
[595] Panel Report, para. 7.143.
[596] Panel Report, para. 7.143.
[597] Panel Report, para. 7.126.
[598] Panel Report, para. 7.233.

indicated that, "[a]ccordingly", it was "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'".[599] While this statement could be read to suggest that the Panel acknowledged that an examination of the different risk profiles attached to the different fishing methods in different areas of the oceans might have been relevant to its analysis, it does not appear to us that such an examination formed part of the Panel's analysis or served as a basis for its conclusions.[600]

7.164. As noted above, the Panel also analysed the even-handedness of the certification requirements assuming *arguendo* that the United States, rather than Mexico, bore the burden of proof. In this alternative analysis, the Panel examined certain facts related to the risks to dolphins arising from various fishing methods in different areas of the oceans. The Panel accepted the United States' argument regarding the "special and, in some senses, 'unique' nature of the harms that the ETP large purse seine fishery poses to dolphins".[601] The Panel considered that Mexico's arguments and evidence relating to tuna-dolphin association and the prevalence of setting on dolphins outside the ETP were not sufficient to rebut the United States' argument that the situation in the ETP is unique or different in a way that would justify the different treatment of the ETP large purse-seine fishery and other fisheries.[602] On this basis, the Panel observed that it "would find that the United States ha[d] made a *prima facie* case that the different certification requirements stem exclusively from a legitimate regulatory distinction".[603] To us, this part of the Panel's reasoning appears to have employed a concept that looks like "calibration". Ultimately, however, the Panel concluded that the different certification requirements are not even-handed. Pointing out that the United States had not rebutted evidence submitted by Mexico concerning the complexity of certifying the dolphin-safe status of a tuna catch, the Panel stated that it "would find that the United States ha[d] 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".[604] For the Panel, the lack of explanation concerning the technical capacities of captains meant that the different certification requirements could not be said to be even-handed, and as such to stem *exclusively* from a legitimate regulatory distinction.[605]

7.165. It appears to us that certain aspects of this part of the Panel's analysis suggest that the Panel gave some consideration to the respective risk profiles associated with different fishing methods in different areas of the oceans. Thus, for example, the Panel explained that the distinction between different fishing methods is "especially important" given that setting on is "inherently dangerous" to dolphins, even where no dolphin is seen to be killed or seriously injured, "because it has unobservable deleterious effects on dolphins' physical and emotional well-being".[606] At the same time, we note that, notwithstanding that it had stated that the treatment of tuna products derived from tuna caught by setting on dolphins would *not* be relevant to its analyses of the certification and tracking and verification requirements, the Panel's discussion of the respective risk profiles seems to have focused exclusively on this fishing technique. We are not certain whether, in the context of the different certification requirements,

[599] Panel Report, para. 7.234 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 297).

[600] While an assessment of the different risks to dolphins does *not* appear to have guided the Panel's analysis in the context of its analysis of Mexico's claim concerning the certification requirements, found in paragraphs 7.195-7.234 of its Report, the Panel did discuss in its analysis of the eligibility criteria, new evidence submitted in the compliance proceedings regarding the respective "harms" to dolphins within the ETP large purse-seine fishery as compared to other fisheries. (See Panel Report, paras. 7.129-7.135) We note, however, that in its analysis of the eligibility criteria the Panel appeared to be examining different groups of tuna products than in its analysis of the certification requirements.

[601] Panel Report, para. 7.238.

[602] Panel Report, para. 7.241. The Panel highlighted that Mexico's evidence suggested 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'." (Ibid. (quoting National Marine Fisheries Service, *An Annotated Bibliography of Available Literature Regarding Cetacean Interactions with Tuna Purse-Seine Fisheries Outside of the Eastern Tropical Pacific Ocean*, Administrative Report LJ-96-20 (November 1996) (Panel Exhibit MEX-40), p. 2)) The Panel added 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'." (Ibid., para. 7.242)

[603] Panel Report, para. 7.245.

[604] Panel Report, para. 7.246.

[605] Panel Report, para. 7.246. (emphasis original)

[606] Panel Report, para. 7.244.

the Panel ultimately considered that the risk profiles of the relevant fisheries giving rise to the different groups of tuna products are the *same* or *different*. Moreover the Panel's ultimate conclusion that the different certification requirements were not even-handed under Article 2.1 was due to the fact that the United States had failed to "explain [] 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".[607] Therefore, while the concept of different risks to dolphins in the relevant fisheries seems to have played some part in its analysis, we do not see that such analysis encompassed a clear identification of the respective risks or an assessment of whether such risks were addressed in an even-handed manner by the different certification requirements.[608]

7.166. In analysing the even-handedness of the tracking and verification requirements, the Panel dismissed the United States' argument that the different tracking and verification requirements are justified or explained in the light of the higher degree of risk to dolphins in the ETP large purse-seine fishery. The Panel explained that any higher risk "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".[609] According to the Panel, the "different risk profiles" of different fisheries may explain regulatory distinctions 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 do not explain the tracking and verification requirements, which are triggered *after* the tuna has been caught.[610] We are not convinced that, as the Panel seems to have thought, considerations of the similarities and differences in risks may not be reflected in and relevant to all stages of the capture and subsequent transport and processing of tuna. We read the Panel as having taken the view that the relevant risk profiles would *change* or become *irrelevant* to the analysis of "even-handedness" merely because those requirements regulate a situation that occurs after the tuna has been caught. In our view, this approach by the Panel does not seem to comport with its own reasoning that the accuracy of the US dolphin-safe label can be compromised at any stage of the tuna production stage, in contradiction with the objectives of the amended tuna measure.[611] Moreover, we consider that the Panel's approach also runs counter to our observations that an assessment of the even-handedness of the amended tuna measure must take account of the fact that its various elements – the eligibility criteria, the certification requirements, and the tracking and verification requirements – establish a series of conditions of access to the dolphin-safe label that are cumulative and highly interrelated.

7.167. In the light of these considerations, it is clear that, since the Panel did not consider the risks to dolphins to be relevant to its analysis of the even-handedness of the tracking and verification requirements, the Panel did not seek to identify those risks in respect of eligible tuna caught both inside and outside the ETP large purse-seine fishery in this part of its analysis. Nor did the Panel compare the different tracking and verification requirements in the light of those risks and the amended tuna measure's objectives concerning the protection of dolphins and providing accurate consumer information.

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[607] Panel Report, para. 7.246.

[608] By contrast, the analysis by the panelist who wrote a separate opinion of the even-handedness of the different certification requirements expressly discusses the notion of "risk profile" and how that applies to the different fisheries in the present dispute, using the term "calibration". (Panel Report, paras. 7.276 and 7.282) However, we do not necessarily see that, in assessing the even-handedness of the different certification requirements, this panelist made a complete assessment of the different levels of risk in different fisheries. Instead, the conclusions reached were on the basis of a general observation that, "given the higher degree of risk in the ETP large purse seine fishery ["particularly harmful" versus "as a general matter, significantly less serious" in fisheries other than the ETP large purse-seine fishery], it is … 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." (Ibid., para. 7.258)

[609] Panel Report, para. 7.398. (emphasis original)

[610] Panel Report, para. 7.398.

[611] We recall that, in the context of the certification requirements, the Panel found that the United States had 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, and that this may result in inaccurate information being passed to consumers, in contradiction with the objectives of the amended tuna measure. (Panel Report, para. 7.233) Similarly, in the context of the tracking and verification requirements, the Panel indicated 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 vessels will be incorrectly labelled as dolphin safe. (Ibid., para. 7.391)

7.168. As an additional argument, the United States contends that any detrimental impact caused by the certification and tracking and verification requirements stems exclusively from a legitimate regulatory distinction because the differences leading to the detrimental impact can be explained by a legitimate, non-discriminatory reason, namely, that these differences reflect that the parties to the AIDCP have consented to impose a unique observer programme on their tuna industries, while other regulatory authorities have not imposed like requirements.[612] In principle, we do not exclude that the fact that the amended tuna measure sets out rules for the ETP large purse-seine fishery reflecting requirements imposed under the AIDCP may be *relevant* to the question of whether the detrimental impact stems exclusively from a legitimate regulatory distinction under Article 2.1 of the TBT Agreement, in particular because it may shed light on the reasons for the distinctions drawn as well as on the nexus between such distinctions and the objectives of the relevant measure. Yet, tying *some* aspects of a measure to an international agreement cannot, alone, suffice to establish that the measure does not embody discrimination of a type prohibited under Article 2.1. Moreover, we observe that, while there is an absence of any international regulation comparable to the AIDCP with respect to all tuna fisheries other than the ETP large purse-seine fishery, the amended tuna measure sets forth *conditions* for those tuna fisheries. In this dispute, the relevant regulatory distinction drawn by the amended tuna measure consists of the requirements applicable to tuna products derived from tuna caught in the ETP large purse-seine fishery vis-à-vis the requirements applicable to tuna products derived from tuna caught in other fisheries. As we have said above, assessing the even-handedness of the amended tuna measure requires looking at both sides of the regulatory distinctions that it draws. The AIDCP, however, is mainly relevant for one side of this regulatory distinction: the requirements applicable to tuna caught in the ETP large purse-seine fishery. Moreover, we observe that the relevant certification and tracking and verification requirements that the amended tuna measure applies in respect of tuna caught in the ETP large purse-seine fishery are *not* identical to, or coextensive with, those under the AIDCP, particularly given that the amended tuna measure, unlike the AIDCP, disqualifies from access to the dolphin-safe label all tuna products derived from tuna caught by setting on dolphins.

7.169. In sum, in the light of the circumstances of this dispute and the nature of the distinctions drawn under the amended tuna measure, we are of the view that, in applying the second step of the "treatment no less favourable" requirement under Article 2.1 of the TBT Agreement, the Panel was required to assess whether the certification and tracking and verification requirements are "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the oceans. Our review of the Panel Report reveals that the Panel's analysis failed to encompass consideration of the relative risks to dolphins from different fishing techniques in different areas of the oceans, and of whether the distinctions that the amended tuna measure draws in terms of the different conditions of access to the dolphin-safe label are explained in the light of the relative profiles. We therefore consider that the Panel failed to take full account of "the particular circumstances" of this case, including "the design, architecture, revealing structure, operation, and application" of the amended tuna measure, as well as of the manner in which similar circumstances pertaining to the original tuna measure had been assessed in the original proceedings. In addition, due to the segmented approach that it adopted in its analyses of the different sets of certification and tracking and verification requirements, the Panel did not properly apply the legal test that it had identified as relevant to an assessment of even-handedness, namely, "whether the detrimental treatment can be reconciled with, or is rationally related to, the policy pursued by the measure at issue."[613] The Panel thus erred in its discrete assessments of the even-handedness of the different certification requirements, and of the different tracking and verification requirements. Accordingly, we find that, in assessing Mexico's claim that the certification requirements and the tracking and verification requirements are not "even-handed", the Panel erred in its application of the second step of the "treatment no less favourable" test under Article 2.1 of the TBT Agreement.

7.2.3.2.3.3 Whether the Panel erred in finding that, by virtue of the determination provisions, the detrimental impact does not stem exclusively from a legitimate regulatory distinction

7.170. The United States raises two challenges to the Panel's findings regarding the "determination provisions". First, the United States argues that, in finding that the "gap" in the

[612] United States' appellant's submission, paras. 209 and 347.
[613] Panel Report, para. 7.91.

determination provisions does not stem exclusively from a legitimate regulatory distinction, the Panel erred by improperly making the case for Mexico. Second, the United States contends that the Panel erred in making its findings on the determination provisions based solely on their design, and not on their application.[614]

7.171. Before addressing the United States' claims, we begin by recalling the Panel's explanation of the determination provisions, as well as the main findings by the Panel regarding these provisions. After reaching its conclusions regarding captains' certifications, the Panel turned to examine an additional aspect of the amended tuna measure that it considered to bear on, and to be of "some importance to"[615], its analysis of the even-handedness of the different certification requirements. The Panel noted that the United States had confirmed in response to a question from the Panel that the determination of regular and significant mortality or serious injury provided for under Section 216.91(a)(4)(iii) of the implementing regulations does not apply to purse-seine fisheries outside the ETP, and that the determination of regular and significant association that may be made pursuant to Section 216.91(a)(2)(i) of those regulations only applies to the non-ETP purse-seine fishery.[616] In this regard, the Panel made the following finding:

> [T]he 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 [a] 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.[617]

7.172. In addition, the Panel held that "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."[618] The Panel noted that the United States had not explained why purse-seine vessels outside the ETP cannot be subject to a declaration that they are causing regular and significant dolphin mortality.[619] Moreover, the Panel expressed doubt 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, and observed that this seemed incompatible with the United States' own explanation of the reasons why observers are necessary in the ETP large purse-seine fishery.[620]

7.173. For these reasons, the Panel expressed its understanding that the determination provisions open up a "gap" in the certification procedures applied outside the ETP large purse-seine fishery.[621] The Panel emphasized that "a determination of regular and significant mortality cannot be made in respect of purse seine fisheries outside the ETP, and a determination of regular and significant tuna-dolphin association cannot be made in respect of non-purse seine fisheries."[622] 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 Panel therefore expressed the view that, by virtue of the determination provisions, the different certification procedures lack

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[614] The United States' additional contention that the Panel acted inconsistently with Article 11 of the DSU by failing to base its findings regarding the determination provisions on a sufficient evidentiary basis is addressed in the next subsection.

[615] Panel Report, para. 7.247.

[616] Panel Report, para. 7.249 (referring to United States' response to Panel question No. 59, para. 295).

[617] Panel Report, para. 7.258. (fn omitted)

[618] Panel Report, para. 7.259.

[619] Panel Report, para. 7.260.

[620] Panel Report, para. 7.261.

[621] Panel Report, para. 7.263.

[622] Panel Report, para. 7.263. (fns omitted)

even-handedness.[623] Moreover, although one panelist had disagreed with the Panel majority regarding the even-handedness of the different certification requirements under the amended tuna measure, that panelist agreed with the majority that "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", and that, therefore, this aspect of the different certification requirements is inconsistent with Article 2.1 of the TBT Agreement.[624]

Whether the Panel improperly made the case for Mexico in reaching its findings regarding the determination provisions

7.174. The United States submits that the Panel erred in finding that the determination provisions "represent a further way" in which the certification requirements "lack[] even-handedness".[625] In the United States' view, "Mexico put forward *no affirmative argument* with regard to the determination provisions in its case-in-chief for its Article 2.1 claim" and, as a consequence, the United States did not present any rebuttal arguments in that respect.[626] The Panel, however, raised the issue on its own initiative in its written questions to the United States, and reached its conclusions despite the fact that Mexico did not "explicitly connect" the determination provisions to its claims under Article 2.1 until it submitted its comments on the United States' responses to Panel questions.[627] Accordingly, the United States claims that the Panel improperly made a *prima facie* case for the complainant and relieved Mexico of its duty to prove its claims under Article 2.1.[628]

7.175. Mexico rejects the United States' claim and observes that it identified the determination provisions in its first written submission, where it explained that the US Department of Commerce (USDOC) has never made any determination under those provisions[629], and in its responses to Panel questions, where it argued that the failure of the USDOC to make any such determination was "an indication of arbitrariness".[630] Mexico acknowledges that it did not argue that "the determination provisions themselves directly result in detrimental impact".[631] However, in Mexico's opinion, it need not have done so, because the relevant detrimental impact of the US dolphin-safe labelling regime was definitively established by the panel and the Appellate Body in the original proceedings. Further, in examining whether the determination provisions are even-handed, it was appropriate for the Panel to focus on their "design, architecture and revealing structure" because such provisions "have never been applied".[632]

7.176. In addressing this issue, we first recall that, while panels enjoy latitude to develop their reasoning and to decide which evidence on the record they wish to rely upon in reaching their findings[633], such discretion is not unfettered. Instead, it is limited by the requirement that the complainant satisfy its burden of proof by adducing evidence and arguments sufficient to make a *prima facie* case in relation to each of the elements of its claims.[634] This does not mean that a complainant must necessarily put forward *all* evidence and arguments relevant to the question of the measure's consistency with the covered agreements. However, at a minimum, it must adduce arguments and evidence that, in the absence of effective refutation by the respondent, would enable a panel to rule in its favour.[635] A panel may not use its interrogative powers to make the

[623] Panel Report, para. 7.258.
[624] Panel Report, paras. 7.282-7.283.
[625] United States' appellant's submission, para. 213 (quoting Panel Report, para. 7.281).
[626] United States' appellant's submission, para. 218. (emphasis original)
[627] United States' appellant's submission, para. 219.
[628] United States' appellant's submission, paras. 225-226.
[629] Mexico's appellee's submission, para. 137 (referring to Mexico's first written submission to the Panel, paras. 21, 41, and 290).
[630] Mexico's appellee's submission, para. 137 (referring to Mexico's responses to Panel questions Nos. 21 and 22).
[631] Mexico's appellee's submission, para. 139.
[632] Mexico's appellee's submission, para. 139.
[633] See Appellate Body Reports, *Canada – Aircraft*, para. 192; *EC – Hormones*, para. 156; *Chile – Price Band System*, para. 166; *US – Gambling*, para. 280; *Mexico – Anti-Dumping Measures on Rice*, para. 156; and *Canada – Renewable Energy / Canada – Feed-In Tariff Program*, para. 5.215.
[634] See Appellate Body Reports, *US – Gambling*, para. 140; and *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, p. 336.
[635] See Appellate Body Reports, *Japan – Apples*, para. 159; and *EC – Hormones*, para. 98.

case for the complainant[636], nor to make good the absence of argumentation on a party's behalf.[637]

7.177. Where, however, the complainant has made out a *prima facie* case, a panel may in principle draw from arguments and evidence on the record, or develop its own reasoning in reaching its findings[638], provided that it does so consistently with the requirements of due process. While arguments may be progressively refined throughout the course of the proceedings[639], each party must be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party.[640] Finally, a panel is not required to test its intended reasoning with the parties.[641] However, due process could be compromised in circumstances where the panel adopts an approach that departs so radically from the cases put forward by the parties that the parties are left guessing as to what proof they would have needed to adduce.[642]

7.178. With these considerations in mind, we briefly describe the progression of the parties' arguments and the Panel's inquiry concerning the determination provisions throughout the proceedings. In its first written submission, Mexico referred to the determination provisions by noting, *inter alia*, that the USDOC has never defined the term "regular and significant", nor made any determination of either regular tuna-dolphin association or of mortality or serious injury of dolphins with respect to fisheries outside the ETP large purse-seine fishery.[643] Mexico relied on the absence of any such determinations to support its view that the certification requirements lack even-handedness.[644] After the first substantive meeting, the Panel sent the parties a set of written questions in order to explore further the application of the determination provisions by the Administrator. In response to questioning from the Panel, both parties confirmed that the Administrator has not made any determination of regular and significant mortality or serious injury or a determination of regular and significant tuna-dolphin association.[645]

7.179. The Panel also asked the United States a number of questions concerning the functioning of the determination provisions. In particular, the Panel asked the United States to confirm its understanding that, if the NMFS Assistant Administrator makes a determination of regular and significant tuna-dolphin association with respect to a given fishery, the observer coverage so imposed would concern only purse-seine vessels (as opposed to all vessels) operating in that fishery. The United States confirmed the Panel's understanding.[646] After receiving written responses from the parties to its initial round of written questions, the Panel additionally asked the parties to confirm whether it was correct in understanding that:

> … 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, … 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.[647]

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[636] See Appellate Body Reports, *US – Continued Zeroing*, para. 343; and *Japan – Agricultural Products II*, para. 129.

[637] See Appellate Body Report, *EC – Fasteners (China)*, para. 566.

[638] See Appellate Body Report, *US – Gambling*, para. 282.

[639] See Appellate Body Reports, *EC – Bananas III*, para. 141; *Korea – Various Measures on Beef*, para. 88; *Chile – Price Band System*, para. 181; and *Dominican Republic – Import and Sale of Cigarettes*, para. 121.

[640] See Appellate Body Reports, *Thailand – Cigarettes (Philippines)*, para. 150; *Australia – Salmon*, para. 278; and *US – Gambling*, para. 270.

[641] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1137.

[642] See Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint)*, fn 2323 to para. 1137; and *US – Continued Zeroing*, para. 347.

[643] Mexico's first written submission to the Panel, paras. 289-290.

[644] Mexico's first written submission to the Panel, paras. 295 and 304.

[645] Mexico's responses to Panel questions No. 21, para. 93 and No. 22, para. 95; United States' responses to Panel questions No. 21, paras. 133-134 and No. 22, para. 145.

[646] United States' response to Panel question No. 55, para. 280.

[647] Panel Question No. 60 to both parties.

7.180. In responding to this question, Mexico submitted that the determination provisions are designed in a way whereby: (i) "even if purse seine vessels operating in a region outside the ETP are causing substantial dolphin mortalities, that region could never be the subject of a determination that there is regular and significant mortality or serious injury of dolphins on that basis"[648]; and (ii) "even though dolphins strongly associate with longline fishing … the Amended Tuna Measure does not allow for a determination that such an association in a fishery is 'regular and significant' such that an observer requirement could be imposed for all tuna that is labelled dolphin-safe from that fishery".[649] According to Mexico, these features of the determination provisions are "arbitrary".[650] In its response to the Panel's question, the United States noted that the determination provisions "appropriately provide[] for *the possibility* that the association in the ETP is not unique" and that "other fisheries (such as longline, hand line, etc.) may also, like the ETP large purse seine vessel fishery, be so problematic that it would be appropriate to require an observer statement to attest to the dolphin safe status of tuna product containing tuna harvested in those fisheries".[651] Further, the United States reiterated its view that Mexico "made no claim" that any difference between the two types of determinations is inconsistent with the covered agreements, and has therefore "made no *prima facie* case with regard to the determination [provisions]".[652] Finally, Mexico connected the features of the determination provisions that it had previously characterized as yet another indication of "arbitrariness"[653] to its argument concerning the "absence of a 'rational connection' between" the detrimental impact of the amended tuna measure and the measure's objective.[654]

7.181. Like the Panel, we see the determination provisions as "an integral part of the certification system put in place by the amended tuna measure".[655] As such, they are relevant to the analysis of whether the United States has brought its dolphin-safe labelling regime into conformity with the recommendations and rulings of the DSB. Furthermore, it does not seem to us that the United States could have been unaware of the legal issues relating to the role of the determination provisions during these Article 21.5 proceedings. In particular, the original panel and Appellate Body reports contain several references to the determination provisions and their content.[656] For instance, the original panel observed that it was not aware of any process or procedure having been established or initiated, under the US dolphin-safe labelling regime, in order to trigger a determination of regular and significant mortality or serious injury of dolphins.[657] The Appellate Body also made reference to the determination provisions in connection with its discussion of the role that a requirement that an independent observer certify that no dolphins were killed or seriously injured would play in determining whether the dolphin-safe labelling provisions are "calibrated" to the risks arising from fishing techniques other than setting on dolphins.[658] In these compliance proceedings, the determination provisions are within the terms of reference of the Panel since they were identified by Mexico in its request for the establishment of a panel. Moreover, Mexico identified in its first written submission the determination provisions as part of its argument concerning the lack of even-handedness of the certification requirements[659], and, as set out above, highlighted key features relating to the design of the determination provisions in response to the Panel's questions and in its comments on the United States' answers. In addition, we also observe that the United States had an opportunity to counter Mexico's allegations and to put forward its own arguments on the design of such provisions. However, the United States chose not to do so, and instead maintained that Mexico had "made no *prima facie* case with regard to the determination [provisions]".[660]

[648] Mexico's response to Panel question No. 60, para. 6. (fn omitted)
[649] Mexico's response to Panel question No. 60, para. 7. (fn omitted)
[650] Mexico's response to Panel question No. 60, paras. 6-7.
[651] United States' response to Panel question No. 60, paras. 9-10. (emphasis original)
[652] United States' response to Panel question No. 60, paras. 15-16.
[653] Mexico's response to Panel question No. 60, paras. 6-7 (referring to Mexico's comments on the United States' response to Panel question No. 59).
[654] Mexico's comments on United States' response to Panel question No. 60, para. 5.
[655] Panel Report, para. 7.257.
[656] See Original Panel Report, paras. 7.534-7.536, 7.538, 7.543, and 7.614; and Appellate Body Report, *US – Tuna II (Mexico)*, para. 249 and para. 296 and fn 613 thereto.
[657] Original Panel Report, para. 7.543.
[658] Appellate Body Report, *US – Tuna II (Mexico)*, para. 296 and fn 613 thereto.
[659] See Mexico's first written submission to the Panel, para. 289.
[660] United States' response to Panel question No. 60, para. 16. See also United States' comments on Mexico's response to Panel question No. 60, para. 5.

7.182. Based on our review of the Panel record, viewed against the backdrop of the original proceedings, we do not consider that the Panel improperly made the case for Mexico in respect of the determination provisions. In the light of the above considerations, we find that the United States has failed to establish that the Panel improperly made the case for Mexico by finding that, by virtue of the determination provisions, the detrimental impact of the amended tuna measure does not stem exclusively from a legitimate regulatory distinction.

Whether the Panel erred in making its findings on the determination provisions based solely on their design and not on their application

7.183. The United States argues that the Panel erred and applied an incorrect legal analysis by, in particular, failing to analyse whether the determination provisions support a finding that the certification requirements "are designed and applied" in an even-handed manner. Rather, "the Panel appears to have examined only how the determination provisions are *designed* without also examining how those provisions are *applied*."[661] Thus, according to the United States, there is no basis for finding that the application of the determination provisions means that the certification requirements are not even-handed "as designed and applied".[662]

7.184. Mexico responds that, in order to determine whether the regulatory distinctions of the amended tuna measure are even-handed, the Panel was required to assess the design, architecture, revealing structure, operation, and application of the measure. Since the determination provisions are an integral part of the amended tuna measure and, as recognized by the United States, they have never been applied, it was appropriate – and indeed required – for the Panel to focus on their design, architecture, and revealing structure.[663] Thus, Mexico asserts that the United States incorrectly faults the Panel for analysing the "design" of the determination provisions alone, instead of also examining how the determination provisions are "applied". Arguing that the United States can point to no evidence that the provisions have been applied, Mexico asserts that it was appropriate for the Panel to make findings based on the design of the determination provisions.[664]

7.185. At the outset, we note the Panel's statement that the determination provisions "appear to be designed to enable the United States to impose conditions on fisheries other than the ETP large purse seine fishery where the conditions in the former approach those of the latter".[665] In particular, we observe that, in the non-ETP large purse-seine fishery, the existing requirement for captain certification in respect of the conditions of "no setting on dolphins" and "no dolphins killed or seriously injured" is supplemented by a requirement of observer certification in respect of those two conditions when a determination has been made that there is regular and significant tuna-dolphin association, similar to the tuna-dolphin association in the ETP. Moreover, with respect to "all other fisheries", the United States' authorities can make a determination that there is regular and significant mortality or serious injury in a specific fishery, which would supplement the existing requirement that a captain provide a certification in respect of the condition of "no dolphins killed or seriously injured" by requiring the same certification from an observer in such a fishery. At the same time, the Panel indicated that the determination provisions do not contemplate the possibility that the US authorities make a determination of regular and significant mortality within the non-ETP purse-seine fishery, or a determination of regular and significant tuna-dolphin association within "all other fisheries".[666] The United States confirmed to the Panel that this understanding was correct.[667]

7.186. In advancing this claim, the United States appears to rely on the Appellate Body's reasoning that the relevant inquiry "probes the legitimacy of regulatory distinctions through careful scrutiny of whether they are *designed and applied* in an even-handed manner such that they may

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[661] United States' appellant's submission, para. 231. (emphasis original)
[662] United States' appellant's submission, para. 234 (referring to Panel Report, para. 7.281).
[663] Mexico adds that the determination provisions are tied to the United States' argument that the amended tuna measure's requirements for independent observers are "calibrated" to potential harm to dolphins. (Mexico's appellee's submission, para. 140)
[664] Mexico's appellee's submission, paras. 145-147.
[665] Panel Report, para. 7.263. The panelist who wrote a separate opinion also cited the determination provisions as an example of where the amended tuna measure "enable[s] the United States to impose the same requirements in fisheries where the same degree of risk prevails". (Ibid., para. 7.280)
[666] Panel Report, paras. 7.251-7.252.
[667] Panel Report, para. 7.252.

be considered 'legitimate' for the purposes of Article 2.1".[668] We do not, however, read this statement to preclude that, depending on the relevant circumstances of a particular case, it may be appropriate for a panel's examination of the measure at issue to focus on its design, rather than also focusing on its application. In the present case, it is uncontested 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."[669] Similarly, it is uncontested that the US authorities have not made a determination that any fishery belonging to the category of "all other fisheries" has regular and significant dolphin mortality.[670] Yet, we do not regard the absence of such determinations as conclusively establishing that the factual circumstances that they contemplate do not exist. Nor does the absence of such determinations say anything about whether the circumstances that should trigger such determinations are likely to exist in the future. For these reasons, we do not see what probative or legal value the United States considers the Panel ought to have attached to the "application" of the determination provisions. It follows that, contrary to the United States' position, we do not consider that, in the present circumstances, a focus on the design of the determination provisions *per se* renders the Panel's analysis faulty.

7.187. The United States contends that the current fishery-by-fishery data clearly supports that there is *no evidence* to establish that there is currently regular and significant association and regular or significant mortality or serious injury in any fishery other than the ETP large purse-seine fishery.[671] In criticizing the Panel for not examining how the determination provisions are *applied*, the United States appears to be taking issue with the fact that the Panel never assessed whether the *evidence on the record* established that there is currently regular and significant association or regular and significant mortality or serious injury in any fishery other than the ETP large purse-seine fishery.[672] However, the Panel never sought to scrutinize the evidentiary basis supporting the proposition that the US authorities have failed to make a determination as to the existence of a fishery, other than the ETP large purse-seine fishery, presenting regular and significant association or regular and significant mortality or serious injury. Rather, the Panel was focusing on the content, structure, and expected operation of the measure at issue with a view to delineating the scope of application of each of the relevant determinations. Therefore, we see as somewhat beside the point the United States' assertion that "there is no basis on which to find that the certification requirements, in fact, impose an observer requirement on tuna product produced from Mexican large purse seine vessels operating in the ETP and not on tuna product produced from other fisheries 'where, as a matter of fact, the conditions in [that other fishery] are the same as those in the ETP large purse seine fishery.'"[673]

7.188. For the foregoing reasons, we find that the United States has not established that the Panel erred in its assessment of whether the determination provisions are even-handed under Article 2.1 of the TBT Agreement.

7.2.3.3 Whether the Panel acted inconsistently with Article 11 of the DSU

7.189. Each of the participants raises several claims under Article 11 of the DSU in connection with the Panel's analysis of whether the detrimental impact on Mexican tuna products flowing from the eligibility criteria and the certification requirements stems exclusively from a legitimate regulatory distinction. With respect to the Panel's analysis of the eligibility criteria, Mexico raises three claims of error under Article 11 of the DSU. First, Mexico argues that the Panel erred by changing the factual findings from the original proceedings regarding the adverse effects from setting on dolphins.[674] Mexico's second challenge under Article 11 of the DSU is that the Panel erred in finding that other fishing methods have no unobservable adverse effects.[675] Third, Mexico

[668] Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.92. (emphasis added)
[669] Panel Report, para. 3.22.
[670] Panel Report, para. 3.22.
[671] United States' appellant's submission, para. 233.
[672] The United States argues that the Panel reached its conclusion in respect of the determination provisions "without any regard for the evidentiary record". (United States' appellant's submission, para. 235)
[673] United States' appellant's submission, para. 234 (quoting Panel Report, para. 7.258).
[674] Mexico's other appellant's submission, subheading V.B.2.c(i).
[675] Mexico's other appellant's submission, subheading V.B.2.c(ii).

contends that the Panel incorrectly asserted that the Appellate Body made a finding that setting on dolphins is more harmful to dolphins than other fishing methods.[676]

7.190. As regards the Panel's analysis of the certification requirements, the United States contends that the Panel acted inconsistently with Article 11 of the DSU by reaching a finding with respect to the determination provisions that is unsupported by the evidence on the record. Mexico, in turn, raises two Article 11 claims in connection with this part of the Panel's analysis. First, Mexico argues that the Panel erred in rejecting Mexico's argument and evidence that fishing vessel captains have an economic self-interest in not reporting that dolphins were killed or seriously injured.[677] Second, Mexico contends that, in finding that setting on dolphins occurs only in the ETP, the Panel erred in disregarding evidence that "dolphins associate with tuna and are intentionally set upon in the Indian Ocean."[678]

7.191. Before turning to these various claims of error on appeal, we recall the legal standard for establishing that a panel has acted inconsistently with its duties under Article 11 of the DSU. To comply with its duty to make an objective assessment of the matter before it, the Appellate Body has stated that a panel must "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence".[679] Panels may not "make affirmative findings that lack a basis in the evidence contained in the panel record".[680] Within these parameters, panels enjoy a margin of discretion in their assessment of the facts.[681] This margin includes the discretion to determine how much weight to attach to the various items of evidence placed before them by the parties.[682] Moreover, the mere fact that a panel did not explicitly refer to each and every piece of evidence in its reasoning is insufficient to establish a claim of violation under Article 11.[683] Rather, a participant must explain why such evidence is so material to its case that the panel's failure to address explicitly and rely upon the evidence has a bearing on the objectivity of the panel's factual assessment.[684] The Appellate Body has also considered that a participant cannot simply recast factual arguments that it made before the panel in the guise of a claim under Article 11.[685] Instead, for a claim under Article 11 to succeed, the Appellate Body "must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts".[686] "[N]ot every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU"[687], but only those that are so material that, "taken together or singly"[688], they undermine the objectivity of the panel's assessment of the matter before it.[689] The Appellate Body has stated that a claim that a panel has failed to conduct the "objective assessment of the matter before it" required by Article 11 of the DSU is "a very serious allegation"[690], and the Appellate Body will not "interfere lightly"[691] with a panel's fact-finding authority.

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[676] Mexico's other appellant's submission, subheading V.B.2.c(iii).

[677] Mexico's other appellant's submission, para. 139.

[678] Mexico's other appellant's submission, para. 143.

[679] Appellate Body Reports, *China – Rare Earths*, para. 5.178; *Brazil – Retreaded Tyres*, para. 185; *EC – Hormones*, paras. 132-133; *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines*, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan – Agricultural Products II*, paras. 141-142; *Korea – Alcoholic Beverages*, paras. 161-162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; *EC – Selected Customs Matters*, para. 258.

[680] Appellate Body Reports, *US – Carbon Steel*, para. 142; *US – Wheat Gluten*, paras. 161-162.

[681] Appellate Body Reports, *China – Raw Materials*, para. 341; *EC – Asbestos*, para. 161; *EC – Hormones*, para. 132; *EC – Sardines*, para. 299; *Japan – Apples*, paras. 221-222; *Korea – Dairy*, paras. 137-138; *US – Wheat Gluten*, para. 151.

[682] Appellate Body Report, *Korea – Dairy*, para. 137.

[683] Appellate Body Report, *EC – Fasteners (China)*, para. 441 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 202).

[684] Appellate Body Report, *EC – Fasteners (China)*, para. 442.

[685] Appellate Body Report, *EC – Fasteners (China)*, para. 442.

[686] Appellate Body Report, *US – Wheat Gluten*, para. 151.

[687] Appellate Body Report, *EC – Fasteners (China)*, para. 442.

[688] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1318.

[689] Appellate Body Reports, *China – Rare Earths*, para. 5.179.

[690] Appellate Body Reports, *US – Carbon Steel (India)*, para. 4.79; *China – Rare Earths*, para. 5.227; *EC – Poultry*, para. 133.

[691] Appellate Body Reports, *EC – Sardines*, para. 299; *US – Wheat Gluten*, para. 151; *US – Carbon Steel*, para. 142.

7.192. As noted above, Mexico raises three claims of error under Article 11 of the DSU relating to the Panel's application of the "less favourable treatment" test to the eligibility criteria. Mexico's first challenge under Article 11 of the DSU is that the Panel erred in "changing" the factual findings regarding setting on dolphins from the original proceedings. In particular, Mexico claims that the original panel's findings that setting on dolphins in the ETP causes unobserved harms to dolphins were "not as strong" in the original proceedings as the Panel now asserts them to be.[692] Mexico points out that the original panel had found that:

> … it appears that there is a degree of uncertainty in relation to the extent to which setting on dolphins may have an adverse impact on dolphins beyond observed mortality. Nonetheless, we consider that sufficient evidence has been put forward by the United States to raise a presumption that genuine concerns exist in this respect.[693]

7.193. According to Mexico, even though there was no new evidence on the unobserved effects of setting on dolphins in the ETP in these Article 21.5 proceedings, the Panel converted the prior finding that "genuine concerns" exist regarding the extent to which setting on dolphins may have an adverse impact on dolphins beyond observed mortality into a finding of "conclusive evidence" of significant unobserved effects.[694]

7.194. The United States responds that the Panel did not "change" the finding concerning the unobserved harms caused by dolphin sets from the original proceedings, nor mischaracterize the finding of the original panel in this regard. The United States adds that the Panel accurately concluded that the original panel made definitive findings that setting on dolphins can cause adverse effects on dolphins apart from observed mortalities.[695] According to the United States, the Appellate Body confirmed the original panel's analysis that dolphins suffer adverse impact beyond observed mortalities from setting on dolphins.[696]

7.195. We begin by noting that Mexico does not identify any specific paragraph in the Panel Report where the Panel allegedly "changed" the factual findings made by the original panel regarding the unobserved adverse effects on dolphins from setting on dolphins. From the context of Mexico's submission, we understand this allegation to relate to the findings made by the Panel in paragraphs 7.120 through 7.122 of its Report. In these paragraphs, the Panel made several observations regarding the unobserved adverse effects of setting on dolphins. According to the Panel, the Appellate Body "found that setting on dolphins is 'particularly harmful to dolphins'".[697] The Panel quoted various adverse effects "beyond observed mortalities" that can arise from setting on dolphins.[698] The Panel also indicated that, "[i]mportantly, the Appellate Body also accepted that these harms arise as a result of the 'chase itself'."[699] The Panel observed that, as a consequence, "[the Appellate Body] affirmed the original panel's conclusion that 'the US objectives … to minimize unobserved consequences of setting on dolphins' would not be attainable if tuna caught by setting-on dolphins were eligible for the dolphin-safe label".[700] Then, the Panel expressed its understanding that "the Appellate Body clearly found that setting on dolphins causes observed and unobserved harm to dolphins."[701]

7.196. Mexico claims that "[t]he original panel's findings that dolphin sets in the ETP cause unobserved harms to dolphins were not as strong in the original proceedings as the Panel now asserts them to be."[702] In this regard, we consider it important to clarify that, in paragraphs 7.120

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[692] Mexico's other appellant's submission, para. 117.

[693] Mexico's other appellant's submission, para. 117 (quoting Original Panel Report, para. 7.504). (underlining added by Mexico)

[694] Mexico's other appellant's submission, para. 118.

[695] The United States points out that "the finding of the original panel was that 'various adverse impacts can arise from setting on dolphins, beyond observed mortalities.'" The United States also indicates that "the original panel had found that, while there was some uncertainty regarding 'the extent' of these impacts, the U.S. evidence had established a presumption that 'genuine concerns exist' in that respect." (United States' appellee's submission, para. 109 (quoting Original Panel Report, para. 7.737))

[696] United States' appellee's submission, paras. 110-111.

[697] Panel Report, para. 7.120 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 289).

[698] Panel Report, para. 7.120 (quoting, without attribution, Original Panel Report, para. 7.499).

[699] Panel Report, para. 7.121.

[700] Panel Report, para. 7.121 (quoting Original Panel Report, para. 7.613).

[701] Panel Report, para. 7.122.

[702] Mexico's other appellant's submission, para. 117.

through 7.122 of its Report, the Panel was *not* referring to the findings of the original panel, but was rather describing its understanding of the findings reached by the Appellate Body in the original proceedings. In any event, the Panel's references to the Appellate Body report do not, in our view, mischaracterize the findings made in the original proceedings regarding the existence of unobserved effects on dolphins. We recall that, in a subsection of its report entitled "Uncontested Findings by the Panel", the Appellate Body made the following observations:

> The [original panel] further remarked that "there is a degree of uncertainty in relation to the extent to which setting on dolphins may have an adverse impact on dolphins beyond observed mortality." Nonetheless, the [original panel] determined "that sufficient evidence has been put forward by the United States to raise a presumption that genuine concerns exist in this respect". The [original panel] also found that the United States had put forward sufficient evidence to raise a presumption "that the method of setting on dolphins 'has the capacity' of resulting in observed and unobserved adverse effects on dolphins".[703]

7.197. The Appellate Body report also shows that, in response to questioning at the oral hearing in the original proceedings, Mexico accepted that "setting on dolphins within the ETP … has the capacity of resulting in observed and *unobserved* effects on dolphins".[704] It follows that, in our view, the Panel reiterated the substance of the Appellate Body's findings when it indicated that "the Appellate Body clearly found that setting on dolphins causes observed and unobserved harm to dolphins."[705] Therefore, we do not agree with Mexico that the Panel's findings regarding the unobserved harms to dolphins due to setting on dolphins are somehow "stronger" than in the original proceedings, or that the Panel breached Article 11 of the DSU in reaching them.

7.198. Mexico's second challenge under Article 11 of the DSU is that the Panel erred in finding that fishing methods other than setting on dolphins have no unobservable adverse effects. According to Mexico, in paragraphs 7.132 and 7.134 of its Report, the Panel found that *all* of the effects on dolphins caused by other fishing methods would be "observable" if a trained person were watching for them. In Mexico's view, this is a factual error, given that it had submitted evidence that not all effects are observable.[706] In particular, Mexico argues that the Panel ignored evidence presented by Mexico regarding gillnet and longline fishing showing that not all the effects from fishing techniques other than setting on dolphins are observable.

7.199. In response, the United States argues that the Panel did not err in finding that other fishing methods do not have unobservable effects similar to those associated with setting on dolphins in the ETP. Contrary to Mexico's argument, the Panel's in-depth examination of the evidence on this point clearly satisfied its obligations under Article 11 of the DSU. The Panel's finding that fishing methods, other than setting on dolphins, do not cause "the kinds of unobservable harms that are caused by setting on dolphins"[707] is amply supported by evidence on the record and reflects a weighing and balancing of that evidence in line with Article 11.

7.200. We begin by noting that the essence of Mexico's claim is that the Panel erred in finding that other fishing methods have no unobservable adverse effects. This, however, is not an accurate characterization of the findings made by the Panel. Contrary to Mexico's assertion, the Panel did not make a finding that *all* of the effects on dolphins of other fishing methods would be "observable" if a trained person were watching for them. Rather, in paragraph 7.132, the Panel found that none of the evidence presented by Mexico regarding the adverse effects on dolphins caused by other fishing methods "suggests that fishing methods other than setting on dolphins inflict the same kinds of unobservable harms that are caused by net sets" (i.e. setting on dolphins).[708] In paragraph 7.134, the Panel rejected Mexico's contention that the United States had conceded 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'."[709] Therefore, contrary to Mexico's assertion, we do not read the Panel's reasoning to include any finding that *all* of the adverse

[703] Appellate Body Report, *US – Tuna II (Mexico)*, para. 246. (fns omitted)
[704] Appellate Body Report, *US – Tuna II (Mexico)*, para. 251. (emphasis added; fn omitted) See also fn 513 to para. 246.
[705] Panel Report, para. 7.122.
[706] Mexico's other appellant's submission, paras. 120-121.
[707] Panel Report, paras. 7.131 and 7.134.
[708] Panel Report, para. 7.132.
[709] Panel Report, para. 7.134.

effects on dolphins caused by other fishing methods would be "observable" if a trained person were watching for them.

7.201. Moreover, we note that, in raising this claim of error under Article 11 of the DSU, Mexico appears to be rearguing the case that it put to the Panel and asking us to attribute to its evidence greater significance than did the Panel. Such a request is neither compatible with the scope of appellate review, nor a proper way to establish a breach of Article 11 of the DSU.[710] In any event, we disagree with Mexico's assertion that the Panel "did not even mention" the evidence concerning the adverse effects on dolphins caused by fishing using gillnets and longlines.[711] Our review of the Panel Report reveals, rather, that the Panel did examine evidence regarding gillnet fishing, in paragraph 7.130, and evidence on longline fishing, in paragraph 7.131 of its Report.

7.202. For the foregoing reasons, we consider that Mexico has not properly substantiated its claim under Article 11 of the DSU, nor established that the Panel found that fishing methods other than setting on dolphins have no unobservable adverse effects.

7.203. In its third challenge under Article 11 of the DSU, Mexico asks us to reverse the Panel's finding that the Appellate Body made a factual finding that "dolphin sets under the rules of [the] AIDCP are more harmful to dolphins than other fishing methods."[712] In making its arguments on this issue, Mexico refers to the following statement by the Panel:

> The Appellate Body found that setting on dolphins is "particularly harmful to dolphins", 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 [sic], as well as muscular damage, immune and reproductive system failures, and other adverse health consequences.[713]

7.204. Mexico highlights that the quoted text that the Panel attributed to the Appellate Body is actually a quotation from the original panel report, which does not appear in the Appellate Body report. Mexico also refers to paragraph 260 of the Appellate Body report, where the Appellate Body noted that the original panel had distinguished between the risks associated with setting on dolphins *before* the AIDCP controls were adopted (unregulated dolphin sets), and dolphin sets that are regulated under the rules of the AIDCP. On this basis, Mexico argues that, when read in context, "the Appellate Body did not find, nor did it imply, that [setting on dolphins] is more harmful to dolphins than other fishing methods when the dolphin set method is regulated under the AIDCP."[714] To the contrary, Mexico considers that the Appellate Body affirmed the finding of the original panel that dolphins face "equivalent" risks from AIDCP-regulated setting on dolphins and from other fishing methods.[715]

7.205. The United States rejects Mexico's claims of error. In its view, the original proceedings clearly resolved that setting on dolphins, including under the AIDCP regime, causes various adverse impacts "beyond observed mortalities". Moreover, "it is clear from the Appellate Body report that the finding that setting on dolphins is 'particularly harmful to dolphins' was not limited to setting on dolphins other than under the AIDCP regime."[716]

7.206. In addressing Mexico's third challenge under Article 11 of the DSU, we begin by pointing out that the paragraph of the Panel Report to which Mexico objects is silent as to the *relative harms* associated with setting on dolphins, on the one hand, as compared to other fishing methods, on the other hand. Rather, in the paragraph identified by Mexico, the Panel is addressing

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[710] Appellate Body Report, *EC – Fasteners (China)*, para. 442.
[711] Mexico's other appellant's submission, paras. 121-122.
[712] Mexico's other appellant's submission, para. 130.
[713] Mexico's other appellant's submission, para. 125 (quoting Panel Report, para. 7.120).
[714] Mexico's other appellant's submission, para. 129.
[715] Mexico's other appellant's submission, para. 129 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, paras. 260-281).
[716] United States' appellee's submission, para. 128.

only the fishing method of setting on dolphins. The Panel's language is somewhat unfortunate insofar as it may be read to imply that the Appellate Body, itself, "found" that setting on dolphins is "particularly harmful to dolphins".[717] What the Appellate Body actually stated, as Mexico also points out[718], was that the original panel appeared to have "accepted the United States' argument that the fishing technique of setting on dolphins is particularly harmful to dolphins".[719] Moreover, while Mexico is correct that the passage quoted by the Panel comes from the original panel report rather than the Appellate Body report, we do not see that this alone amounts to error under Article 11, particularly given that the Appellate Body did refer to precisely these types of harms in its report. Specifically, in addressing the United States' appeal under Article 2.2 of the TBT Agreement, the Appellate Body took note of the original panel's finding, "undisputed by the participants, that dolphins suffer adverse impact beyond observed mortalities from setting on dolphins, even under the restrictions contained in the AIDCP rules."[720] In footnotes to this observation, the Appellate Body also referred to the original panel's statements regarding the unobserved effects that arise "as a result of the chase itself"[721] and to the examples given by the original panel of these various adverse effects.[722]

7.207. We see no merit in this allegation of error under Article 11 of the DSU by Mexico. Mexico has neither established that the Panel made a finding "that the dolphin set method is more harmful to dolphins than other fishing methods when the dolphin set method is regulated under the AIDCP", nor identified any problem with the statements made by the Panel regarding the Appellate Body's use of the phrase "particularly harmful" in connection with the fishing method of setting on dolphins. We further observe that Mexico's arguments in support of this claim of error are cursory and do not explain why any alleged error made by the Panel would rise to the level required in order to establish a breach of Article 11 of the DSU.

7.208. For all of the above reasons, we find that Mexico has not established that the Panel acted inconsistently with its duty to conduct an objective assessment of the matter, pursuant to Article 11 of the DSU, in its analysis of the consistency of the eligibility criteria set out in the amended tuna measure with Article 2.1 of the TBT Agreement.

7.209. We next examine the participants' claims in connection with the Panel's analysis of the certification requirements. We begin with the United States' claim that the Panel acted inconsistently with Article 11 of the DSU in its assessment of the determination provisions.

7.210. The United States contends that the Panel acted inconsistently with Article 11 of the DSU by arriving at a finding that is unsupported by the evidence on the record. The United States recalls that the Panel expressed concern over two particular "gaps" in the determination provisions.[723] The first "gap" identified by the Panel would occur within the non-ETP purse-seine fishery where there is regular and significant mortality or serious injury of dolphins without regular and significant tuna-dolphin association. The United States notes that the evidence establishes that there is a direct positive correlation between association and observed mortality or serious injury in purse-seine fisheries. As a consequence, "the evidence establishes that a 'gap' such as the Panel envisioned does not, in fact, occur – there is no evidence on the record that a purse seine fishery exists where a 'regular and significant' mortality is occurring without a tuna-dolphin association also being present."[724] The United States indicates that, in the Panel's view, the second "gap" would occur in a non-purse-seine fishery where there is regular and significant tuna-dolphin association without regular and significant mortality or serious injury of dolphins. The United States considers that the Panel's analysis appears to be a "self-defeating

[717] Panel Report, para. 7.120 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 289).
[718] Mexico's other appellant's submission, para. 126.
[719] Appellate Body Report, *US – Tuna II (Mexico)*, para. 289.
[720] Appellate Body Report, *US – Tuna II (Mexico)*, para. 330 (referring to Original Panel Report, paras. 7.491-7.506).
[721] Appellate Body Report, *US – Tuna II (Mexico)*, fn 664 to para. 330 (quoting Original Panel Report, para. 7.504).
[722] The Appellate Body noted the following examples given by the original panel of the various adverse effects that arise "as a result of the chase in itself": "cow-calf separation; potential muscle injury resulting from the chase; immune and reproductive systems failures; and other adverse health consequences for dolphins, such as continuous acute stress". (Appellate Body Report, *US – Tuna II (Mexico)*, fn 663 to para. 330 (referring to Original Panel Report, paras. 7.491-7.506))
[723] United States' appellant's submission, paras. 237-239.
[724] United States' appellant's submission, para. 245.

proposition"[725], because, if the Panel is correct that the risk of mortality or serious injury is positively correlated with the existence of a tuna-dolphin association in non-purse-seine fisheries, then any regular and significant association would imply that there is regular and significant mortality or serious injury. In such situation, "the non-purse seine fishery would not fall into a 'gap' at all but would be designated under [Section] 216.91(a)(4)(iii)."[726]

7.211. Mexico disagrees with the United States' argument that the Panel acted inconsistently with Article 11 of the DSU by finding that there are two "gaps" in the determination provisions. Mexico argues that there is considerable evidence on the record to support the Panel's findings.[727] Moreover, in Mexico's view, it was "both reasonable and appropriate for the Panel to conclude that dolphin association with fishing methods other than purse seine nets could be harmful to dolphins, and that purse seine fishing could cause dolphin mortalities even if an ocean region did not feature tuna-dolphin association similar to the ETP".[728]

7.212. We understand the essence of the United States' claim to be that the Panel's reasoning and findings regarding the determination provisions were not based on "sufficient" evidence and, consequently, that the Panel acted inconsistently with Article 11 of the DSU in making such findings. The United States contends that it is incorrect to believe that there are two "gaps" in the determination provisions.

7.213. Our assessment of the United States' arguments reveals that a number of them are aimed at establishing that there is *no evidence* on the record supporting the conclusion that there is any fishery, other than the ETP large purse-seine fishery, where there is regular and significant tuna-dolphin association or regular and significant mortality or serious injury of dolphins. We have examined and rejected this argument above in the context of the United States' challenge to the Panel's application of Article 2.1 to the determination provisions. We recall that the Panel never sought to scrutinize the evidentiary basis supporting the proposition that the US authorities have failed to make a determination as to the existence of a fishery, other than the ETP large purse-seine fishery presenting regular and significant tuna-dolphin association or regular and significant mortality or serious injury of dolphins. Rather, the Panel was focusing on the content, structure, and expected operation of the measure at issue with a view to delineating the scope of application of each of the relevant determinations. The Panel was thus providing a series of hypothetical situations regarding the applicability of the determination provisions to the various fisheries that are subject to the amended tuna measure.

7.214. In the light of the above considerations, we find that the United States has not established that the Panel acted inconsistently with its duty to conduct an objective assessment of the matter before it pursuant to Article 11 of the DSU in its analysis of the consistency of the determination provisions set out in the amended tuna measure with Article 2.1 of the TBT Agreement.

7.215. We now turn to Mexico's claims that the Panel acted inconsistently with its obligations under Article 11 of the DSU in its analysis of the certification requirements under Article 2.1 of the TBT Agreement. In its first claim, Mexico asserts that the Panel erred in rejecting Mexico's argument and evidence that fishing vessel captains have an economic self-interest in not reporting that dolphins were killed or seriously injured.[729] Mexico asserts that, despite its finding that "[t]he documents submitted by Mexico certainly suggest that there have been instances in which captains' certifications have been unreliable"[730], the Panel declined to "draw the inevitable conclusions from that evidence".[731] Consequently, Mexico submits that the Panel did not make an

[725] United States' appellant's submission, para. 247.
[726] United States' appellant's submission, para. 247.
[727] Mexico recalls that the panel in the original proceedings found that there is "strong evidence that regular and significant mortality and serious injury of dolphins also exists outside the ETP". (Mexico's appellee's submission, para. 149 (quoting Original Panel Report, para. 7.543)) Mexico also points to evidence about the harms caused to dolphins by other fishing methods, such as the undisputed facts that dolphins are attracted to feed on the fish caught on hooks or in gillnets, and that the USDOC has designated the Atlantic Pelagic Longline fishery as a "Category I" fishery due to frequently documented interactions with marine mammals. (Ibid., para. 149 (referring to Mexico's first written submission to the Panel, para. 141))
[728] Mexico's appellee's submission, para. 151.
[729] Mexico's other appellant's submission, para. 139.
[730] Mexico's other appellant's submission, para. 139 (quoting Panel Report, para. 7.209; and referring to para. 7.596).
[731] Mexico's other appellant's submission, para. 139.

objective assessment of the matter "because it conflated captains' reliability in general with the reliability, specifically, of captains' self-certifications with respect to the 'dolphin-safe' status of tuna for the purposes of accessing the market advantage of the U.S. label", and requests us to reverse the Panel's finding that "captains' dolphin-safe certifications are always reliable."[732]

7.216. In response, the United States asserts that the Panel's findings regarding the reliability of captains' certifications were not inconsistent with Article 11 of the DSU. For the United States, Mexico wrongly argues that the Panel failed to understand that Mexico's argument concerned the specific situation of captains making dolphin-safe certifications. To the contrary, "the Panel described Mexico's argument as relating to vessel captains' 'financial incentive to certify that their catch is dolphin-safe even when it is not'".[733] The United States also disagrees that the Panel erred by finding that Mexico had not established that captains' statements are unreliable, because the Panel's finding "was supported by a significant amount of evidence on the record, which Mexico fails to confront in making this appeal".[734] The United States points out that Mexico "does not articulate any basis for finding that the Panel exceeded its discretion as the trier of fact, or that the Panel's finding was not based on a weighing of the evidence before it", or "allege that the Panel's treatment of the evidence undermined its objectivity".[735] Consequently, the United States concludes that Mexico's claim should be rejected.

7.217. At the outset, we note that, in response to questioning at the oral hearing, Mexico indicated that this claim is both a challenge to the Panel's application of the law to the facts and a challenge that the Panel acted inconsistently with its obligations under Article 11 of the DSU. We recall that the Appellate Body has stated that, "[i]n most cases … an issue will *either* be one of application of the law to the facts *or* an issue of the objective assessment of facts, and not both."[736] Allegations implicating a panel's assessment of the facts and evidence fall under Article 11 of the DSU.[737] Mexico's central argument is that the Panel did not make "an objective assessment" because it "declined to draw the inevitable conclusions from [certain] evidence"[738] and because it "conflated captains' reliability in general with the reliability, specifically, of captains' self-certifications with respect to the 'dolphin-safe' status of tuna".[739] In the light of the nature of Mexico's arguments, which relate, in our view, to the Panel's weighing of the evidence, we analyse Mexico's claim as a challenge to the Panel's findings under Article 11 of the DSU.

7.218. Having made this preliminary observation, we also note that Mexico requests us to reverse the Panel's finding that "captains' dolphin-safe certifications are always reliable."[740] Our review of the Panel Report reveals that, in fact, the Panel made *no* such finding. Rather, after examining the arguments and evidence submitted by each party, the Panel considered the evidence presented by the United States to be a "highly relevant and probative fact" that "many regional and international organizations and arrangements rely on captains' certifications and logbooks".[741] In the Panel's view, this fact raised "a strong presumption that, from a systemic perspective, such certifications are reliable."[742] Then, the Panel explicitly acknowledged that Mexico's evidence "suggest[ed] that there have been instances in which captains' certifications have been unreliable".[743] However, the Panel noted that this evidence did not suffice to rebut the United States' general demonstration regarding the reliability of captains' certifications.[744]

[732] Mexico's other appellant's submission, para. 142.
[733] United States' appellee's submission, para. 142 (quoting Panel Report, para. 7.198).
[734] United States' appellee's submission, para. 145.
[735] United States' appellee's submission, para. 147. (fns omitted)
[736] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 955 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 872 (emphasis original)).
[737] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 955.
[738] Mexico's other appellant's submission, para. 139.
[739] Mexico's other appellant's submission, para. 142.
[740] Mexico's other appellant's submission, para. 142.
[741] Panel Report, para. 7.208.
[742] Panel Report, para. 7.208.
[743] Panel Report, para. 7.209.
[744] In particular, the Panel concluded that "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 … that such instances of non-compliance should not be considered as seriously undermining the general reliability of captains' certifications". (Panel Report, para. 7.209)

Furthermore, the Panel was also not convinced by Mexico's argumentation concerning the economic incentives facing captains.[745]

7.219. As established by the Appellate Body, panels enjoy a margin of discretion in their assessment of the facts under Article 11 of the DSU.[746] A panel does not err simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it.[747] In the present claim, Mexico does *not* single out any particular exhibit that the Panel misinterpreted or failed to take into consideration. Nor does Mexico point to any mistakes regarding the Panel's objectivity in its assessment of the evidence. Consequently, we consider that Mexico has not established that the Panel acted inconsistently with Article 11 of the DSU in concluding that "Mexico ha[d] 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".[748]

7.220. In its second claim under Article 11 of the DSU, Mexico argues that the Panel erred in its finding that setting on dolphins only occurs in the ETP.[749] According to Mexico, "[t]he failure of the Panel to even mention, let alone address, evidence Mexico submitted that dolphins associate with tuna and are intentionally set upon in the Indian Ocean was inconsistent with the Panel's obligations under Article 11 of the DSU".[750] Mexico points out that Exhibit MEX-161 was not mentioned or addressed by the Panel.[751] According to Mexico, Exhibit MEX-161, a report by Dr R. Charles Anderson on *Cetaceans and Tuna Fisheries in the Western and Central Indian Ocean*[752], contains a comprehensive and scientific analysis of dolphin mortalities in the Indian Ocean tuna fishery.[753] Mexico submits that "the refusal of the Panel to deal with this crucial evidence played a key role in its finding that independent observers are unnecessary outside the ETP to assure the accuracy of dolphin-safe claims."[754]

7.221. The United States rejects Mexico's appeal and asserts that "Mexico has failed to meet the high standard required for a successful Article 11 claim".[755] The United States argues, first, that the Panel fulfilled its obligations under Article 11 since it analysed Mexico's evidence and arguments concerning the existence of dolphin sets outside the ETP.[756] The United States points out that Exhibit MEX-161 was acknowledged by the Panel in a citation in another part of the Panel Report.[757] Accordingly, the Panel "had discretion to choose 'which evidence … to utilize in making findings' and the fact that it did not rely on one of Mexico's exhibits in a particular place is not sufficient to establish an Article 11 violation."[758] The United States submits that, in any event, Exhibit MEX-161 in "no way undermines the Panel's finding", since the report in this exhibit makes no mention of "dolphins sets, as they occur in the ETP – involving chasing dolphins to catch tuna – *ever* occurring *outside* the ETP" and does not suggest that "the type of 'association' that ETP large purse seiners exploit … occurs anywhere outside the ETP".[759]

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[745] For the Panel, Mexico provided no evidence to establish that it is unlikely that captains accurately report dolphin mortality or serious injury. (Panel Report, para. 7.210)

[746] Appellate Body Reports, *China – Raw Materials*, para. 341; *EC – Asbestos*, para. 161; *EC – Hormones*, para. 132; *EC – Sardines*, para. 299; *Japan – Apples*, para. 221; *Korea – Dairy*, paras. 137-138; *US – Wheat Gluten*, para. 151.

[747] Appellate Body Reports, *Australia – Salmon*, para. 267; *Japan – Apples*, para. 221; *Korea – Alcoholic Beverages*, para. 164.

[748] Panel Report, para. 7.211.

[749] Mexico notes that the Panel rejected its position, stating 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'". (Mexico's other appellant's submission, para. 143 (quoting Panel Report, para. 7.242))

[750] Mexico's other appellant's submission, para. 143.

[751] Mexico's other appellant's submission, paras. 144-145.

[752] R.C. Anderson, *Cetaceans and Tuna Fisheries in the Western and Central Indian Ocean*, International Pole and Line Foundation, Technical Report No. 2 (London, 2014) (Panel Exhibit MEX-161).

[753] Mexico's other appellant's submission, paras. 143-144.

[754] Mexico's other appellant's submission, para. 146.

[755] United States' appellee's submission, para. 160.

[756] United States' appellee's submission, para. 156 (referring to Panel Report, fn 134 to para. 7.46).

[757] United States' appellee's submission, para. 156 (referring to Panel Report, fn 134 to para. 7.46).

[758] United States' appellee's submission, para. 156 (quoting Appellate Body Reports, *China – Rare Earths*, para. 5.178).

[759] United States' appellee's submission, para. 159 (referring to Anderson, *Cetaceans and Tuna Fisheries*). (emphasis original)

7.222. Mexico's central claim on appeal is that the Panel failed to address the evidence contained in Exhibit MEX-161, which, in its view, indicates that dolphins associate with tuna and are intentionally set upon in the Indian Ocean. According to Mexico, this amounts to a breach of the Panel's obligations under Article 11 of the DSU.

7.223. At the outset, we observe that Mexico correctly points out that the Panel did not discuss Exhibit MEX-161 in the section of the Panel Report addressing the certification requirements.[760] However, this does not necessarily amount to a breach of the Panel's obligations under Article 11 of the DSU. As established by the Appellate Body, the mere fact that a panel did not explicitly refer to each and every piece of evidence in its reasoning is insufficient to establish a claim of violation under Article 11.[761] Indeed, it is within the Panel's discretion in assessing the facts "to decide which evidence it chooses to utilize in making findings"[762] and to determine how much weight to attach to the various items of evidence placed before it by the parties.[763]

7.224. Moreover, we observe that the content of Exhibit MEX-161 is entirely compatible with the Panel's findings. Indeed, we note that, before the Panel, Mexico argued that "'tuna dolphin associations have been sighted and deliberately set on' outside of the ETP, and accordingly the absence of independent observers outside the ETP is unjustifiable."[764] After reviewing evidence submitted by both parties, the Panel was not persuaded by Mexico's arguments and evidence. We note that, in response to Mexico's argument, the Panel acknowledged that the evidence submitted by Mexico suggests that "there may be some interaction between tuna and marine mammals, including dolphins, outside of the ETP".[765] However, the Panel *also* pointed out that "dolphins in the Atlantic, Indian, and western Pacific Oceans [do not associate with tuna] as systematically as they do in the Eastern Tropical Pacific".[766] This passage reveals that the Panel did acknowledge and accept the existence of association between tuna and dolphins in the Indian Ocean, which is one of the issues addressed in Exhibit MEX-161. Furthermore, we observe that, while this exhibit concludes that "dolphins and tuna do associate in the [Western Indian Ocean (WIO)]"[767], it also notes that "the only comparative study of the cetaceans from the [WIO] and the ETP … suggested that tuna-dolphin schools were seen less frequently in the WIO than in the ETP."[768] This observation from Exhibit MEX-161 also seems to be in line with the above-mentioned Panel findings.

7.225. Furthermore, we note that the Panel indicated 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'".[769] This passage shows that, contrary to Mexico's assertion, the Panel never made the finding that "dolphin sets are only made in the ETP".[770] To the contrary, the Panel acknowledged that setting on dolphins may, "occasionally and incidentally", occur outside the ETP. Exhibit MEX-161 notes that "it is possible that there has been more setting on dolphins in the WIO than has been reported".[771] At the same time, this exhibit also indicates that "[t]his does not imply that the tuna-dolphin fishery in the WIO is of the same scale as that in

[760] We note that the Panel did acknowledge the existence of Exhibit MEX-161, given that it referred to it in a different part of its Report. (Panel Report, fn 134 to para. 7.46) We observe, however, that this reference by the Panel did not relate to the issue of the prevalence of tuna-dolphin association and setting on practices outside the ETP, but was rather utilized to support the proposition that there is limited evidence regarding the incidence of dolphin mortality in fisheries other than the ETP large purse-seine fishery. (Ibid.)

[761] Appellate Body Report, *EC – Fasteners (China)*, paras. 441-442; *Brazil – Retreaded Tyres*, para. 202.

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

[763] Appellate Body Report, *Korea – Dairy*, para. 137.

[764] Panel Report, para. 7.241 (quoting Mexico's first written submission to the Panel, para. 113).

[765] Panel Report, para. 7.241.

[766] Panel Report, para. 7.241 (quoting National Marine Fisheries Service, *An Annotated Bibliography of Available Literature Regarding Cetacean Interactions with Tuna Purse-Seine Fisheries Outside of the Eastern Tropical Pacific Ocean*, Administrative Report LJ-96-20 (November 1996) (Panel Exhibit MEX-40), p. 2).

[767] Mexico's other appellant's submission, para. 145 (quoting Anderson, *Cetaceans and Tuna Fisheries*, p. 63).

[768] Mexico's other appellant's submission, para. 145; United States' appellee's submission, para. 158 (both quoting Anderson, *Cetaceans and Tuna Fisheries*, p. 63).

[769] Panel Report, para. 7.242.

[770] Mexico's other appellant's submission, heading VI.B.

[771] Mexico's other appellant's submission, para. 145 (quoting Anderson, *Cetaceans and Tuna Fisheries*, p. 67).

the ETP."[772] The study concludes that "[t]he true scale of purse seine fishing on dolphin-associated schools in the WIO is therefore open to question."[773] These passages, in our view, also indicate that the Panel's findings regarding the use of the fishing technique of setting on dolphins in fisheries outside the ETP are consistent with the conclusions found in Exhibit MEX-161.

7.226. For the foregoing reasons, we conclude that, while the Panel did not expressly refer to Exhibit MEX-161 in the context of its assessment of the certification requirements, this, in and of itself, is insufficient to establish a breach of Article 11 of the DSU.[774] The excerpts from Exhibit MEX-161 cited by Mexico show that the content of this exhibit is entirely compatible with the Panel's findings, and do not suggest widespread tuna-dolphin association or widespread use of the fishing technique of setting on dolphins outside the ETP.

7.227. For all of the above reasons, we find that Mexico has not established that the Panel acted inconsistently with its duty to conduct an objective assessment of the matter, pursuant to Article 11 of the DSU, in its analysis of the consistency of the certification requirements set out in the amended tuna measure with Article 2.1 of the TBT Agreement.

7.2.3.4 Overall conclusions on the Panel's analysis under Article 2.1 of the TBT Agreement

7.228. We have found that the Panel erred in its analysis of whether the amended tuna measure has a detrimental impact on Mexican tuna products in the US market within the meaning of Article 2.1 of the TBT Agreement.

7.229. As regards the Panel's analysis of whether the detrimental impact on Mexican tuna products stems exclusively from a legitimate regulatory distinction, we have not found error in the Panel's articulation of the legal standard. However, we have found error in the Panel's "reaffirm[ation]" of the supposed "finding" of the Appellate Body that "the eligibility criteria are even-handed, and accordingly are not inconsistent with Article 2.1 of the TBT Agreement."[775] We have further found that, in the light of the circumstances of this dispute and the nature of the distinctions drawn under the amended tuna measure, the Panel erred by failing to consider whether differences in the relative risks of harm to dolphins from different fishing techniques in different areas of the oceans explain or justify the differences in the certification requirements and the tracking and verification requirements applied inside and outside the ETP large purse-seine fishery. In addition, we have indicated that, due to the segmented approach that it adopted in its analysis of the different sets of certification and tracking and verification requirements, the Panel did not properly apply the legal test that it had identified as relevant to an assessment of even-handedness, namely, "whether the detrimental treatment can be reconciled with, or is rationally related to, the policy pursued by the measure at issue".[776]

7.230. Taken together, the errors that we have identified in the two steps of the Panel's analysis of "treatment no less favourable" under Article 2.1 of the TBT Agreement constitute error in the application of that provision to the amended tuna measure, and deprive the Panel's ultimate findings thereunder of a proper legal basis. Accordingly, we reverse the Panel's discrete findings, in paragraph 8.2 of the Panel Report, 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

[772] Mexico's other appellant's submission, para. 145 (quoting Anderson, *Cetaceans and Tuna Fisheries*, p. 67).
[773] Mexico's other appellant's submission, para. 145 (quoting Anderson, *Cetaceans and Tuna Fisheries*, p. 67).
[774] Appellate Body Reports, *EC – Fasteners (China)*, paras. 441-442; *Brazil – Retreaded Tyres*, para. 202.
[775] Panel Report, para. 7.126.
[776] Panel Report, para. 7.91.

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.

7.2.4 Completion of the legal analysis

7.231. We now turn to consider whether the amended tuna measure has brought the United States into compliance with the DSB's recommendations and rulings in the original proceedings. We recall that completion of the legal analysis may assist in ensuring the prompt settlement and effective resolution of the dispute. However, the Appellate Body has completed the legal analysis only when sufficient factual findings by the panel and undisputed facts on the record have allowed it to do so.

7.232. In order to establish that a measure is inconsistent with Article 2.1 of the TBT Agreement, the following elements must be established: (i) that the measure constitutes a technical regulation within the meaning of Annex 1.1; (ii) that the imported products are "like" the domestic products and products of other origins; and (iii) that the treatment accorded to imported products is "less favourable" than that accorded to like domestic products and/or like products from any other country.[777] Based largely on the findings in the original proceedings and the positions of the parties, the Panel accepted that the first two elements had been established in these compliance proceedings, and this is not appealed by the participants.[778]

7.233. With respect to the third element, we recall that an analysis of "treatment no less favourable" under Article 2.1 consists of two steps: (i) whether the technical regulation at issue modifies the conditions of competition to the detriment of imported products vis-à-vis like products of domestic origin and/or like products originating in any other country; and, if so, (ii) whether such detrimental impact stems exclusively from a legitimate regulatory distinction.[779]

7.234. Beginning with the first step, we consider whether the labelling conditions under the amended tuna measure, taken together, modify the conditions of competition to the detriment of Mexican tuna products in the US market. In so doing, we must take "due cognizance"[780] of the DSB's recommendations and rulings, including the findings of detrimental impact in the original proceedings, which constitute relevant background for our assessment. Accordingly, we begin by recalling the Appellate Body's finding in the original proceedings that the detrimental impact of the original tuna measure was "caused by the fact that most Mexican tuna products contain tuna caught by setting on dolphins in the ETP and are therefore not eligible for a 'dolphin-safe' label, whereas most tuna products from the United States and other countries that are sold in the US market contain tuna caught by other fishing methods outside the ETP and are therefore eligible for a 'dolphin-safe' label."[781] Our task is to ascertain whether the amended tuna measure has altered the detrimental impact that was associated with the original tuna measure, as established in the findings that were made by the original panel and the Appellate Body in the original proceedings and, by virtue of the DSB's adoption of the reports from the original proceedings, form part of the recommendations and rulings of the DSB in this dispute.

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[777] Appellate Body Report, *US – Tuna II (Mexico)*, para. 229.

[778] Panel Report, para. 7.71. We note that, although the Panel referred to the like products as consisting of both tuna and tuna products, Mexico had explained to the original panel that it was limiting its claims to tuna products, and the participants confirmed at the oral hearing that the claims in this dispute, both in the original and Article 21.5 proceedings, are raised only with respect to tuna products. (See Original Panel Report, paras. 7.228-7.233 and 7.253-7.254)

[779] Appellate Body Reports, *US – COOL*, paras. 268 and 271 (referring to Appellate Body Reports, *US – Clove Cigarettes*, para. 182; and *US – Tuna II (Mexico)*, para. 215).

[780] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 136 (referring to Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 142; *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 109 and 121; *US – FSC (Article 21.5 – EC II)*, para. 61; *US – Softwood Lumber IV (Article 21.5 – Canada)*, paras. 68 and 77; and *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 102).

[781] Appellate Body Report, *US – Tuna II (Mexico)*, para. 284.

7.235. As we have already explained, before the Panel and in these appellate proceedings, Mexico and the United States have both expressed the view that the detrimental impact of the amended tuna measure is the same as that of the original measure. Mexico's core argument with respect to detrimental impact is that the key elements of the original measure – in particular, the disqualification of all tuna caught by setting on dolphins – and the relevant features of the US market for tuna products remain unchanged, such that most Mexican tuna products are still being excluded from access to the dolphin-safe label, whereas most like products from the United States and other Members are still eligible for such label.[782] Mexico also submitted that "virtually all of [its] purse seine tuna fleet continues to fish in the ETP by setting on dolphins".[783] The United States, for its part, does not contest the continuing applicability of the Appellate Body's conclusions on detrimental impact in the original proceedings.[784] Rather, it expressly acknowledges that, "because Mexico's tuna fleet is comprised 'virtually' entirely of large purse seine vessels setting on dolphins in the ETP, Mexico does not export 'any products to the United States that are eligible to be labelled dolphin-safe under the Amended Tuna Measure'."[785]

7.236. As the original panel found and as both participants have acknowledged in these compliance proceedings, access to the dolphin-safe label constitutes an "advantage" on the US market for tuna products by virtue of that label's "significant commercial value".[786] We further recall that, in the original proceedings, the Appellate Body relied on the following factual findings by the original panel: (i) "the Mexican tuna cannery industry is vertically integrated, and the major Mexican tuna products producers and canneries own their vessels, which operate in the ETP"; (ii) "at least two thirds of Mexico's purse seine tuna fleet fishes 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 US dolphin-safe labelling provisions"; (iii) "the US fleet currently does not practice setting on dolphins in the ETP"; and (iv) "as the practices of the US and Mexican tuna fleets currently stand, 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 is potentially eligible for the label".[787] These various factual elements thus supplied the foundation for the Appellate Body's finding of detrimental impact. At the oral hearing in these appellate proceedings, both Mexico and the United States confirmed that the relevant factual situation, as defined by these findings relied upon by the Appellate Body, has not changed.

7.237. We do not see that the Panel made any factual findings that go against those original findings. In fact, the opposite is true. In its assessment of the consistency of the amended tuna measure with Articles I:1 and III:4 of the GATT 1994, the Panel found that the regulatory distinction between tuna products derived from tuna caught by setting on dolphins and tuna products derived from tuna caught by other fishing methods "has the effect of denying [Mexican] tuna products … access to the dolphin-safe label".[788] In the light of the above, we do not see any Panel findings or uncontested evidence on the record indicating that the position of Mexican tuna products in terms of access to the dolphin-safe label has substantially changed as a result of the amended tuna measure.[789]

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[782] Mexico's first written submission to the Panel, paras. 223-224 and 231-232.

[783] Mexico's first written submission to the Panel, para. 227. According to Mexico, as of 2012, its tuna fishing fleet operating in the ETP was comprised of "39 large purse-seine vessels" and "three small vessels". (Ibid. (referring to Statement of Dr Michel Dreyfus, Chief Researcher, National Program for the Utilization of Tuna and Protection of Dolphins (28 March 2014) (Panel Exhibit MEX-84))

[784] See Panel Report, para. 7.446.

[785] United States' appellant's submission, para. 329 (referring to and quoting Mexico's response to Panel question No. 57, paras. 155 and 146, respectively). We recall that, in 2009, Mexican tuna products accounted for only 1% of the tuna products imported into the United States. (See Original Panel Report, para. 7.355)

[786] Original Panel Report, paras. 7.289 and 7.291. See also Panel Report, para. 7.424.

[787] Appellate Body Report, *US – Tuna II (Mexico)*, para. 234 (quoting Original Panel Report, paras. 7.310, 7.314, and 7.316-7.317).

[788] Panel Report, para. 7.447. See also para. 7.498.

[789] Given that the 2013 Final Rule introduced additional certification and tracking and verification requirements for tuna products containing tuna caught outside the ETP large purse-seine fishery, it may be that fewer such products qualify for the label than was the case under the original measure. However, it does not appear that there are any Panel findings, nor any evidence on the record, uncontested or otherwise, regarding the extent to which the absolute levels or proportions of tuna products from the United States and other countries that can access the dolphin-safe label may have changed as compared to the situation under the original tuna measure.

7.238. Since the amended tuna measure maintains the overall architecture and structure of the original tuna measure – in particular, in terms of the regulatory distinction between tuna products derived from tuna caught by setting on dolphins and tuna products derived from tuna caught by other fishing methods – and given the participants' agreement that the relevant factual situation has not changed from the original proceedings, we find that, by excluding most Mexican tuna products from access to the dolphin-safe label, while granting conditional access to such label to like products from the United States and other countries, the amended tuna measure, similar to the original measure, modifies the conditions of competition to the detriment of Mexican tuna products in the US market.

7.239. Next, we address whether the amended tuna measure can nevertheless be said not to constitute less favourable treatment of Mexican tuna products by virtue of the fact that the detrimental impact on Mexican tuna products stems exclusively from a legitimate regulatory distinction. Such an examination requires scrutiny of whether the amended tuna measure is, in the light of the particular circumstances of the case, even-handed in its design, architecture, revealing structure, operation, and application.[790] As we have noted, where a regulatory distinction is not designed and applied in an even-handed manner, because, for example, it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination, that distinction cannot be considered legitimate for purposes of Article 2.1.[791] We have also explained that, in the circumstances of this dispute, it is appropriate to assess whether the differences in the labelling conditions for tuna products containing tuna caught in the ETP large purse-seine fishery, on the one hand, and for tuna products containing tuna caught outside that fishery, on the other hand, are calibrated to the likelihood that dolphins will be adversely affected in the course of tuna fishing operations in the respective fisheries.[792]

7.240. In these Article 21.5 proceedings, the Panel pointed to the statements in paragraph 292 of the Appellate Body report in the original proceedings regarding the basis for the finding of WTO-inconsistency of the original tuna measure.[793] In that paragraph, the Appellate Body stated:

> From the [original panel's] findings, it thus appears that the measure at issue does not address adverse effects on dolphins resulting from the use of fishing methods predominantly employed by fishing fleets supplying the United States' and other countries' tuna producers. The [original panel] noted that the only requirement currently applicable to purse seine vessels fishing outside the ETP is to provide a certification by the captain that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip. This requirement, however, does not address risks from other fishing methods, such as [fish aggregating devices] FADs. As the [original panel] stated, 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 the tuna was caught."[794]

7.241. The Panel went on to state that adding a new substantive requirement to the amended tuna measure addressing the mortality or serious injury of dolphins is "precisely what the United States has done".[795] The Panel recalled that, by virtue of the additional requirements that the 2013 Final Rule incorporated into the US dolphin-safe labelling regime, "*all* tuna, wherever and however caught, can only be labelled as dolphin safe if it was not caught in a set or other gear

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[790] Appellate Body Report, *US – Clove Cigarettes*, para. 182.

[791] See Appellate Body Reports, *US – COOL*, para. 271: "[W]here a regulatory distinction is not designed and applied in an even-handed manner – because, for example, it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination – that distinction cannot be considered 'legitimate', and thus the detrimental impact will reflect discrimination prohibited under Article 2.1"; and *EC – Seal Products*, para. 5.306: "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."

[792] Appellate Body Report, *US – Tuna II (Mexico)*, para. 286.

[793] Panel Report, para. 7.140 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 292).

[794] Appellate Body Report, *US – Tuna II (Mexico)*, para. 292 (quoting Original Panel Report, para. 7.561). (fns omitted)

[795] Panel Report, para. 7.141.

deployment in which one or more dolphins was killed or seriously injured."[796] The Panel stated that this meant that "the substantive certification required for all tuna … is now the same."[797] 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."[798]

7.242. We agree with this reasoning by the Panel. As we have noted, the question before the Panel was whether the amended tuna measure, including the new elements introduced by the 2013 Final Rule, has brought the United States into compliance with the DSB's recommendations and rulings. The 2013 Final Rule introduced into the amended tuna measure additional requirements that apply outside the ETP large purse-seine fishery, the principal of which are the new requirements: (i) that captains certify that no dolphins were killed or seriously injured irrespective of the fishing method used; and (ii) that all dolphin-safe tuna be segregated from non-dolphin-safe tuna from the time of the catch through the entire processing chain.[799] Thus, to the extent that these requirements serve to enhance the capacity of the amended tuna measure to "address adverse effects on dolphins resulting from the use of fishing methods predominantly employed by fishing fleets supplying the United States' and other countries' tuna producers"[800] outside the ETP large purse-seine fishery, they may be said to respond to the "calibration" of the dolphin-safe labelling regime that the Appellate Body found was lacking in the original tuna measure. In assessing whether the amended tuna measure is adequately calibrated to the relative adverse effects on dolphins arising outside the ETP large purse-seine fishery as compared to those inside that fishery, we must examine whether there are relevant factual findings by the Panel or undisputed evidence on the record regarding the different risk profiles in these different fisheries.

7.243. The Panel had before it considerable evidence concerning the nature and scope of the relative risks associated with different fishing practices in different areas of the oceans. Mexico claimed before the Panel that the amended tuna measure is not even-handed because it imposes different and heightened requirements in the ETP large purse-seine fishery as compared to other fisheries, and that this is not justified because the adverse effects on dolphins arising from fishing methods other than setting on dolphins are equal to or greater than the risks associated with the setting on method.[801] Mexico further argued 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."[802] Mexico indicated before the Panel that, since the original proceedings, it had collected "substantial additional evidence showing that (i) tuna fishers intentionally set nets on marine mammals outside the ETP, and (ii) other methods of fishing for tuna are causing many thousands of dolphin mortalities."[803] Mexico submitted evidence regarding fishing methods and bycatch arising from various fishing methods outside the ETP, including

[796] Panel Report, para. 7.141. (emphasis original)
[797] Panel Report, para. 7.141.
[798] Panel Report, para. 7.141.
[799] As we have noted, in fisheries other than the ETP large purse-seine fishery, the amended tuna measure also introduced an observer requirement in the event of a determination by the NMFS Assistant Administrator that observers are qualified and authorized to certify that there are "no dolphins killed or seriously injured", and, in the non-ETP purse-seine fishery, "no setting on dolphins", when such observers are already on board the vessel.
[800] Appellate Body Report, *US – Tuna II (Mexico)*, para. 292.
[801] Mexico's first written submission to the Panel, paras. 13, 248, 263, and 306. Mexico also argued before the Panel, and on appeal, that there is a "zero tolerance" benchmark for risk embodied in the amended tuna measure, and that this benchmark does not permit differences in regulation to address differences in risks to dolphins arising in different fisheries. We do not see that such a contention differs in substance from Mexico's position that, because there are no differences in harms to dolphins arising in different fisheries, any consideration of relative harms is not relevant to an analysis of the even-handedness of the distinctions drawn under the amended tuna measure. (See Panel Report, para. 7.184; Mexico's other appellant's submission, para. 109; and United States' appellee's submission, paras. 80-87)
[802] Mexico's second written submission to the Panel, para. 319. (fn omitted)
[803] Mexico's first written submission to the Panel, para. 106.

dolphin mortalities due to setting on practices, and other fishing methods such as using FADs, gillnets, and longline fishing.[804]

7.244. The United States responded to Mexico's claims by arguing that it was justified in drawing distinctions between the method of setting on dolphins and other fishing methods due to the different risks posed to dolphins by these different fishing methods.[805] The United States did not contest that fishing methods other than setting on dolphins present risks to dolphins, but rather drew support from the original panel's conclusion that "certain fishing techniques seem to pose greater risks to dolphins than others"[806] and the Appellate Body's "conclusion" that "setting on dolphins is particularly harmful to dolphins."[807] The United States also submitted considerable evidence to demonstrate that "setting on dolphins causes both observed and unobserved harms to dolphins."[808] In relation to observed harms, the United States claimed that the "number of dolphins killed in the ETP tuna purse-seine fishery … is the greatest known for any fishery" and that Mexico had failed to put forward evidence demonstrating that other fishing methods had killed as many dolphins in any fishery as had setting on dolphins.[809] Moreover, the United States addressed Mexico's contention that other fishing methods pose harms to dolphins that are equal to or greater than the harms caused by setting on dolphins, by introducing evidence of regional fishing management organizations, observer programmes, and scientists, on the levels of observed harms associated with fishing methods used to produce tuna products for the US market, such as

[804] Mexico listed this evidence as consisting of the following: (i) nets are set on dolphins outside the ETP; (ii) it is well accepted and scientifically documented that dolphins are killed as bycatch in all of the world's major tuna fisheries; (iii) scientists have estimated that globally, hundreds of thousands of cetaceans die from entanglement in fishing gear each year, including in US fisheries; (iv) a report published by the Sea Turtle Restoration Project on longline fishing estimates that over 18,000 dolphins are killed annually by longline fishing in the Pacific Ocean; (v) there is substantial dolphin bycatch when using FADs in the Philippines, where it is estimated that 2,000 dolphins are killed annually; (vi) gillnet fishing along the Indian coast is killing about 10,000 cetaceans including dolphins every year which is "alarmingly high"; (vii) when dolphins do not immediately drown in a gillnet (observed adverse effects), interactions with the net causes dolphins to die later (unobserved adverse effects); (viii) it is now widely recognized that dolphins are severely harmed by interactions with longline fishing and that adverse effects are both observed and unobserved; (ix) trawl fishing kills and injures dolphins. (Mexico's first written submission to the Panel, para. 248) In addition, Mexico submitted evidence in support of its contention before the Panel that, although the United States claimed its dolphin-safe labelling regime was necessary because two dolphin stocks in the ETP – northeastern offshore spotted and eastern spinner dolphins – were depleted, this was no longer the case since those dolphin stocks were growing. (Mexico's first written submission to the Panel, paras. 188-194 (referring to IDCP, 7th Meeting of the Scientific Advisory Board held on 30 October 2009, "Updated Estimates of N_{min} and Stock Mortality Limits", Document SAB-07-05 (Original Panel Exhibit MEX-91; Panel Exhibit MEX-4); AIDCP, 22nd Meeting of the Parties held on 30 October 2009, Minutes (Original Panel Exhibit MEX-117; Panel Exhibit MEX-5), item 8 on p. 4, and Appendix 8 on p. 10; M.N. Maunder, "Evaluating recent trends in EPO dolphin stocks", IATTC draft paper (Panel Exhibit MEX-81); and V.R. Restrepo, Chair's Report of the ISSF Tuna-Dolphin Workshop held on 25-26 October 2012 (Panel Exhibit MEX-82), p. 3))

[805] United States' second written submission to the Panel, para. 92.

[806] United States' first written submission to the Panel, para. 71 (quoting Original Panel Report, para. 7.438; and referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 288).

[807] United States' first written submission to the Panel, para. 71 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 289).

[808] United States' first written submission to the Panel, para. 89 (referring to Original Panel Report, paras. 7.493, 7.504, and 7.738; and Appellate Body Report, *US – Tuna II (Mexico)*, para. 251).

[809] United States' second written submission to the Panel, para. 16 (referring to T. Gerrodette, "The Tuna-Dolphin Issue", in *Encyclopedia of Marine Mammals*, 2nd edn, W.F. Perrin, B. Würsig, J.G.M. Thewissen (eds.) (Oxford, 2009), p. 1192 (Panel Exhibit US-29)).

non-setting on purse-seine fishing, longline fishing, and pole-and-line fishing.[810] In regards to unobserved harms, the United States submitted that other fisheries are not "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,' as the purse seine fishery in the ETP."[811] In support of this position, the United States offered IATTC data on the numbers of dolphins chased and captured in the years 2009-2013 showing that "the scale of the unobserved harms caused by the chase in the ETP is unprecedented."[812]

7.245. We recall that, at the outset of its assessment of the relative harms posed by setting on dolphins versus other fishing methods, the Panel focused mainly on the unobserved harms associated with different fishing methods.[813] Observing that the Appellate Body found that setting on dolphins causes both observed and unobserved harm to dolphins, the Panel nevertheless considered that "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'."[814] Subsequently, the Panel acknowledged that "[t]he 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."[815] The Panel therefore accepted that tuna fisheries other than the ETP large purse-seine fishery may, and in fact have, caused harms to dolphins.

7.246. The Panel, however, did not address what the evidence adduced by the parties indicated in respect of the overall *relative* harms, both observed and unobserved, associated with setting on dolphins versus other fishing practices, but rather focused only on whether that evidence undermined its understanding that these fishing practices are distinguishable on the basis of unobserved harms. Thus, in respect of gillnet fishing, the Panel referenced Mexico's substantial

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[810] The United States indicated that the evidence it had put forward demonstrates the following: (i) in the ETP, dolphin sets account for virtually all observed dolphin mortalities and serious injuries despite the fact that dolphin sets constitute less than half the total number of sets on average; (ii) the percentage of dolphins killed in the ETP purse-seine fishery from dolphin sets has never fallen below 99% of total observed dolphin mortalities in the years 2009-2013; (iii) in the Western Central Pacific Ocean purse-seine fishery, dolphin mortality per 1,000 sets was an estimated 26.98 dolphins in 2007-2009 and 2.64 dolphins in 2010, whereas, in the ETP purse-seine fishery, dolphin mortality per 1,000 sets was 56.1 dolphins in 2009 and 53.4 dolphins in 2010; (iv) the average numbers of dolphins killed each year in the Atlantic and Hawaii US longline fisheries between 2006 and 2010 are mere fractions of the number killed each year in the ETP and of the number allowed to be killed under the AIDCP; (v) in the Hawaii longline fishery, the estimated average annual dolphin mortality from 2006-2010 was 40.4 animals per year; (vi) pole and line fishing is not associated with dolphin bycatch or bycatch of any marine mammal; and (vii) purse-seine fishing other than by setting on dolphins, longline fishing, and pole and line fishing are often employed without any dolphin within sight of the vessel and without any dolphin interaction at all, whereas all dolphin sets are inherently dangerous to dolphins. (United States' second written submission to the Panel, para. 23 (emphasis omitted))

[811] United States' first written submission to the Panel, para. 113 (quoting Original Panel Report, paras. 7.499 and 7.504; and referring to the review of A.C. Myrick, Jr. and P.C. Perkins, "Adrenocortical color darkness and correlates as indicators of continuous acute premortem stress in chased and purse-seine captured male dolphins" (1995) 2 *Pathophysiology* (Original Panel Exhibit US-11; Panel Exhibit US-48), p. 191).

[812] United States' response to Panel question No. 15, para. 82. The United States added that "IATTC data indicates that in the years 2009-2013 large ETP purse seine vessels chased *31.3 million* dolphins, capturing *18.5 million* of them." (Ibid. (referring to Tables Summarizing Fishery-by-Fishery Evidence on the Record (Panel Exhibit US-127), Table 1, "Association of Dolphins and Tuna in Various Fisheries") (emphases original)) See also United States' first written submission to the Panel, para. 73 (referring to IATTC, Eastern Pacific Ocean (EPO) Dataset 2009-2013 (9 May 2014) (Panel Exhibit US-26 (corrected)); United States' response to original panel question No. 31, para. 70; and IDCP, 34th Meeting of the International Review Panel held on 9-10 October 2003, "Effectiveness of Technical Guidelines to Prevent High Mortality During Sets on Large Dolphin Herds", Document IRP-34-10 (revised) (Panel Exhibit US-27), Table 2 at p. 4). The United States also challenged Mexico's position that the United States itself considered that ETP dolphin stocks were recovering, and offered its own scientific evidence to show that dolphin populations are not increasing. (See United States' first written submission to the Panel, paras. 104-108 (referring to, *inter alia*, A.E. Punt, *Independent Review of the Eastern Pacific Ocean Dolphin Population Assessment*, IATTC Special Report 21 (2013) (Panel Exhibit US-49), pp. 5-6; and S.B. Reilly et al., *Report of the Scientific Research Program Under the International Dolphin Conservation Program Act*, NOAA Technical Memorandum NMFS (March 2005) (Panel Exhibit US-28), pp. 31-32))

[813] Panel Report, paras. 7.120-7.121 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 289; and quoting, without attribution, Original Panel Report, para. 7.499).

[814] Panel Report, para. 7.122 (quoting Original Panel Report, para. 7.504).

[815] Panel Report, para. 7.129 (referring to Mexico's first written submission to the Panel, section III.A).

evidence showing that gillnets kill and seriously injure dolphins, but stated that none of this evidence indicated that gillnets have the same kind of unobserved effects as has setting on dolphins.[816] Similarly, in respect of longline fishing, the Panel stated that, although Mexico's evidence indicated that longlining is having a negative effect on the sustainability of dolphin populations, none of that evidence suggests that longline fishing has unobserved effects similar to those caused by setting on dolphins.[817] Furthermore, the Panel explicitly acknowledged that Mexico submitted evidence concerning the extent of mortality and serious injury caused by tuna fishing methods including FAD fishing, longline fishing, gillnet fishing, trawl fishing, and driftnet fishing, but again opined that none of this evidence suggested that such fishing methods inflict the same kinds of unobserved effects as setting on dolphins.[818] The Panel therefore concluded that Mexico had not demonstrated that fishing methods other than setting on dolphins "consistently cause" harms similar to the harms to dolphins caused by setting on dolphins.[819]

7.247. We note that the Panel's conclusion could be read to imply that it found that Mexico had not demonstrated that fishing methods other than setting on dolphins consistently cause observed and unobserved harms to dolphins similar to the observed harms caused by setting on dolphins, and that Mexico had also failed to demonstrate that such other fishing methods cause unobserved harms to dolphins similar to those caused by setting on dolphins. In fact, however, when read together with the reasoning that preceded it, it is clear that the Panel's conclusion rests solely on its finding that the *unobserved* harms differed between setting on and other fishing methods. This is because, whenever the Panel referred to the evidence of observed mortality or serious injury arising from fishing methods other than setting on dolphins, it was only to establish that such harms occur, but without indicating how the nature or extent of those harms *compare to* the observed harms arising from setting on dolphins. Indeed, although the Panel referred to observed mortality or serious injury arising from fishing methods other than setting on dolphins, we do not see that the Panel ever compared those harms with those arising from setting on dolphins in a manner that allowed for a comparative assessment of the *extent* of those harms *in relation to* each other.

7.248. The limited scope of the Panel's conclusion is relevant in two respects. First, the disagreement between the parties regarding whether the amended tuna measure is even-handed rested on fundamentally different premises concerning the risks associated with different fishing practices. Mexico maintained that the observed mortality or serious injury from practices other than setting on dolphins was "equal to or greater than"[820] that associated with setting on dolphins, whereas the United States asserted that the risks associated with practices other than setting on dolphins produced "nowhere near the observed dolphin mortality or serious injury that setting on dolphins does".[821] The parties also disagreed regarding the nature and extent of unobserved harms. The United States contended that tuna-dolphin association and related unobserved harms are unique to the ETP large purse-seine fishery[822], whereas Mexico maintained that such association also occurs outside the ETP, and that unobserved harms also result from fishing methods other than setting on dolphins.[823] By failing to consider the relative risks posed by different fishing methods in respect of *observed* mortality or serious injury, while focusing solely on the narrower difference in the respective risks attributable to *unobserved* harms, the Panel never resolved the question of the overall levels of risk in the different fisheries, and how they compared to each other, notwithstanding that both parties had addressed such comparative risk profiles in their pleadings in support of their arguments regarding even-handedness. We note, in this regard, that, at the oral hearing in this appeal, both Mexico and the United States criticized the Panel for focusing on too narrow a range of harms and, in particular, for not dealing with observed harms.

[816] Panel Report, para. 7.130.
[817] Panel Report, para. 7.131.
[818] Panel Report, para. 7.132. (fns omitted)
[819] Panel Report, para. 7.135: "[O]ur 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."
[820] Mexico's first written submission to the Panel, paras. 13, 248, 263, and 306.
[821] United States' second written submission to the Panel, para. 201. See also United States' first written submission to the Panel, para. 236.
[822] United States' first written submission to the Panel, paras. 85 and 338-339.
[823] Mexico's first written submission to the Panel, para. 248.

7.249. Second, arriving at a conclusion in respect of the *relative* risks attributable to different fisheries, including in respect of both observed *and* unobserved harms, was, in our view, particularly important given that the very issue the Panel was seeking to address was whether the new requirements of the amended tuna measure, which apply exclusively to fisheries other than the ETP large purse-seine fishery, adequately address the risks of harm to dolphins arising in such fisheries.[824] Moreover, the two principal additional requirements – namely, that a captain must certify that there were no dolphins killed or seriously injured, and that tuna caught must be segregated into dolphin-safe and non-dolphin-safe storage areas – both seek to enhance the manner in which the measure addresses the risks of observed mortality or serious injury outside of the ETP large purse-seine fishery. Yet, the Panel never sought to compare the *relative* harms in respect of *observed* mortality or serious injury. Instead, the Panel reached a conclusion only on the basis of a comparative assessment of *unobserved* harms. On the basis of the foregoing concerns, we do not consider that the Panel put itself in a position to conduct an assessment of whether the amended tuna measure is even-handed in addressing the respective risks of setting on dolphins in the ETP large purse-seine fishery versus other fishing methods outside that fishery.

7.250. We recall that, in the original proceedings, the question concerning the relative risks to dolphins arising in different fisheries was framed by the original panel's findings that adverse effects consisting of observed mortality or serious injury arise in fisheries outside the ETP, but that the original tuna measure did not require any certification in respect of tuna caught in those fisheries that no dolphins were killed or seriously injured. On that basis, the Appellate Body was able to conclude that, while the original tuna measure fully addressed the adverse effects on dolphins resulting from setting on dolphins in the ETP, it did "not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP".[825] In these circumstances, it was reasonable to consider that, irrespective of any differences in the relative risks, the original tuna measure did not address the incidence of harms arising from practices other than setting on dolphins because there was no certification required to document whether any dolphins had been killed or seriously injured. For that reason, the Appellate Body was able to state that, "*even accepting* that the fishing technique of setting on dolphins is particularly harmful to dolphins", it was not persuaded that the measure was even-handed, as argued by the United States.[826]

7.251. In these Article 21.5 proceedings, however, the question as to the relative risk profiles associated with different fishing practices in different areas of the oceans has become more acute. Given that the amended tuna measure introduced a requirement outside the ETP large purse-seine fishery that captains certify that no dolphins were killed or seriously injured, and that, for that purpose, segregation of dolphin-safe and non-dolphin-safe tuna must be maintained, the exercise of gauging whether these new requirements are sufficient to address the risks posed to dolphins outside the ETP large purse-seine fishery requires a more thorough understanding of the relative risk profile outside that fishery as compared to the risks to dolphins within that fishery, and, in particular, the risks associated with setting on dolphins.[827] Moreover, as we have noted, the parties presented conflicting accounts, supported by considerable arguments and evidence, as to why the relative risks of observed mortality or serious injury did or did not justify the differences in regulatory treatment inside and outside the ETP large purse-seine fishery provided for under the amended tuna measure.

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[824] As we noted, the Panel appears to have sought to address this question because of the significance it attached to the Appellate Body's conclusion in the original proceedings 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'." (Panel Report, para. 7.140 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 292, in turn quoting Original Panel Report, para. 7.561))

[825] Appellate Body Report, *US – Tuna II (Mexico)*, para. 297 (quoting Original Panel Report, para. 7.544).

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

[827] On appeal, Mexico argues for the use of an "objective, scientifically-established" benchmark – such as potential biological removal (PBR) levels – that could be used to compare how different fishing methods each affect the sustainability of dolphin populations. (Mexico's other appellant's submission, para. 110) For its part, the United States points to the insufficiency of PBR data across fisheries and rejects the relevance of PBR levels for examining relative risk profiles. (United States' appellee's submission, paras. 88-90) We do not exclude that reference to such objective indicators might assist in an assessment of whether regulatory differences in the treatment of different fisheries can be explained on the basis that such treatment is calibrated to, or commensurate with, the relative risks to dolphins arising from different fishing methods in different areas of the oceans.

7.252. We do not discount the difficulty associated with making such an assessment of the respective risks, particularly in the light of the highly contested evidence adduced by the parties.[828] Neither do we consider that the Panel was necessarily in a position to come to a definitive or precise view as to the extent to which the relevant risk profiles differed. However, for the reasons set out above, we do not see that the Panel in these proceedings set out to examine the extent of mortality or serious injury arising from fishing methods in different areas of the oceans so as to enable itself to gauge properly the overall relative risks or levels of harm to dolphins arising in those fisheries, which was needed in order to assess whether the differences in the dolphin-safe labelling conditions under the amended tuna measure are appropriately tailored to, and commensurate with, those respective risks.

7.253. For instance, we note the Panel's finding that captains, in comparison to observers, do not necessarily and always have the technical skills required to certify that no dolphins were killed or seriously injured.[829] As the Panel found, this difference, as between captains and independent observers, in the respective training and technical skills required to certify the dolphin-safe status of tuna "may result in inaccurate information being passed to consumers, in contradiction with the objectives of the amended tuna measure".[830] We also note the Panel's conclusions that the tracking and verification requirements that apply outside the ETP large purse-seine fishery are less burdensome than those that apply inside that fishery in terms of their depth, accuracy, and degree of government oversight[831] and that this "may contribute to inaccurate labelling of tuna caught outside the ETP large purse seine fishery".[832] In the absence of a proper assessment by the Panel of the relative risks existing inside and outside the ETP large purse-seine fishery, the Panel limited its ability to determine whether the discriminatory aspects of the amended tuna measure can be explained as being properly tailored to, or commensurate with, the differences in such risks in the light of the objective of protecting dolphins from adverse effects arising in different fisheries. For similar reasons, the Panel's limited analysis in respect of the relative risk profiles in turn constrains our ability to complete the legal analysis in this regard.

7.254. There are, however, other features of the amended tuna measure that are not dependent on an assessment of the relative risks associated with different fishing methods in different areas of the oceans. In particular, we have previously examined the Panel's analysis regarding the determination provisions set out in the amended tuna measure, and in particular the provisions that trigger a requirement to provide certification by observers for specific fisheries in scenarios in which the risks of harm to dolphins in such fisheries would be comparably high to those existing in the ETP large purse-seine fishery. We recall, in this context, the Panel's finding that the determination provisions are "an integral part" of the "certification system" under the US dolphin-safe labelling regime.[833] In general, for tuna caught in fisheries other than the ETP large purse-seine fishery, the required certification(s) need be provided only by a captain. Yet, as we previously explained, depending on the category of fishery concerned, and on whether certain determinations have been made by the NMFS Assistant Administrator, then, in addition to the required captain certification(s), the amended tuna measure in some circumstances also conditions access to the dolphin-safe label on the provision of a certification by a qualified and approved observer in respect of the conditions, where applicable, of "no setting on dolphins" and "no dolphins killed or seriously injured". In particular, such observer certification is required if a determination has been made by the NMFS Assistant Administrator: (i) within the non-ETP purse-seine fishery, that there is a regular and significant tuna-dolphin association, similar to the

[828] Panel Report, para. 7.46. The Panel stated that "the relevant factual evidence is highly contested and, with respect to some of the issues in dispute, minimal", and that, "[i]n particular, there appears to be limited scientific evidence concerning the scope and nature of dolphin mortalities in some non-ETP fisheries". (Ibid.)

[829] Panel Report, para. 7.233.

[830] Panel Report, para. 7.233.

[831] Panel Report, paras. 7.354 and 7.370.

[832] Panel Report, para. 7.382.

[833] Panel Report, para. 7.257.

tuna-dolphin association in the ETP; or (ii) within "all other fisheries"[834], that there is a regular and significant mortality or serious injury of dolphins.[835]

7.255. In addressing the Panel's analysis of the certification requirements under the second stage of the "treatment no less favourable" analysis under Article 2.1 of the TBT Agreement, we did not accept the United States' claims that the Panel erred in its analysis of the determination provisions set out in Sections 1385(d)(1)(B)(i) and (d)(1)(D) of the DPCIA and Sections 216.91(a)(2)(i) and (a)(4)(iii) of the implementing regulations. Specifically, we found that Mexico has properly identified the determination provisions as part of its broader claim under Article 2.1 of the TBT Agreement, and that the United States has not established that the Panel erred, either in its application of Article 2.1 or under Article 11 of the DSU, in analysing the determination provisions by focusing on the design, structure, and expected operation of the measure.

7.256. We note that, in their design[836], the determination provisions seem to apply to all fisheries other than the ETP large purse-seine fishery where the risk of harm to dolphins approximates that existing in the ETP large purse-seine fishery. Indeed, this link is explicit on the face of the determination provision applicable to the non-ETP purse-seine fishery in that it concerns a finding that regular and significant association occurs "similar to the association between dolphins and tuna in the [ETP]".[837] As the Panel explained, the determination provisions "appear to be designed to enable the United States to impose conditions on fisheries other than the ETP large purse seine fishery where the conditions in the former approach those of the latter".[838] As the Panel remarked, this helps to ensure that similar situations are treated similarly under the amended tuna measure. Thus, in the non-ETP purse-seine fishery, the existing requirement that a captain provide a certification in respect of the conditions of "no setting on dolphins" and "no dolphins killed or seriously injured" is supplemented by an additional requirement of observer certification in respect of those two conditions when a determination is made that there is regular and significant tuna-dolphin association, similar to the tuna-dolphin association in the ETP. When such a determination of tuna-dolphin association in the non-ETP purse-seine fishery is made, the certification requirements are thereby heightened in terms of *who* is to make the required certifications (captain *and* observer). Moreover, the amended tuna measure explicitly states that such a determination is to be made when the association is similar to the association between dolphins and tuna in the ETP.[839] Because the Panel found that observers are more qualified, and therefore more likely to make accurate certifications in respect of mortality or serious injury, this determination appears, in our view, to enhance the correlation, for fisheries other than the ETP large purse-seine fishery, between the risks of harm to dolphins and the manner in which the measure seeks to address those risks.

7.257. The same can be said of the determination provision applicable to "all other fisheries", which supplements the existing requirement that a captain provide a certification in respect of the

[834] We recall that the category of "all other fisheries" includes non-purse-seine vessels in any fishery and small purse-seine vessels in the ETP.

[835] We further noted that the amended tuna measure also provides, in fisheries other than the ETP large purse-seine fishery, for an observer certification where observers are determined by the NMFS Assistant Administrator to be qualified and authorized to certify that there are "no dolphins killed or seriously injured", and, for non-ETP purse-seine vessels, "no setting on dolphins", and such observers are already on board the vessel for other reasons.

[836] The United States confirmed, in response to questioning at the oral hearing that, to date, the NMFS Assistant Administrator has not made a determination that any fishery outside the ETP large purse-seine fishery has either regular and significant tuna-dolphin association or regular and significant mortality or serious injury of dolphins. (See also Panel Report, para. 3.22) We also note that, in responding to public comments on the proposed 2013 Final Rule, the NMFS identified the following question that it had received: "Is there a defined process for determining 'regular and significant,' and has the Department of Commerce defined it?" The NMFS responded that the 2013 Final Rule was not intended to address or revise the "regular and significant" standard already in the DPCIA and the implementing regulations and that the NMFS had not made any determination because it had "no credible reports of any fishery in the world, other than the tuna purse seine fishery in the ETP, where dolphins are systematically and routinely chased and encircled each year in significant numbers by tuna fishing vessels, or any tuna fishery that has regular and significant mortality or serious injury of dolphins". (2013 Final Rule, Comment 11, p. 41000)

[837] Section 1385(d)(1)(B)(i) of the DPCIA; Section 216.91(a)(2)(i) of the implementing regulations.

[838] Panel Report, para. 7.263. The panelist who wrote a separate opinion also cited the determination provisions as an example of where the amended tuna measure "enable[s] the United States to impose the same requirements in fisheries where the same degree of risk prevails". (Ibid., para. 7.280)

[839] Section 1385(d)(1)(B)(i) of the DPCIA; Section 216.91(a)(2)(i) of the implementing regulations.

condition of "no dolphins killed or seriously injured" with a requirement for the same certification from an observer when there is a determination made that there is regular and significant mortality or serious injury in that fishery. When such a determination is made, the certification requirements are thereby heightened in terms of *who* is to make the required certifications (captain *and* observer). Although the amended tuna measure does not state what criteria inform a determination of regular and significant mortality or serious injury, we would understand the reference to "regular" and "significant" mortality or serious injury as indicating that there exist risks of dolphin death or serious injury that are equivalent to or greater than those existing in the ETP large purse-seine fishery. We therefore consider that this determination also appears to enhance the correlation, in respect of "all other fisheries", between the risks of harm to dolphins and the manner in which the measure seeks to address those risks.

7.258. Like the Panel, however, we observe that the determination provisions do not appear to address other scenarios in which there may be heightened risks of harm to dolphins associated with particular fishing methods in fisheries other than the ETP large purse-seine fishery.[840] As noted, the determination provision applicable to the non-ETP purse-seine fishery allows for the addition of a requirement for observer certification if there is a determination of "regular and significant association", but not for a determination of "regular and significant mortality or serious injury".[841] In our view, this is difficult to reconcile with the fact that such an observer certification is required in the ETP large purse-seine fishery, and that such a determination, on the basis of "regular and significant mortality or serious injury", can be made pursuant to the other relevant determination provision, which is applicable to "all other fisheries".[842] We recall, in this regard, the Panel's finding that captains, in comparison to observers, do not necessarily and always have the technical skills required to certify that no dolphins were killed or seriously injured.[843]

7.259. According to the Panel, when asked why specific fisheries within the non-ETP purse-seine fishery cannot be subject to a determination that they are causing "regular and significant dolphin mortality or serious injury", the United States provided no explanation.[844] On appeal, the United States explains that a focus on mortality would not take into account the unobserved harms to dolphins resulting from setting on dolphins.[845] The United States also maintains that, due to the direct positive correlation between tuna-dolphin association and observed mortality and serious injury in purse-seine fisheries, there is no evidence on the record that a purse-seine fishery exists where there is regular and significant mortality without tuna-dolphin association also being present.[846] We do not find these arguments convincing. First, while we agree that a focus *only* on mortality might not take into account the *unobserved* harms to dolphins resulting from setting on dolphins, the question here is rather whether the determination provisions should *also* address a situation of regular and significant mortality or serious injury *in addition to* addressing a situation of regular and significant tuna-dolphin association. Any concerns in respect of unobserved harms arising from setting on dolphins would be addressed by the existing determination provision to the extent that it requires observer certification if there is a determination of "regular and significant association". Instead, we are expressing concern that the determination provision does not allow for comparable regulation of a risk scenario where there is regular and significant mortality or serious injury in respect of non-setting on practices by purse-seine vessels inside versus outside the ETP.

7.260. Second, we do not find persuasive the United States' argument that there is no basis for imposing an observer requirement in the absence of evidence that a purse-seine fishery exists where there is regular and significant mortality without tuna-dolphin association also being present. We are not convinced that, in the absence of tuna-dolphin association, there is no possibility of regular and significant mortality or serious injury occurring in a fishery. As the Appellate Body noted in the original proceedings, requiring certification that purse-seine vessels have not engaged in setting on dolphins does not address the risks involved in such vessels' use of

[840] Panel Report, para. 7.263. As the Panel explained, by virtue of the determination provisions, "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." (Ibid.)

[841] Section 1385(d)(1)(B)(i) of the DPCIA; Section 216.91(a)(2)(i) of the implementing regulations.

[842] Section 1385(d)(1)(D) of the DPCIA; Section 216.91(a)(4)(iii) of the implementing regulations.

[843] Panel Report, para. 7.233.

[844] Panel Report, para. 7.260.

[845] United States' appellant's submission, para. 242.

[846] United States' appellant's submission, paras. 243-245.

other fishing methods, such as using FADs.[847] Moreover, the amended tuna measure contemplates the existence of risks of mortality or serious injury in the absence of setting on dolphins given that the determination provision linked to regular and significant mortality or serious injury applies in "all other fisheries" existing both inside and outside the ETP. For the foregoing reasons, we see no convincing explanation as to why such a scenario should be excluded from the dolphin-safe labelling regime, thereby preventing the possibility of triggering the addition of an observer requirement for non-setting on activities in the non-ETP purse-seine fishery, when such a requirement already exists for non-setting on activities in the ETP large purse-seine fishery and, upon a determination, in "all other fisheries".

7.261. We also consider that our observations about the determination provisions are particularly relevant in the light of statements made by the Appellate Body regarding the shortcomings of the original tuna measure. The Appellate Body stated that it did not understand the original panel to have suggested that imposing a requirement that an independent observer certify that no dolphins were killed or seriously injured would be the only way for the United States to calibrate its dolphin-safe labelling provisions to the risks that the original panel found were posed by fishing techniques other than setting on dolphins. The Appellate Body added, however, that "such a requirement may be appropriate in circumstances in which dolphins face higher risks of mortality or serious injury".[848] Thus, even if the United States may reasonably have sought to implement the DSB's recommendations and rulings by implementing a condition of "no dolphins killed or seriously injured" other than through an observer certification, the Appellate Body also suggested that an observer requirement may be appropriate when dolphins face higher risks of mortality or serious injury.

7.262. In respect of the determination provision applicable to "all other fisheries", there is also a question as to whether this provision sufficiently addresses scenarios in which there may be elevated risks of harm associated with particular fishing methods outside the ETP large purse-seine fishery. We recall that, for this category of fisheries, the determination provision allows for the addition of a requirement of observer certification if there is a determination of "regular and significant mortality or serious injury", but does not provide for a determination of "regular and significant association".[849]

7.263. Both before the Panel, and again on appeal, the United States argues that there is no need to provide for the possibility to make a determination linked to tuna-dolphin association in these fisheries since such determination would have no impact on the degree of mortality or serious injury caused by fishing methods other than setting on dolphins.[850] As the United States explains, if there is a correlation between tuna-dolphin association and the risk of mortality or serious injury, then the higher risks to dolphins would already be addressed by a determination regarding regular and significant mortality or serious injury.[851] The United States also questions the risks posed by such a correlation by noting that the tuna-dolphin association is only dangerous to dolphins when a purse-seine vessel intentionally interacts with dolphins and seeks to take advantage of that association by encircling them with purse-seine nets.[852]

7.264. We see some merit in the United States' contention that the more relevant consideration in respect of a tuna-dolphin association is whether there is a vessel that is capable of intentionally targeting and taking advantage of that association, and which would thereby produce the observed and unobserved harms to dolphins that are linked to the fishing method of setting on dolphins. Like the United States, we recognize that the other fisheries to which this determination provision applies do not concern the operation of large purse-seine vessels, which are the only vessels that are recognized as capable of setting on dolphins. At the same time, we also take note of the Panel's view that, wherever dolphins associate with tuna, "they are more likely to interact with

[847] Appellate Body Report, *US – Tuna II (Mexico)*, para. 292.
[848] Appellate Body Report, *US – Tuna II (Mexico)*, fn 612 to para. 296.
[849] Section 1385(d)(1)(D) of the DPCIA; Section 216.91(a)(4)(iii) of the implementing regulations.
[850] Panel Report, para. 7.261.
[851] United States' appellant's submission, para. 247. The United States also argues that, in any event, the evidence on the record contradicts the Panel's "common-sense" approach because it shows that, in the ETP, where it is uncontested that tuna-dolphin association exists, observed harms are very low for vessels that do not set on dolphins. (Ibid., paras. 248-249)
[852] United States' appellant's submission, para. 253.

tuna fishing gear, even if such interaction is accidental or unintentional".[853] For this reason, the Panel considered that, even for fishing methods that do not deliberately target the association of dolphins with tuna, "the risk of mortality or serious injury is necessarily heightened"[854] where there is association and that, accordingly, "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".[855] It is also not clear to us whether the association of dolphins and tuna necessarily heightens the risk to dolphins from non-purse-seine fishing methods, nor whether any such heightened risk could be adequately addressed by a determination that there is "regular and significant mortality or serious injury". To the extent that there may in fact be a heightened risk to dolphins due to association, comparable to that existing in the ETP large purse-seine fishery, even where the fishing methods employed are not capable of setting on dolphins, and that such risk would not be addressed by a determination of "regular or significant mortality or serious injury", we would consider this to be relevant to an assessment of the even-handedness of the amended tuna measure.

7.265. Finally, we note that our analysis regarding the determination provisions is premised on the existence of risks outside the ETP large purse-seine fishery that are comparably high to the risks existing in the ETP large purse-seine fishery.[856] As the Panel explained, the determination provisions "appear to be designed to enable the United States to impose conditions on fisheries other than the ETP large purse seine fishery where the conditions in the former approach those of the latter".[857] We recall from our discussion of the measure at issue that there are differences between the documentation requirements that the amended tuna measure applies inside and outside the ETP large purse-seine fishery in respect of segregation.[858] We also recall that the Panel found that the differences in the tracking and verification requirements are such that there are differences in the depth, accuracy, and degree of government oversight that is legally required under the amended tuna measure with respect to tuna products derived from tuna caught in the ETP large purse-seine fishery, on the one hand, and from tuna caught in all fisheries other than the ETP large purse-seine fishery, on the other hand.[859] In such circumstances, we would expect that any determination outside the ETP large purse-seine fishery would entail not only the heightened certification requirements, but also tracking and verification requirements that work together with and reinforce certification in addressing this heightened risk.

7.266. In conclusion, in the absence of a proper assessment by the Panel of the respective risks posed to dolphins inside and outside the ETP large purse-seine fishery, we are unable to complete the legal analysis and assess fully whether all of the regulatory distinctions drawn under the amended tuna measure can be explained and justified in the light of differences in the relative risks associated with different methods of fishing for tuna in different areas of the oceans.

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[853] Panel Report, para. 7.261. According to the Panel, "the more dolphins there are in the vicinity, the more likely [it is] that one or more dolphins will be killed or seriously injured." (Ibid.)

[854] Panel Report, para. 7.261.

[855] Panel Report, para. 7.262.

[856] We note that the determination provisions may also aim at addressing situations where the risks to dolphins are comparably high to those associated with the other fishing method that is disqualified from access to the dolphin-safe label, namely, large-scale driftnet fishing in the high seas.

[857] Panel Report, para. 7.263. The panelist who wrote a separate opinion also cited the determination provisions as an example of where the amended tuna measure "enable[s] the United States to impose the same requirements in fisheries where the same degree of risk prevails". (Ibid., para. 7.280)

[858] We have noted in our discussion of the measure at issue that the regime for segregation of tuna caught in the ETP large purse-seine fishery is supported by documentary requirements consisting of separate TTFs, one of which is used to record information regarding each dolphin-safe tuna set, and another to record the same information in respect of non-dolphin-safe sets. All tuna caught by US-flagged large purse-seine vessels fishing in the ETP must be accompanied by these TTFs, and importers of tuna and tuna products containing tuna caught by non-US-flagged ETP large purse-seine vessels must provide the TTF numbers when submitting the required documents for importation. Moreover, the TTFs or TTF numbers accompany the relevant tuna from the time of catch throughout the fishing and production process. We have further noted that all fisheries outside the ETP large purse-seine fishery are required to segregate dolphin-safe and non-dolphin-safe tuna from the time of the catch through the entire processing chain.

[859] The Panel found, for example, that, for tuna products derived from tuna caught in the ETP large purse-seine fishery, the tuna can be traced back to the particular set in which the tuna was caught and the well in which it was stored, but for tuna products containing tuna caught in other fisheries, the tuna can only be traced back to the vessel and trip on which it was caught. The Panel also highlighted the absence of a mechanism, in respect of tuna caught outside the ETP large purse-seine fishery, to ensure that a particular certification matches and remains attached to a specific batch of tuna throughout the production process. (Panel Report, paras. 7.354-7.368)

Nevertheless, we have been able to examine the even-handedness of the labelling conditions applied under the amended tuna measure in certain scenarios that would present comparably high risks to dolphins inside and outside the ETP large purse-seine fishery. We found, in this respect, that aspects of the design of the amended tuna measure reflect a lack of even-handedness. In particular, we considered that the determination provisions do not provide for the substantive conditions of access to the dolphin-safe label to be reinforced by observer certification in all circumstances of comparably high risks, and that this may also entail different tracking and verification requirements than those that apply inside the ETP large purse-seine fishery. For this reason, it has not been demonstrated that the differences in the dolphin-safe labelling conditions under the amended tuna measure are calibrated to, or commensurate with, the risks to dolphins arising from different fishing methods in different areas of the oceans. Since it therefore follows that the detrimental impact of the amended tuna measure cannot be said to stem exclusively from a legitimate regulatory distinction, we find that the amended tuna measure is inconsistent with Article 2.1 of the TBT Agreement.

7.3 Articles I, III, and XX of the GATT 1994

7.3.1 Articles I:1 and III:4 of the GATT 1994

7.267. We now turn to address whether the Panel erred in its analysis of the consistency of the amended tuna measure with Articles I:1 and III:4 of the GATT 1994.

7.268. The United States requests us to reverse the Panel's findings that the certification requirements and the tracking and verification requirements of the amended tuna measure are inconsistent with Articles I:1 and III:4.[860] The United States claims that the Panel erred in finding that the two sets of requirements under the amended tuna measure: (i) provide an "advantage, favour, privilege, or immunity" to tuna and tuna products from other Members that is not "accorded immediately and unconditionally" to like products from Mexico, in a manner inconsistent with Article I:1; and (ii) accord "less favourable treatment" to Mexican tuna and tuna products than that accorded to like domestic products, in a manner inconsistent with Article III:4. The United States does not advance independent arguments in support of these claims, but rather refers back to the arguments it developed in its challenge to the Panel's alleged errors regarding the detrimental impact of the certification and tracking and verification requirements under Article 2.1 of the TBT Agreement.[861] In response, Mexico reiterates its claim that, instead of making separate findings of inconsistency with respect to each set of criteria, "the Panel should have analysed the amended tuna measure as a whole"[862] and concluded that the measure is inconsistent with Articles I:1 and III:4 of the GATT 1994.[863] In Mexico's view, the Panel's failure to make findings of inconsistency with Articles I:1 and III:4 with respect to the amended tuna measure as a whole amounts to legal error.[864]

7.269. Before addressing the merits of the participants' claims of error, we first recount the relevant analysis and findings by the Panel.

7.270. In setting out its analysis, the Panel noted that Article I:1 of the GATT 1994 embodies a "different legal standard[]" from that in Article 2.1 of the TBT Agreement.[865] For the Panel, "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 … requires an *additional* consideration of whether any detrimental impact nevertheless stems exclusively from a legitimate regulatory distinction."[866] The Panel noted, however, that the focus on the question of "whether conditions imposed on access to an advantage modify the conditions of competition to the detriment of imported like products" is "similar" to a detrimental impact analysis under Article 2.1 of the TBT Agreement, "which similarly looks to the effect of a

[860] United States' appellant's submission, paras. 43, 357, and 359 (referring to Panel Report, paras. 8.3.b and 8.3.c).
[861] United States' appellant's submission, paras. 357 and 359.
[862] Mexico's appellee's submission, paras. 179 and 182.
[863] Mexico's other appellant's submission, paras. 75 and 77.
[864] Mexico's other appellant's submission, para. 72.
[865] Panel Report, para. 7.432 (referring to Appellate Body Reports, *EC – Seal Products*, para. 5.94).
[866] Panel Report, para. 7.432 (referring to Appellate Body Reports, *EC – Seal Products*, para. 5.93). (emphasis original)

measure on the competitive opportunities of imported products".[867] Likewise, in its analysis under Article III:4 of the GATT 1994, the Panel observed that, unlike Article 2.1 of the TBT Agreement, Article III:4 does not require a panel to examine whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction.[868] The Panel noted, however, that the "treatment no less favourable" test under that provision "is very similar to the first element of the 'less favourable treatment' test in Article 2.1 of the TBT Agreement".[869] In the light of the above, the Panel found it "appropriate" to apply the findings it made with respect to detrimental impact under Article 2.1 of the TBT Agreement to its analysis of the amended tuna measure's consistency with Articles I:1 and III:4 of the GATT 1994.[870]

7.271. The Panel then separately examined whether each of the three sets of requirements under the amended tuna measure – the eligibility criteria, the certification requirements, and the tracking and verification requirements – is consistent with Article I:1.[871] Similarly, the Panel conducted separate examinations of the consistency of each of the three sets of requirements with Article III:4.[872]

7.272. Starting with the eligibility criteria, the Panel noted that the parties agreed that, under the amended tuna measure, most Mexican tuna products continue to be derived from tuna caught by setting on dolphins and are therefore denied access to the dolphin-safe label, while most like products from the United States and other Members are not derived from tuna caught by setting on dolphins and are therefore eligible for the label.[873] The Panel considered that the regulatory distinction between tuna products derived from tuna caught by setting on dolphins and tuna products derived from tuna caught by other fishing methods "has the effect of denying [Mexican] tuna products a valuable market advantage (that is, access to the dolphin-safe label)".[874] Therefore, the Panel concluded that the eligibility criteria modify the conditions of competition to the detriment of Mexican tuna products in the US market, in a manner inconsistent with Articles I:1[875] and III:4 of the GATT 1994.[876]

7.273. As for the certification requirements, the Panel recalled that, in its detrimental impact analysis under Article 2.1 of the TBT Agreement, it had found that such requirements impose "a lighter burden" on tuna products derived from tuna caught outside the ETP large purse-seine fishery than on tuna products derived from tuna caught within that fishery.[877] According to the Panel, the imposition of an observer requirement in the ETP large purse-seine fishery, coupled with the absence of such a requirement in other fisheries, "in itself strongly suggests that the amended tuna measure imposes certain conditions on access to the dolphin-safe label on only *some* tuna products".[878] In the Panel's view, by imposing on tuna products containing tuna caught in the ETP large purse-seine fishery an "additional, heavier or more burdensome" condition for access to the dolphin-safe label than on tuna products containing tuna caught in other fisheries, the certification requirements "modif[y] the competitive opportunities of like … tuna products", inconsistently with Articles I:1[879] and III:4 of the GATT 1994.[880]

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[867] Panel Report, para. 7.433. The Panel also noted that "Mexico refer[red] 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." (Ibid., para. 7.434 (referring to Mexico's second written submission to the Panel, para. 202))

[868] Panel Report, para. 7.479 (referring to Appellate Body Reports, *EC – Seal Products*, para. 5.117).

[869] Panel Report, para. 7.481.

[870] Panel Report, paras. 7.434 and 7.495.

[871] Panel Report, sections 7.6.1.2.2.2, 7.6.1.2.2.3, and 7.6.1.2.2.4, respectively.

[872] Panel Report, paras. 7.498-7.499, 7.500-7.501, and 7.502-7.503, respectively. The Panel reasoned that the segmentation of its assessment along the three sets of requirements was necessary because Mexico had articulated its claims under Articles I:1 and III:4 in terms of the "different labelling conditions", thus encompassing not only the ineligibility of tuna products derived from tuna caught by setting on dolphins for access the dolphin-safe label, but also the different certification and tracking and verification requirements. (Ibid., paras. 7.430 and 7.492)

[873] Panel Report, paras. 7.444-7.446.

[874] Panel Report, para. 7.447. See also para. 7.498.

[875] Panel Report, para. 7.447.

[876] Panel Report, para. 7.499.

[877] Panel Report, para. 7.454.

[878] Panel Report, para. 7.455. (emphasis original)

[879] Panel Report, para. 7.455.

[880] Panel Report, para. 7.501.

7.274. Finally, as regards the tracking and verification requirements, the Panel recalled that, in its detrimental impact analysis under Article 2.1 of the TBT Agreement, it had found that the requirements for tuna products containing tuna caught outside the ETP large purse-seine fishery are "less burdensome" than those for tuna products containing tuna caught within that fishery.[881] The Panel considered that, by imposing on the latter group of products an "additional" and more "burdensome" condition for access to the label than on the former group of products, the tracking and verification requirements "upset the equality of competitive opportunities", inconsistently with Articles I:1[882] and III:4 of the GATT 1994.[883]

7.275. Based on the foregoing, the Panel made separate findings that the eligibility criteria, the different certification requirements, and the different tracking and verification requirements are each inconsistent with Articles I:1 and III:4 of the GATT 1994.[884]

7.276. As the overview above shows, the Panel's analysis of the consistency of the eligibility criteria with Articles I:1 and III:4 somewhat differs from its analysis of the alleged detrimental impact flowing from such criteria under Article 2.1 of the TBT Agreement. In the context of Articles I:1 and III:4, the Panel assessed the extent to which the disqualification of tuna products derived from tuna caught by setting on dolphins affects the relative competitive conditions of Mexican, US, and other tuna products in the US market, whereas, in the context of Article 2.1, the Panel simply "reaffirm[ed]" the Appellate Body's alleged finding that the eligibility criteria are even-handed, without expressly evaluating their impact on access to the dolphin-safe label for the relevant groups of like tuna products.[885] Conversely, in its separate analyses of the consistency with Articles I:1 and III:4 of the different certification requirements and the different tracking and verification requirements, the Panel's approach closely mirrored its approach to assessing of the alleged detrimental impact of each such set of requirements under Article 2.1 of the TBT Agreement.

7.277. We recall that, in the original proceedings, the Appellate Body criticized the original panel's "assumption" that the claims under the TBT Agreement and the GATT 1994 were "substantially the same". The Appellate Body found, for this reason, that the original panel had acted inconsistently with Article 11 of the DSU and exercised false judicial economy in refraining from ruling on Mexico's claims under Articles I:1 and III:4 of the GATT 1994.[886] This is because, unlike Article 2.1 of the TBT Agreement, Articles I:1 and III:4 do not require a panel to examine whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction.[887] Moreover, unlike in Article 2.1 of the TBT Agreement, the most-favoured nation obligation in Article I:1 is not expressed in terms of "treatment no less favourable", but rather 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 countries.[888]

7.278. These differences notwithstanding, important parallels exist between the non-discrimination provisions contained in Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994. In particular, the inquiry under these provisions hinges on the question of whether the measure at issue modifies the conditions of competition in the responding Member's market to the detriment of products imported from the complaining Member vis-à-vis like domestic products or like products imported from any other country.[889] Accordingly, in assessing whether a measure affects competitive conditions under Article I:1 and/or Article III:4 of the GATT 1994, it may be reasonable for a panel to rely on any relevant findings it made in

[881] Panel Report, para. 7.463.
[882] Panel Report, para. 7.464.
[883] Panel Report, para. 7.503.
[884] Panel Report, paras. 8.3.a, 8.3.b, and 8.3.c, respectively. Subsequently, the Panel found that the "eligibility criteria" meet the requirements of the chapeau of Article XX of the GATT 1994 (ibid., para. 8.5.a), whereas the "certification requirements" and the "tracking and verification requirements" do not. (Ibid., paras. 8.5.b and 8.5.c, respectively)
[885] See section 7.2.2 of this Report.
[886] Appellate Body Report, *US – Tuna II (Mexico)*, para. 405.
[887] Appellate Body Reports, *EC – Seal Products*, paras. 5.93 and 5.105.
[888] Appellate Body Reports, *EC – Seal Products*, para. 5.81.
[889] See e.g. Appellate Body Reports, *EC – Seal Products*, paras. 5.88 and 5.101; *Thailand – Cigarettes (Philippines)*, para. 129; *Korea – Various Measures on Beef*, para. 137; *US – Clove Cigarettes*, para. 180; *US – Tuna II (Mexico)*, para. 215; and *US – COOL*, para. 268.

examining that measure's detrimental impact under Article 2.1 of the TBT Agreement. For these reasons, we do not see that the Panel's reliance, in its analyses under Articles I:1 and III:4 of the GATT 1994, on certain reasoning and findings from its analysis of detrimental impact under Article 2.1 of the TBT Agreement was, in itself, inappropriate.

7.279. However, we recall that we have already expressed a number of concerns with respect to the Panel's approach, in its analysis under Article 2.1 of the TBT Agreement, to assessing whether the amended tuna measure has a detrimental impact on Mexican tuna products in the US market.[890]

7.280. First, we held that, by segmenting its analysis along the three sets of requirements under the amended tuna measure, the Panel failed to conduct a holistic assessment of how those various labelling conditions, taken together, adversely affect the conditions of competition for Mexican tuna products in the US market as compared to like US and other tuna products. Nor did the Panel give due consideration to the question of whether and how such detrimental impact resembles, in nature or extent, the detrimental impact that was found, in the original proceedings, to exist under the original tuna measure. These considerations apply equally to the Panel's analytical approach under Articles I:1 and III:4. In our view, the Panel's examination of relative access to the dolphin-safe label for Mexican, US, and other tuna products should not have been limited to the regulatory distinction between tuna products derived from tuna caught by setting on dolphins and tuna products derived from tuna caught by other fishing methods. Indeed, while Mexican tuna products may be denied access to the dolphin-safe label by virtue of the fact that they are derived from tuna caught by setting on dolphins, other elements of the amended tuna measure, such as the "no dolphin killed or seriously injured" standard and the certification and tracking and verification requirements, may also exclude some tuna products of US or other origin from access to the label. Thus, the Panel should *also* have assessed how the certification and tracking and verification requirements introduced by the 2013 Final Rule for tuna products originating outside the ETP large purse-seine fishery had the effect of reducing (or increasing) access to the dolphin-safe label for such tuna products, thus narrowing (or broadening) the difference in treatment between Mexican tuna products and like US or other products in terms of access to the dolphin-safe label. By failing to do so, the Panel's segmented analysis falls short of a proper examination of the extent to which the various labelling conditions under the amended tuna measure, taken together, modify the detrimental impact that was found to exist in the original proceedings.

7.281. Second, we noted that, in its discrete detrimental impact analyses regarding the certification and tracking and verification requirements, the Panel engaged in a comparison of a subset of the relevant groups of products found to be "like" in this dispute – on the one hand, Mexican tuna products derived from tuna caught other than by setting on dolphins; on the other hand, tuna products from the United States and other countries derived from tuna caught other than by setting on dolphins. We took the view that, in order to reach its conclusions on detrimental impact, the Panel should have, instead, compared the treatment that the labelling conditions under the amended tuna measure accord to the *group* of Mexican tuna products, on the one hand, with the treatment accorded to the *groups* of like tuna products from the United States and other countries, on the other hand. These considerations apply with equal force to the analytical approach adopted, and the product groups compared by the Panel in order to assess whether the certification and tracking and verification requirements discriminate against Mexican tuna products under Articles I:1 and III:4 of the GATT 1994.

7.282. For the above reasons, we consider that, in assessing whether the amended tuna measure modifies the conditions of competition to the detriment of Mexican tuna products in the US market under Articles I:1 and III:4 of the GATT 1994, the Panel applied an incorrect approach. We therefore find that the Panel erred in its analysis of whether the amended tuna measure: (i) provides an "advantage, favour, privilege, or immunity" to tuna products from other Members that is not "accorded immediately and unconditionally" to like products from Mexico, in a manner inconsistent with Article I:1 of the GATT 1994; and (ii) accords "less favourable treatment" to Mexican tuna products than that accorded to like domestic products, in a manner inconsistent with Article III:4 of the GATT 1994. Accordingly, we reverse the Panel's findings, in paragraphs 8.3.a, 8.3.b, and 8.3.c of the Panel Report, that the eligibility criteria, the different

[890] See section 7.2.2 of this Report.

certification requirements, and the different tracking and verification requirements are each inconsistent with Articles I:1 and III:4 of the GATT 1994.

7.283. Having reversed these findings by the Panel, we do not consider it necessary to rule on the United States' claims on appeal that: (i) the Panel improperly allocated the burden of proof under Articles I:1 and III:4 by making findings on the different costs and burdens imposed by the certification and tracking and verification requirements on suppliers of tuna products operating inside and outside the ETP large purse-seine fishery[891]; (ii) the Panel erred in finding a difference in costs and burdens stemming from the certification and tracking and verification requirements and in failing to explain how any such difference modifies the conditions of competition to the detriment of Mexican tuna products[892]; and (iii) the Panel did not properly establish a genuine relationship between the certification and tracking and verification requirements and any detrimental impact on Mexico's competitive opportunities in the US market.[893]

7.3.2 The chapeau of Article XX of the GATT 1994

7.284. The Panel found that the features of the amended tuna measure that gave rise to violations of Articles I and III relate to the goal of conserving dolphins and, accordingly, are provisionally justified under Article XX(g) of the GATT 1994.[894] Neither participant has challenged this finding on appeal.[895] We therefore turn to address the claims of the United States and Mexico regarding the Panel's analysis and findings under the chapeau of Article XX of the GATT 1994. Before turning to address these claims, we first recount the relevant findings of the Panel.

7.3.2.1 The Panel's findings

7.285. In analysing the United States' defence under Article XX of the GATT 1994, the Panel sought to determine whether the requirements of the amended tuna measure, including its eligibility criteria, certification requirements, and tracking and verification requirements, are justified under Article XX(g).[896] The Panel agreed with the parties that dolphins are an "exhaustible natural resource"[897], and considered that measures designed to reduce the harm done to dolphins in commercial fishing practices "concern" the protection of dolphins, and "relate to" the conservation of dolphins.[898] The Panel considered 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."[899] The Panel therefore found that the requirements concerning eligibility, certification, and tracking and verification "relate to" the goal of conserving dolphins since they help to ensure that the US tuna market does not operate in a way that encourages fishing techniques that are not dolphin safe.[900] The Panel therefore concluded 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 [of] the GATT 1994."[901]

7.286. Turning to the chapeau of Article XX of the GATT 1994, the Panel considered that, where even-handedness under Article 2.1 of the TBT Agreement is analysed through the lens of, or using, the analytical framework of arbitrary or unjustifiable discrimination, it may be appropriate to rely

[891] United States' appellant's submission, paras. 357 and 359 (referring to paras. 136-144 and 288-295).
[892] United States' appellant's submission, paras. 357 and 359 (referring to paras. 145-155 and 314-319).
[893] United States' appellant's submission, paras. 357 and 359 (referring to paras. 167-184 and 327-330).
[894] Panel Report, para. 7.541. The Panel exercised judicial economy in respect of the United States' defence under subparagraph (b) of Article XX. (Ibid., para. 7.545)
[895] In its Notice of Appeal, the United States also made a conditional request for completion of the legal analysis under Article XX(b) of the GATT 1994. Because this request was contingent on Mexico appealing the Panel's finding that the amended tuna measure is provisionally justified under Article XX(g) of the GATT 1994 – which Mexico did not do – we need not consider the United States' request.
[896] Panel Report, para. 7.510.
[897] Panel Report, para. 7.521.
[898] Panel Report, para. 7.529.
[899] Panel Report, para. 7.533.
[900] Panel Report, para. 7.535.
[901] Panel Report, para. 7.541. The Panel exercised judicial economy in respect of the United States' defence under subparagraph (b) of Article XX. (Ibid., para. 7.545)

on that reasoning in the context of assessing a measure's consistency with the chapeau of Article XX.[902] The Panel acknowledged that, 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 of the GATT 1994.[903] The Panel in this dispute did not consider that this precluded reliance on Article 2.1 findings in the context of the chapeau of Article XX, but rather that a panel need only justify its reliance on such findings. The Panel noted that its findings in the context of Article 2.1 were based on its conclusion that particular features of the amended tuna measure are arbitrarily discriminatory because they are not reconcilable with the measure's objectives.[904] Accordingly, the Panel considered that it was "appropriate" to rely on the reasoning it had developed in the context of Article 2.1 in the course of its analysis under the chapeau of Article XX.[905]

7.287. The Panel separately analysed the requirements of the amended tuna measure as they relate to eligibility, certification, and tracking and verification. With respect to the eligibility criteria, the Panel noted that the main regulatory distinction of the amended tuna measure does not concern different countries, but rather different fishing methods, and that it is the fishing method of setting on dolphins that is regulated differently and more tightly than other fishing methods. The Panel noted, moreover, that tuna products containing tuna caught in instances where a dolphin was killed or seriously injured are ineligible to be labelled dolphin safe regardless of what fishing method was used, and regardless of where or how the tuna was caught. The Panel agreed with the United States that the most appropriate condition to examine is the different harms to dolphins caused by setting on dolphins versus those caused by other fishing methods.[906] The Panel recalled that setting on dolphins causes unobservable harms to dolphins beyond mortality and serious injury. These harms arise "as a result of the chase itself", and support the Appellate Body's conclusion in the original proceedings that setting on dolphins is "particularly harmful" to dolphins.[907] The Panel also noted the finding by the original panel 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"[908], and 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."[909]

7.288. Applying these findings in the present case, the Panel was not convinced that fishing methods other than setting on dolphins cause the same or similar unobserved harms. Rather, the Panel agreed 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."[910] The Panel also observed that the Appellate Body did not say in the original proceedings that the United States must disqualify all other fishing methods from accessing the dolphin-safe label, 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 the United States is permitted to "calibrate" the requirements imposed by the amended tuna measure according to "the likelihood that dolphins would be adversely affected in the course of tuna fishing operations in the respective conditions" of different fisheries.[911]

[902] Panel Report, para. 7.557.
[903] Panel Report, para. 7.558 (referring to Appellate Body Reports, *EC – Seal Products*, para. 5.310).
[904] Panel Report, para. 7.559.
[905] Panel Report, para. 7.560.
[906] Panel Report, para. 7.577.
[907] Panel Report, para. 7.579 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, paras. 246 and 289).
[908] Panel Report, para. 7.580 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 287).
[909] Panel Report, para. 7.580 (quoting Original Panel Report, para. 7.613). We recall that tuna products may carry the AIDCP dolphin-safe label whenever no dolphin was killed or seriously injured in harvesting the tuna contained therein, even if the tuna is caught by setting on dolphins.
[910] Panel Report, para. 7.581 (quoting United States' first written submission to the Panel, para. 113 (emphasis original)).
[911] Panel Report, para. 7.582 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 286).

7.289. The Panel noted the parties' agreement 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.[912] The Panel considered that the eligibility criteria are rationally related to the dolphin protection objective of the amended tuna measure. In the Panel's view, the fact that other fishing methods do not cause the kind of unobservable harms as those 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. Having considered that any discrimination that the eligibility criteria cause is directly connected to the main goal of the amended tuna measure, the Panel found that this aspect of the measure is not inconsistent with the requirements of the chapeau of Article XX.[913]

7.290. With respect to the certification requirements, the Panel recalled its finding that, while fishing methods other than setting on dolphins cause dolphin mortality and serious injury, the nature and degree of the interaction between tuna fishing vessels and dolphins is different in quantitative and qualitative terms.[914] Accordingly, there may be no need to have an observer on board whose sole task is to monitor the safety of dolphins during the set or other gear deployment. The Panel considered this sufficient to demonstrate that maintaining different certification requirements does not necessarily amount to unjustifiable or arbitrary discrimination, although neither is it necessarily determinative of whether the system in place in fisheries other than the ETP large purse-seine fishery – which requires certification by captains only – is balanced and justified within the meaning of the chapeau of Article XX.[915]

7.291. The Panel agreed with Mexico that captains' certificates may be unreliable because captains may not have the technical expertise necessary to certify accurately that no dolphins were killed or seriously injured in a particular set or gear deployment.[916] In particular, the Panel considered that the tasks generally expected of a captain may be rather different from those involved in certifying that no dolphins were killed or seriously injured in sets or other gear deployments, and captains or other crew members are not always and necessarily in possession of such highly specialized skills.[917] In the Panel's view, the United States had 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.[918] The Panel further recalled its concerns with the determination provisions due to the fact that such determinations are only possible in respect of certain fisheries, and the United States had not explained adequately how this limitation is rationally connected to the objectives pursued by the amended tuna measure.[919]

7.292. On the basis of this analysis, the Panel considered that the findings that it had made in the context of Article 2.1 of the TBT Agreement applied with equal force in the context of the chapeau of Article XX of the GATT 1994. The Panel considered that, 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, this aspect of the amended tuna measure is unjustifiably and arbitrarily discriminatory. The Panel also stated 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. The Panel thus found that the different certification requirements are not applied consistently with the requirements of the chapeau of

[912] Panel Report, para. 7.583.
[913] Panel Report, para. 7.584. The Panel relied on the same reasoning to conclude that the eligibility criteria are applied in a manner that does not constitute a disguised restriction on trade. (Ibid., para. 7.585)
[914] Panel Report, para. 7.592.
[915] Panel Report, para. 7.593.
[916] Panel Report, para. 7.598.
[917] Panel Report, para. 7.601.
[918] Panel Report, para. 7.603.
[919] Panel Report, para. 7.604.

Article XX.[920] One of the panelists expressed a separate opinion similar to that which had been expressed in the context of Article 2.1 of the TBT Agreement.[921]

7.293. With respect to the tracking and verification requirements, the Panel recalled its conclusion that such requirements impose a lighter burden on tuna products containing tuna caught other than in the ETP large purse-seine fishery.[922] The Panel 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 products containing tuna caught by vessels other than large purse-seine vessels will be incorrectly labelled as dolphin safe, although it did not find it necessary to make a definitive finding on that point. The Panel agreed with Mexico that the lesser burden placed on tuna products containing 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, the Panel considered that, to the extent that the different requirements may make it easier for tuna products containing tuna caught other than by large purse-seine vessels in the ETP to be incorrectly labelled, this would also be inconsistent with the measure's goal of providing accurate information to consumers. In the Panel's view, the United States had not provided any explanation as to how this differential treatment is related to, let alone justified by, the objectives pursued by the amended tuna measure. Accordingly, the Panel concluded 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.[923]

7.3.2.2 Whether the Panel erred in its analysis under the chapeau of Article XX of the GATT 1994

7.294. The participants advance claims challenging different parts of the Panel's analysis and findings under the chapeau of Article XX of the GATT 1994. Mexico challenges the Panel's findings regarding the eligibility criteria, and requests us to modify the reasoning of the Panel and find that the eligibility criteria also demonstrate that the amended tuna measure as a whole is applied in a manner that constitutes arbitrary or unjustifiable discrimination.[924] For its part, the United States challenges the Panel's findings regarding the certification requirements and the tracking and verification requirements, and requests us to reverse the Panel's findings and complete the legal analysis in this regard.[925]

7.295. Both participants contend that the Panel erred in its analysis of whether discrimination occurs "between countries where the same conditions prevail". The Panel found that, with respect to the eligibility criteria, the conditions between countries *are not* the same.[926] This finding is appealed by Mexico. In respect of the certification requirements and the tracking and verification requirements, however, the Panel found that the conditions between countries *are* the same.[927] The United States appeals these findings of the Panel.

7.296. In addition, both participants advance claims of error regarding the Panel's analysis as to whether the discrimination is "arbitrary or unjustifiable". The Panel found that the eligibility criteria *are* directly related to the objectives of the measure, and therefore are applied in a manner that meets the requirements of the chapeau.[928] This finding is appealed by Mexico. Conversely, the Panel found that the certification requirements and the tracking and verification requirements

[920] Panel Report, para. 7.605.
[921] The panelist who wrote a separate opinion considered, contrary to the Panel majority's view, that the United States had demonstrated that the different requirements as to who must make a dolphin-safe certification are rationally connected or calibrated to the different risks facing dolphins in different areas of the oceans and from different fishing methods. (Panel Report, para. 7.606) The panelist agreed, however, with the majority in finding that the United States had not explained or justified the discrimination caused by the determination provisions, and would have found, for this reason alone, that the United States had not established that the certification requirements are applied consistently with the chapeau of Article XX. (Ibid., para. 7.607)
[922] Panel Report, para. 7.610.
[923] Panel Report, para. 7.611.
[924] Mexico's other appellant's submission, para. 167(d).
[925] United States' appellant's submission, para. 463.
[926] Panel Report, para. 7.584.
[927] Panel Report, para. 7.605.
[928] Panel Report, paras. 7.584 and 8.5.a.

are not directly related to the objectives of the measure, and therefore are applied in a manner that does not meet the requirements of the chapeau of Article XX.[929] These findings are appealed by the United States.

7.3.2.2.1 Discrimination between countries where the same conditions prevail

7.297. In respect of the Panel's analysis of the eligibility criteria, Mexico claims that the Panel erred by finding that "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."[930] Mexico considers this finding to be erroneous because, in its view, the relevant conditions are not the differences in unobservable harms, but rather in dolphin mortalities and serious injuries (both observed and unobserved) caused by commercial tuna fishing operations. As a result, because there are mortalities and injuries in tuna fisheries other than the ETP large purse-seine fishery, the relevant conditions are the same, and the Panel erred by limiting the relevant conditions to the impact of unobservable effects only.[931]

7.298. The United States responds that "the relevant 'conditions' relate to *all* adverse effects suffered by dolphins, which … include not only mortality and serious injuries, but those unobservable harms that dolphins incur from being chased."[932] Because it considers that the harm to dolphins occurring in the ETP large purse-seine fishery differs from the harm in other fisheries, the United States argues that the conditions are not the same between fisheries. Thus, the United States argues, since the relevant conditions are not the same, no discrimination exists for purposes of the chapeau, and the eligibility criteria are therefore justified under Article XX.[933]

7.299. In respect of the Panel's analysis of the certification and tracking and verification requirements, the United States claims that the Panel failed to conduct an independent examination of whether the requirements discriminate between countries where the same conditions prevail. In the context of the certification requirements, the only condition the Panel cited was the fact that "dolphins may be killed or seriously injured by all fishing methods in all oceans", and its conclusion that "accurate certification is necessary regardless of the particular fishery" where tuna was caught.[934] The United States asserts that the relevant condition in this dispute is *the relative harm* (both observed and unobserved) suffered by dolphins from different fishing methods in different fisheries, and that the findings in the original proceedings affirm that this condition is not the same in the ETP large purse-seine fishery and all other fisheries.[935] Noting the Panel's focus on whether the differences in the education and training of observers and captains result in differences in the accuracy of certifications, the United States observes that the Panel made no "definitive finding" as to the accuracy of certifications, and that, in any event, the evidence on the Panel record does not support such a finding.[936] The United States therefore considers that the Panel's analysis "is legally unsupported by the evidence on the record".[937] In the context of the tracking and verification requirements, the United States maintains that the Panel did not even address the issue of whether these requirements discriminate between countries where the same conditions prevail.[938]

7.300. In response, Mexico argues that the Panel correctly found that the same conditions exist for Mexico, the United States, and other countries because dolphins may be killed or seriously injured by all fishing methods in all oceans. Accordingly, accurate certification and tracking and verification are necessary regardless of the particular fishery in which tuna is caught.[939] Mexico disagrees with the United States' contention that the relevant conditions are the relative harm suffered by dolphins from different fishing methods in different fisheries, and that those conditions are not the same in the ETP large purse-seine fishery and all other fisheries. As Mexico recalls from

[929] Panel Report, paras. 7.605, 7.611, 8.5.b, and 8.5.c.
[930] Mexico's other appellant's submission, para. 156 (quoting Panel Report, para. 7.584). (emphasis added by Mexico)
[931] Mexico's other appellant's submission, para. 158.
[932] United States' appellee's submission, para. 178. (emphasis original)
[933] United States' appellee's submission, para. 180.
[934] United States' appellant's submission, para. 391 (quoting Panel Report, para. 7.605).
[935] United States' appellant's submission, paras. 393-394.
[936] United States' appellant's submission, paras. 395-399.
[937] United States' appellant's submission, para. 400.
[938] United States' appellant's submission, para. 401.
[939] Mexico's appellee's submission, para. 202.

its other appellant's submission, the relevant conditions are dolphin mortalities and serious injuries (both observed and unobserved) caused by commercial tuna fishing operations.[940] The Panel was therefore "correct in finding, either explicitly or implicitly, that the amended tuna measure discriminates between countries where the same conditions prevail".[941]

7.301. The Appellate Body has identified three analytical elements in respect of arbitrary or unjustifiable discrimination in the chapeau of Article XX: (i) the application of the measure results in discrimination; (ii) the discrimination occurs between countries where the same conditions prevail; and (iii) the discrimination is arbitrary or unjustifiable.[942] In *EC – Seal Products*, the Appellate Body considered that the second of these steps "necessitates an assessment of whether the 'conditions' prevailing in the countries between which the measure allegedly discriminates are 'the same'".[943] This suggests that an assessment of whether there is discrimination between countries where the conditions prevailing are "the same" is both a predicate for, and necessarily informs, a panel's examination as to whether such discrimination is "arbitrary or unjustifiable".[944] The Appellate Body added that, in assessing which "conditions" are *relevant* for purposes of establishing arbitrary or unjustifiable discrimination, pertinent context may be found in the particular subparagraph of Article XX under which a measure has been provisionally justified, and the provisions of the GATT 1994 with which a measure has been found to be inconsistent.[945]

7.302. We do not see that the participants fundamentally differ as to the general character of the "conditions" that are relevant for purposes of the analysis under Article XX. Both Mexico and the United States seem to agree that the relevant conditions are, broadly speaking, harms suffered by dolphins by virtue of commercial tuna fishing operations. Rather, their disagreement appears to concern the *degree* of specificity with which those harms should be identified, and *whether, as a factual matter*, the harms arising from setting on dolphins in the ETP large purse-seine fishery, on the one hand, and from other fishing methods in other fisheries, on the other hand, are similar or different. Mexico argues that the relevant conditions prevailing between countries are *the same* because the harms to dolphins in terms of mortality and serious injury arises irrespective of the fishing area or method used. By contrast, the United States argues that the relevant conditions prevailing between countries are *not the same* because the harms to dolphins, in particular, the unobservable harms, are greater in the ETP large purse-seine fishery. In this respect, the disagreement between the participants amounts to another iteration of their opposing positions as to whether the harms or risks associated with setting on dolphins in the ETP large purse-seine fishery are greater than those associated with other fishing methods occurring in the ETP and elsewhere.

7.303. In their arguments, however, the participants devote little attention to the underlying factors that inform which conditions are relevant for purposes of the Panel's analysis. Both Mexico and the United States refer to the Appellate Body's guidance in *EC – Seal Products* that the identification of the "relevant conditions" under the chapeau may be understood by reference to the applicable subparagraph of Article XX under which the measure was provisionally justified, and the substantive obligations under the GATT 1994 with which a violation has been found.[946] Neither participant, however, provides much analysis as to how such factors favour its view over that of the other participant regarding the conditions that are relevant in this dispute.

7.304. Turning to the Panel's analysis, we first note that the Panel indeed appears to have found that, for purposes of its examination of *the eligibility criteria*, the relevant condition was *the harms*

[940] Mexico's appellee's submission, para. 202 (referring to Mexico's other appellant's submission, paras. 155-158).
[941] Mexico's appellee's submission, para. 203.
[942] Appellate Body Report, *US – Shrimp*, para. 150.
[943] Appellate Body Reports, *EC – Seal Products*, para. 5.299.
[944] Appellate Body Reports, *EC – Seal Products*, para. 5.317.
[945] Appellate Body Reports, *EC – Seal Products*, paras. 5.300-5.301 (referring to Appellate Body Reports, *US – Gasoline*, pp. 23-24, DSR 1996:I, pp. 21-22; and *US – Shrimp*, para. 150). The Appellate Body found uncontested that "the same animal welfare conditions prevail in all countries where seals are hunted", and that the European Union had not otherwise succeeded in demonstrating that the conditions prevailing in Canada and Norway, on the one hand, and Greenland, on the other hand, "are relevantly different". The Appellate Body therefore proceeded on the basis that the conditions prevailing in those countries were "the same" for purposes of the chapeau of Article XX. (Ibid., para. 5.317)
[946] Mexico's other appellant's submission, para. 155; United States' appellant's submission, para. 385 (both referring to Appellate Body Reports, *EC – Seal Products*, para. 5.300).

to dolphins arising from the unobservable effects of fishing methods. As the Panel explained, "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."[947] By contrast, in its examination of the certification requirements, the Panel appears to have considered that the relevant condition was *the harms to dolphins arising from death or serious injury*. Here, the Panel stated 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."[948] The Panel did not make any statement regarding conditions prevailing between countries in the context of its analysis of the tracking and verification requirements.

7.305. We have concerns with the Panel's view that the relevant conditions for certain aspects of the measure (the eligibility criteria) somehow differ from the relevant conditions for other aspects of the measure (the certification requirements), and its ultimate conclusion that the conditions are *not the same* for the former, but are *the same* for the latter. Article XX requires that the *measure* not be applied in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail. We therefore do not understand how the Panel considered that different sets of conditions are relevant in respect of different aspects of the measure at issue. The Panel may have taken this approach because, as we noted in previous sections of our Report, the Panel seems to have compared different sets of tuna products depending on the particular requirements of the measure that it was examining. That is, when it came to the eligibility criteria, the Panel compared the treatment accorded to tuna products that either qualified or did not qualify for the dolphin-safe label depending on whether they derived from tuna caught by setting on dolphins, whereas, when it turned to the certification and tracking and verification requirements, the Panel compared the treatment accorded to tuna products meeting different sets of requirements in different fisheries, but which all qualified for access to the dolphin-safe label. We reiterate the concern we previously expressed that the Panel's segmented analysis of the measure led it to isolate its consideration of different elements of the measure without examining the manner in which those elements are interrelated, and without reconciling the different conclusions it drew in respect of these elements. In particular, we do not see on what basis the conditions relevant for the certification or tracking and verification requirements would differ from those relevant for the eligibility criteria given that, as we have pointed out, access to the dolphin-safe label is conditioned on the satisfaction of all of the conditions, including the certification and tracking and verification requirements, that are contained in the amended tuna measure.

7.306. Moreover, the Panel did not explain why it selected the conditions it did. We recall that the Appellate Body in *EC – Seal Products* provided guidance on this question, noting that the identification of the "relevant conditions" under the chapeau may rely for pertinent context on the applicable subparagraph of Article XX under which the measure was provisionally justified, and the substantive obligations of the GATT 1994 found to be violated.[949] In this dispute, the Panel did not refer to subparagraph (g) in identifying the relevant "conditions" for purposes of the chapeau to Article XX. Rather, in the context of its examination of the eligibility criteria, the Panel did not identify the relevant conditions by reference to these elements, but rather to the risks associated with "fisheries where tuna is caught by setting on dolphins and fisheries where that method is not used".[950] In the context of the certification requirements, the Panel stated that, unlike in the context of the eligibility criteria, the conditions prevailing among Members in respect of the certification requirements are the same since "dolphins may be killed or seriously injured by all fishing methods in all oceans".[951]

7.307. We note that, in the context of its analysis under Article XX(g), the Panel referred to the parties' agreement that dolphins are an "exhaustible natural resource"[952]; that one of the goals of

[947] Panel Report, para. 7.584.
[948] Panel Report, para. 7.605.
[949] Appellate Body Reports, *EC – Seal Products*, para. 5.300.
[950] Panel Report, para. 7.584.
[951] Panel Report, para. 7.605.
[952] Panel Report, para. 7.521.

the US dolphin-safe labelling regime is to contribute to the protection of dolphins; and that the conservation of dolphins is therefore a policy objective falling within the scope of Article XX(g).[953] The Panel added that a measure that is designed to reduce the harm done to dolphins in commercial fishing practices concerns the protection of dolphins.[954] We also recall the Panel's statement 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."[955] In addition, the original panel recognized that the adverse effects on dolphins addressed by the US dolphin-safe provisions relate to observed and unobserved mortalities and serious injuries to dolphins in the course of tuna fishing operations.[956] In the context of Articles I:1 and III:4 of the GATT 1994, the Panel examined the differences in treatment accorded to Mexican producers of tuna products, on the one hand, and US and other producers of tuna products, on the other hand. Irrespective of the type and nature of the applicable requirements in the amended tuna measure, however, all such requirements seek to address the risk of harm to dolphins arising from different fishing methods in different areas of the oceans.

7.308. These factors indicate to us that the prevailing conditions between countries are the risks of adverse effects on dolphins arising from tuna fishing practices. Moreover, having indicated in other parts of its analysis that the relevant conditions for purposes of the amended tuna measure are harms to dolphins arising from tuna fishing practices, it is not clear why the Panel then identified more specific conditions relating to the *type* or *level* of harm as being relevant to different aspects of the measure, and then found that only in respect of one of those aspects (namely, the eligibility criteria) the conditions differed, whereas for another aspect (namely, the certification requirements) the conditions were the same. We do not consider that such an analysis is consistent with the chapeau's requirement that the *measure* not be applied in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or accords proper treatment to the integrated elements of the US dolphin-safe labelling regime. In the circumstances of this case, we proceed on the basis that the conditions prevailing between countries are the same for purposes of the chapeau of Article XX of the GATT 1994.

7.3.2.2.2 Arbitrary or unjustifiable discrimination

7.309. We now turn to address the participants' claims that the Panel erred in its analysis as to whether the discrimination is "arbitrary or unjustifiable".

7.310. In respect of the Panel's analysis of the eligibility criteria, Mexico claims that the Panel should have focused on the policy objective reflected in Article XX(g) of the GATT 1994, rather than on the objectives of the measure.[957] Had the Panel done so, Mexico argues, then it would properly have focused on "the reduction of dolphin mortalities and serious injuries in all circumstances" rather than on the different type, nature, quality, magnitude, or regularity of the adverse effects.[958] According to Mexico, there is no basis to "calibrate" between different levels of dolphin mortalities or serious injuries in achieving the policy objective under Article XX(g). Mexico notes that it has challenged the granting of the dolphin-safe label to tuna products produced from tuna caught by the fleets of other countries using different fishing methods in different fisheries. Mexico considers that evidence before the Panel and the Panel's findings "clearly establish[] that these other fishing methods cause observed and unobserved dolphin mortalities and serious injuries."[959]

7.311. In response to Mexico's claim, the United States argues that the practice of setting on dolphins reflects an inherent danger that is simply not present in other fishing methods, despite the fact that those other methods may also kill or seriously injure dolphins. The United States notes that the Panel recognized the legitimacy of drawing a distinction between fishing methods that have different natures, and considers that this distinction is clearly reconcilable with, and rationally related to, the policy objective of protecting dolphins. The United States also rejects

[953] Panel Report, para. 7.525.
[954] Panel Report, para. 7.529.
[955] Panel Report, para. 7.533.
[956] Panel Report, para. 7.528 (referring to Original Panel Report, para. 7.486).
[957] Mexico's other appellant's submission, para. 161.
[958] Mexico's other appellant's submission, para. 161.
[959] Mexico's other appellant's submission, para. 162.

Mexico's argument that Article XX(g) does not permit Members to apply measures that are "calibrated" to different risks. The United States observes that, in *US – Shrimp*, the Appellate Body found that not taking into account different risk levels or conditions in different countries indicated that a measure does not meet the requirements of the chapeau.[960]

7.312. In its appeal concerning the certification and tracking and verification requirements, the United States claims that the Panel misunderstood the analysis of whether discrimination is arbitrary or unjustifiable. According to the United States, the Panel erroneously considered this to be "a single-factor test … rather than a cumulative analysis of all the factors that could be relevant to making such a determination."[961] The United States contends that, by applying an overly narrow legal analysis, the Panel erroneously relied entirely on its Article 2.1 analysis, and improperly disregarded other relevant factors. The United States advances similar arguments in respect of the determination provisions[962] and the tracking and verification requirements.[963] In addition, the United States argues that the Panel erred in its examination of the certification and tracking and verification requirements under the chapeau because it did not take into account the different risks to dolphins inside and outside the ETP large purse-seine fishery.[964]

7.313. In response to the United States' claim, Mexico argues that the Panel was correct to focus on 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.[965] Mexico argues that the Panel did not disregard other relevant factors, but gave the United States an opportunity to explain why the differential treatment was not arbitrary or unjustifiable, and the United States was unable to do so. Mexico considers that the Panel properly explained its reasons for concluding that, in the circumstances of this dispute, it was appropriate for it to rely on the reasoning it had developed in the context of Article 2.1 in its analysis under the chapeau of Article XX.[966]

7.314. In our view, these aspects of the participants' claims raise two threshold issues in respect of the legal standard under the chapeau of Article XX: (i) whether the Panel was correct to focus its analysis on whether discrimination can be reconciled with, or is rationally related to, the policy objective of the measure; and (ii) whether the Panel was correct to rely on its findings in the context of Article 2.1 of the TBT Agreement in reaching its conclusions regarding Article XX of the GATT 1994. If the Panel was correct on both counts, then we must assess the participants' claims that the Panel erred in its application of the legal test that it identified.

7.315. First, with respect to the legal standard under the chapeau of Article XX, we note that Mexico and the United States challenge different aspects of the Panel's articulation of that standard. The United States argues that the Panel erred by unduly limiting its chapeau analysis to a "single-factor test" that focused on whether the discrimination can be reconciled with, or is rationally related to, the policy objective of the measure. For its part, Mexico argues that the Panel erred by focusing on the policy objective of the measure, rather than the policy objective as identified in the applicable subparagraph of Article XX.

7.316. The Appellate Body has stated that the analysis of whether discrimination is arbitrary or unjustifiable "should focus on the cause of the discrimination, or the rationale put forward to explain its existence".[967] The Appellate Body has explained that such an analysis "should be made in the light of the objective of the measure", and that discrimination will be arbitrary or unjustifiable when the reasons given for the discrimination "bear no rational connection to the objective" or "would go against that objective".[968] Thus, "[o]ne 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

[960] United States' appellee's submission, para. 186 (referring to Appellate Body Reports, *US – Shrimp*, para. 165; and *US – Shrimp (Article 21.5 – Malaysia)*, paras. 140-143).
[961] United States' appellant's submission, para. 416.
[962] United States' appellant's submission, paras. 432 and 434.
[963] United States' appellant's submission, para. 451.
[964] United States' appellant's submission, paras. 421 and 455.
[965] Mexico's appellee's submission, para. 209 (referring to Panel Report, para. 7.553).
[966] Mexico's appellee's submission, para. 211.
[967] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226 (referring to Appellate Body Reports, *US – Gasoline*, *US – Shrimp*, and *US – Shrimp (Article 21.5 – Malaysia)*).
[968] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227.

which the measure has been provisionally justified under one of the subparagraphs of Article XX.[969] This factor is "particularly relevant in assessing the merits of the explanations provided by the respondent as to the cause of the discrimination".[970] The Appellate Body has explained, however, that this is not the sole test, and that, depending on the nature of the measure at issue and the circumstances of the case at hand, there could be additional factors that may also be relevant to the overall assessment.[971] Prior Appellate Body jurisprudence therefore underscores the importance of examining the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective of the measure. In addition, however, depending on the nature of the measure at issue and the circumstances of the case at hand, additional factors could also be relevant to the analysis.

7.317. In this dispute, we do not see that the Panel provided an overly narrow articulation of the legal standard. The Panel itself noted that the question of rational relationship with the objective was "[o]ne of the most important factors", which suggests that it did not consider that such an analysis necessarily precluded the consideration of other factors. It appears that the essence of the United States' appeal in this regard concerns whether the Panel properly accounted for different levels of risk in its chapeau analysis. We do not see that the Panel's articulation of the legal standard, however, precluded such a consideration. Rather, it may be that a panel falls into error in applying that standard by not taking account of factors that, due to the nature of the measure at issue and the circumstances of the case, are relevant to the analysis. Below we return to the United States' claim as to whether the Panel properly applied an analysis under the chapeau to accommodate potentially different risk profiles in different fisheries.

7.318. Similarly, we do not agree with Mexico that the Panel erred in articulating the legal standard as consisting of a focus on whether there is a rational relationship with the objectives of the amended tuna measure, rather than the objective reflected in Article XX(g). We do not understand how a focus on one of the objectives in the subparagraphs of Article XX, rather than a focus on the objective of the measure, necessarily leads to the result Mexico seeks. We consider that such a distinction is somewhat artificial given that, by virtue of an examination of whether a measure is provisionally justified under one of the subparagraphs, the objective of the measure will already have been tested against, and will have been found to be aligned with, one of the objectives set out in Article XX. Indeed, prior findings by the Appellate Body confirm that the focus is on the objective of the measure as examined in relation to the applicable subparagraph of Article XX.[972] We therefore do not understand how, in the circumstances of this dispute, where the Panel has found that the objective of dolphin protection relates to the conservation of exhaustible natural resources, reliance on the objective of Article XX(g), rather than the measure, would yield a different analytical result.

7.319. Finally, we address the United States' argument that the Panel erred by relying entirely on its Article 2.1 analysis, rather than making the required independent analysis under the chapeau of Article XX. The Panel addressed this point in its Report. While it acknowledged that the Appellate Body had faulted the panel in *EC – Seal Products* for automatically importing its analysis under Article 2.1 into its analysis under the chapeau of Article XX, it did not consider that the Appellate Body's finding stands for the proposition that a panel can never rely on its findings under Article 2.1 in the context of the chapeau of Article XX.[973] Rather, if a panel seeks to rely on findings made under Article 2.1 in the context of the chapeau, it must justify its use of those findings. In particular, the Panel reasoned, where an Article 2.1 analysis was based entirely on the question of 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, a panel may apply relevant aspects of its reasoning and factual findings developed in the context of Article 2.1 to its analysis under the chapeau of Article XX.[974] The Panel therefore considered it

[969] Appellate Body Reports, *EC – Seal Products*, para. 5.306.

[970] Appellate Body Reports, *EC – Seal Products*, para. 5.306 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227).

[971] Appellate Body Reports, *EC – Seal Products*, para. 5.321.

[972] See Appellate Body Report, *Brazil – Retreaded Tyres*, para. 228, finding that an aspect of the measure "bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective". See also Appellate Body Reports, *US – Shrimp*, para. 165; and *EC – Seal Products*, para. 5.317.

[973] Panel Report, para. 7.558.

[974] Panel Report, para. 7.558.

"appropriate … to rely on the reasoning" developed in the context of its analysis under Article 2.1 in the course of its analysis under the chapeau of Article XX.[975]

7.320. Previously, we considered that it was appropriate for the Panel, in the context of Article 2.1 of the TBT Agreement, to focus its analysis on whether there is arbitrary or unjustifiable discrimination by assessing whether the discrimination is rationally related to, or can be reconciled with, the policy objective of the measure. Although we identified concerns with the Panel's application of the legal standard under Article 2.1, we did not find that the Panel erred in its articulation of that standard. Accordingly, we do not believe it was inappropriate for the Panel, in principle, to have referred to and relied on that same legal standard in the context of its reasoning under the chapeau of Article XX. We agree with the Panel that this is not an instance where a panel has simply imported its finding under Article 2.1, but rather a situation in which a panel has relied on a similar analytical process under the two provisions by focusing on the existence of arbitrary or unjustifiable discrimination. Moreover, while the panel in *EC – Seal Products* devoted three sentences to its analysis under the chapeau of Article XX by reference to its findings under Article 2.1[976], the Panel in this dispute developed a distinct analysis under Article XX and provided considerably more reasoning on this issue, in addition to examining other dimensions of the chapeau analysis that were not developed in the context of its analysis under Article 2.1.[977]

7.321. As we noted in connection with the United States' arguments above, the essence of the United States' claim concerns whether the Panel accounted for different levels of risks to dolphins in its chapeau analysis. We do not see that the Panel's articulation of the legal standard, or the fact that the Panel relied on reasoning it had developed in the context of Article 2.1, precluded such a consideration under the chapeau of Article XX. Below we address the United States' claim as to whether the Panel properly applied a chapeau analysis to accommodate potentially different risk profiles in different fisheries.

7.322. For the foregoing reasons, we do not consider that either Mexico or the United States has sustained their respective claims regarding the Panel's interpretation or articulation of the legal standard under the chapeau of Article XX, and we do not agree with the United States that the Panel erred in its chapeau analysis by relying on the reasoning it had developed when considering Mexico's claims under Article 2.1 of the TBT Agreement.

7.323. This brings us to the participants' claims as they relate to the Panel's application of the legal standard under the chapeau of Article XX of the GATT 1994.

7.324. In respect of the Panel's analysis of the eligibility criteria, Mexico maintains that the Panel erred because, had it properly focused its analysis on the objective of reducing dolphin mortality and serious injury in all circumstances, there would have been no basis to "calibrate" between different levels of dolphin mortalities and serious injuries.[978] For its part, the United States argues that the opposite is true, and that the Appellate Body has found that *not* taking into account different risk levels or conditions in different countries indicates that the measure does not meet the requirements of the chapeau.[979]

7.325. In its examination of the eligibility criteria under the chapeau of Article XX, the Panel again relied on what it considered to be the Appellate Body's "settled" conclusion that the United States is entitled to disqualify tuna products containing tuna caught by setting on dolphins from accessing the dolphin-safe label, and that the United States need not disqualify fishing methods other than setting on dolphins. The Panel thus cross-referenced its earlier analysis in the context of Article 2.1 of the TBT Agreement that established, in the Panel's view, that the Appellate Body had found that the eligibility criteria were not inconsistent with Article 2.1.[980] The Panel repeated its understanding that the Appellate Body had concluded that setting on dolphins is particularly harmful to dolphins due to the unobserved harms resulting from the chase itself.[981] The Panel also

[975] Panel Report, para. 7.560.
[976] Panel Reports, *EC – Seal Products*, para. 7.650.
[977] Panel Report, paras. 7.546-7.611.
[978] Mexico's other appellant's submission, para. 161.
[979] United States' appellee's submission, para. 186 (referring to Appellate Body Reports, *US – Shrimp*, para. 165; and *US – Shrimp (Article 21.5 – Malaysia)*, paras. 140-143).
[980] Panel Report, para. 7.578 and fn 792 thereto (referring to paras. 7.126-7.135).
[981] Panel Report, paras. 7.579-7.581.

recalled its view that the Appellate Body had not faulted the original tuna measure due to the disqualification for the dolphin-safe label arising from setting on dolphins, but rather because it did not sufficiently address the harms caused to dolphins by other tuna fishing methods.[982] According to the Panel, the Appellate Body accepted that, in principle, WTO law allows the United States to "calibrate" the requirements imposed by the amended tuna measure to "the likelihood that dolphins would be adversely affected in the course of tuna fishing operations in the respective conditions" of different fisheries.[983] The Panel understood this to mean that, because the Appellate Body 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 regime is consistent with Article 2.1 of the TBT Agreement.

7.326. We recall that, in our assessment of the Panel's analysis under Article 2.1 of the TBT Agreement, we did not agree with the Panel's statement that the Appellate Body in the original proceedings had settled that the United States is entitled to disqualify tuna products containing tuna caught by setting on dolphins from ever accessing the dolphin-safe label, and that it may bring its dolphin-safe labelling regime into conformity with Article 2.1 without disqualifying methods of tuna fishing other than setting on dolphins. We further considered that, by finding that this issue had been "settled" in the original proceedings, the Panel precluded a proper relational and comparative analysis of the regulatory distinctions and the treatment of the group of products that are ineligible for access to the dolphin-safe label under the amended tuna measure, as compared to the group of products that are eligible for such access. In addition, we observed that the Panel's approach also prevented it from engaging in the central question in these compliance proceedings, namely, a full exploration of whether the changes introduced by the United States to the amended tuna measure suffice to bring this measure into compliance with the recommendations and rulings of the DSB. We find that, because these criticisms concern aspects of the Panel's reasoning and findings that it also relied upon in the context of its analysis under the chapeau of Article XX, and that we, too, consider relevant to that analysis, the Panel also erred in its assessment of the eligibility criteria under the chapeau.

7.327. In respect of the Panel's analysis of the certification and tracking and verification requirements, the United States advances several claims that are the same or similar to claims it raises in challenging the Panel's analysis under Article 2.1 of the TBT Agreement. Foremost among these challenges is the United States' claim that the Panel majority erred in finding that the certification requirements impose arbitrary or unjustifiable discrimination because any differences in labelling accuracy resulting from differences in education and training between captains and observers are "calibrated" to the risks to dolphins arising from different fishing methods in different ocean areas.[984] In the United States' view, the Panel majority's analysis contradicts the principle, expressed by the Appellate Body, that "WTO law allows the United States to 'calibrate' the requirements imposed by the amended measure" based on the different risks to dolphins arising in different fisheries.[985] For the United States, a Member can impose different requirements based on the different conditions in the areas subject to each type of requirement, and this is supported by the Appellate Body's view that *not* taking into account different risk levels or conditions in different countries indicates that the measure *does not* meet the requirements of the chapeau.[986] The United States further argues that, once it is established that the United States can impose different requirements to address the fact that the ETP large purse-seine fishery has a different risk profile than other fisheries, it is clear that the different certification requirements are justified by reference to the objective of dolphin protection.[987] In addition, the United States maintains that the Panel majority's finding contradicts the finding of the Appellate Body that the United States could bring itself into compliance without requiring observer certification for access

[982] Panel Report, para. 7.582.
[983] Panel Report, para. 7.582 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 286).
[984] United States' appellant's submission, para. 421.
[985] United States' appellant's submission, para. 422 (quoting Panel Report, para. 7.582, in turn quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 286).
[986] United States' appellant's submission, para. 422 (referring to Appellate Body Reports, *US – Shrimp*, para. 165; and *US – Shrimp (Article 21.5 – Malaysia)*, paras. 140-143).
[987] United States' appellant's submission, para. 423. The United States argues that this point is further supported by the reasoning of the panelist who wrote a separate opinion. (Ibid.)

to the dolphin-safe label.[988] The United States advances similar arguments for the tracking and verification requirements.[989]

7.328. For its part, Mexico does not advance any new argumentation in response to this claim by the United States, but rather cross-references its general argumentation in respect of the question of whether the Panel properly accounted for the different risks inside and outside the ETP large purse-seine fishery.[990] We recall that, in sum, Mexico argues that the amended tuna measure is not saved by the fact that it accepts a higher percentage of incorrect dolphin-safe information on product labels to be passed to consumers with respect to tuna caught in purportedly low-risk fisheries (i.e. all fisheries outside of the ETP large purse-seine fishery) than for tuna caught in the purportedly high-risk fishery (i.e. the ETP large purse-seine fishery). Because the amended tuna measure's objective of "ensuring that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins" is "absolute", there is no "acceptable" mortality or serious injury in the dolphin-safe information. Mexico argues that, in the light of the objectives of the amended tuna measure, any proposed calibration of the different risks by the measure clearly results in arbitrary and unjustifiable discrimination.

7.329. We recall that the analysis of whether discrimination is arbitrary or unjustifiable "should focus on the cause of the discrimination, or the rationale put forward to explain its existence".[991] Indeed, as the Appellate Body has explained, "[o]ne 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.[992] However, the relationship of the discrimination to the objective of a measure may not be the entire inquiry; depending on the nature of the measure at issue and the circumstances of the case at hand, there could be additional factors that may also be relevant to the overall assessment.[993]

7.330. In the circumstances of this dispute, we understand this jurisprudence to support, as relevant for an analysis of arbitrary or unjustifiable discrimination under the chapeau of Article XX, an assessment of whether the requirements of the amended tuna measure are calibrated to the likelihood that dolphins would be adversely affected in the course of tuna fishing operations in the respective conditions. According to the United States, any differences in the regulatory requirements of the amended tuna measure are justified by reference to the objective of dolphin protection because such differences reflect the differences in risks arising in different fisheries. Before the Panel, the United States advanced that rationale to explain why the different sets of requirements under the amended tuna measure do not mean that such measure is designed and applied in a manner constituting arbitrary or unjustifiable discrimination. For this reason, it was incumbent on the Panel to engage with that explanation, and any evidence about the design and application of the measure, in order to determine whether these sufficed to demonstrate that the measure is not designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination.

7.331. In its examination of the certification requirements under the chapeau of Article XX, the Panel again relied on reasoning and findings it had developed in the context of Article 2.1 of the TBT Agreement. In particular, the Panel noted its agreement with Mexico's claim that captains may not have the technical expertise necessary to certify accurately that no dolphins were killed or seriously injured in a particular set or gear deployment.[994] The Panel concluded that, to the extent that captains cannot be assumed to have the skills necessary to make an accurate dolphin-safe certification, this distinction makes it easier for tuna products containing non-dolphin-safe tuna caught other than by a large purse-seine vessel in the ETP to be incorrectly labelled as dolphin safe.[995] On that basis, the Panel found that the United States had not shown that the different

[988] United States' appellant's submission, para. 424 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 296).
[989] United States' appellant's submission, paras. 455-457.
[990] Mexico's appellee's submission, para. 212 (referring to section IV.B of its submission).
[991] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226 (referring to Appellate Body Reports, *US – Gasoline*; *US – Shrimp*; and *US – Shrimp (Article 21.5 – Malaysia)*).
[992] Appellate Body Reports, *EC – Seal Products*, para. 5.306.
[993] Appellate Body Reports, *EC – Seal Products*, para. 5.321.
[994] Panel Report, paras. 7.598-7.601.
[995] Panel Report, para. 7.602.

certification requirements do not impose arbitrary or unjustifiable discrimination.[996] The Panel further recalled its finding that the determination provisions are also inconsistent with Article 2.1 because the United States had not adequately explained how the fact that the relevant determinations are only possible in respect of certain fisheries is rationally connected to the objective pursued.[997] In its examination of the tracking and verification requirements, the Panel again relied on reasoning and findings it had developed in the context of Article 2.1 to conclude that the lesser burden placed on producers catching tuna other than in the ETP large purse-seine fishery, is not rationally related to the objective of the amended tuna measure.[998]

7.332. We recall that, in our assessment of the Panel's analysis of the certification and tracking and verification requirements under Article 2.1 of the TBT Agreement, we found that the Panel's segmented approach led it to overlook the manner in which these requirements, when viewed together with the substantive conditions that limit access to the dolphin-safe label, operate together to *further* the objectives of the amended tuna measure. We therefore considered that the Panel's decision to adopt a segmented analytical approach prevented it from properly applying the legal standard that it articulated. We also expressed our concern that the Panel's analysis was not clear as to whether it considered, in the context of the different certification requirements, that the risk profiles of the relevant fisheries giving rise to the different groups of tuna products are the *same* or *different*. Therefore, while the concept of different risk profiles affecting dolphins in the relevant fisheries seems to have played some part in the Panel's analysis, we did not see that such analysis encompassed consideration of the relative risks of harm to dolphins from different fishing techniques in different areas of the oceans, or of whether the distinctions that the amended tuna measures draws in terms of the different conditions of access to the dolphin-safe label are explained in the light of the relative risk profiles.[999] In respect of the Panel's analysis of the tracking and verification requirements, we observed that the Panel did not seek to identify the risk profiles inside and outside the ETP large purse-seine fishery, and that we were not convinced by the Panel's suggestion that it need not consider such risk profiles because these requirements relate only to circumstances occurring subsequent to the time of catch.[1000] We find that, because these criticisms concern aspects of the Panel's reasoning and findings that it also relied upon in the context of its analysis under the chapeau of Article XX, the Panel also erred in its assessment of the certification and tracking and verification requirements under the chapeau.

7.3.2.2.3 Conclusion

7.333. We have identified a number of errors of the Panel's analysis and ultimate findings under the chapeau of Article XX of the GATT 1994 concerning the eligibility criteria, certification requirements, and tracking and verification requirements. We do not consider that the Panel properly analysed whether the discrimination that exists is between countries where the same conditions prevail. Having examined the Panel's findings, we consider that, in this dispute, the prevailing conditions between countries are the risks of adverse effects on dolphins arising from tuna fishing practices, and that such conditions are the same for purposes of the analysis of the conformity of the amended tuna measure with the requirements of the chapeau.

7.334. With regard to whether the eligibility criteria resulted in arbitrary or unjustifiable discrimination, we consider that the Panel's analysis suffered from a similar failing to that arising in its analysis under Article 2.1 of the TBT Agreement, namely, that it categorically concluded that the disqualification of tuna products derived from tuna caught by setting on dolphins is a

[996] Panel Report, para. 7.603.
[997] Panel Report, para. 7.604.
[998] Panel Report, para. 7.610.
[999] We also addressed the United States' claims concerning the Panel's analysis of the determination provisions, but did not find a basis for legal error. In particular, we considered that the Panel did not improperly make the case for Mexico in respect of the determination provisions, and that the Panel did not err in focusing on how the determination provisions are designed, rather than on how they are applied.
[1000] We also addressed the United States' argument that any detrimental impact caused by the certification and tracking and verification requirements stems exclusively from a legitimate regulatory distinction because the parties to the AIDCP consented to impose a unique observer programme on their tuna industries. We noted that the amended tuna measure distinguishes between several categories of fisheries, but that the AIDCP certification and tracking and verification requirements apply only with respect to tuna caught in one of those categories, that is, in the ETP large purse-seine fishery. We noted, moreover, that the conditions that the amended tuna measure applies in respect of tuna caught in the ETP large purse-seine fishery are, in any event, not coextensive with those under the AIDCP, in particular because the AIDCP does not disqualify tuna caught by setting on dolphins from being eligible to be labelled "dolphin safe".

permissible regulatory distinction without conducting the inherently comparative exercise needed to determine under what circumstances such a distinction would be permissible. We also express several concerns in respect of the Panel's analysis of the certification and tracking and verification requirements, including the fact that the Panel did not properly identify the relative risk profiles in different fisheries that would have permitted the Panel to assess whether the regulatory distinctions in the amended tuna measure are, as argued by the United States, calibrated to the different risk profiles in different fisheries.

7.335. Furthermore, the fact that the Panel conducted a segmented and isolated analysis of the three sets of requirements under the amended tuna measure was also problematic in the context of an analysis under the chapeau of Article XX. Indeed, a conclusion that a particular element of the amended tuna measure results in arbitrary or unjustifiable discrimination because it is not balanced in relation to particular risk profiles in different fisheries may not be sustainable if other integral elements of the measure are also examined. This, in our view, underscores the importance of making an assessment of arbitrary or unjustifiable discrimination in respect of relevant elements of the measure, taking into account relevant interlinkages. For the foregoing reasons, we reverse the Panel's finding, in paragraph 8.5.a of the Panel Report, that the "eligibility criteria" are applied consistently with the chapeau of Article XX of the GATT 1994, as well as the Panel's discrete findings, in paragraphs 8.5.b and 8.5.c of the Panel Report, that the "certification requirements" and the "tracking and verification requirements" are each applied inconsistently with the chapeau of Article XX of the GATT 1994.

7.3.3 Completion of the legal analysis

7.336. Having reversed the findings made by the Panel under the GATT 1994, we now turn to consider whether we can complete the analysis and rule on whether the amended tuna measure is consistent with the United States' obligations under the GATT 1994. As we have noted, although completion of the legal analysis may assist in ensuring the prompt settlement and effective resolution of the dispute, the Appellate Body has completed the legal analysis only when sufficient factual findings by the panel and undisputed facts on the record have allowed it to do so.

7.3.3.1 Articles I:1 and III:4 of the GATT 1994

7.337. We begin with an assessment of the consistency of the amended tuna measure with Articles I:1 and III:4 of the GATT 1994. We observe that, referring to the Appellate Body reports in *EC – Seal Products*, the Panel set out the four elements that must be demonstrated in order to establish that a measure is inconsistent with Article I:1[1001], as well as the three elements required to establish inconsistency with Article III:4.[1002] Mexico and the United States both accept that the amended tuna measure satisfies all but the last of the relevant elements that must be shown to establish a violation of each provision.[1003] Thus, with respect to Article I:1, it remains for us to consider whether, under the amended tuna measure, the "advantage" of access to the dolphin-safe label that is granted to tuna products from other countries is "accorded immediately and unconditionally" to like Mexican tuna products. In considering this issue we also take note of, and agree with, the Panel's statement that the eligibility criteria and the different certification and tracking and verification requirements are "conditions" imposed upon the "advantage" of access to the dolphin-safe label.[1004] As for Article III:4, we must consider whether the treatment that the

[1001] The Panel explained that establishing inconsistency with Article I:1 entails demonstrating: (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. (Panel Report, para. 7.405 (referring to Appellate Body Reports, *EC – Seal Products*, para. 5.86))

[1002] The Panel explained that establishing inconsistency with Article III:4 entails demonstrating: (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. (Panel Report, para. 7.470 (referring to Appellate Body Reports, *EC – Seal Products*, para. 5.99))

[1003] Panel Report, paras. 7.424 and 7.496.

[1004] Panel Report, para. 7.442.

amended tuna measure accords to US tuna products is "less favourable" than that accorded to like Mexican tuna products.

7.338. Notwithstanding their textual differences, Articles I:1 and III:4 are both concerned with protecting expectations of equal competitive opportunities for like imported products, either upon importation or exportation, or within a Member's market.[1005] Thus, as the Panel correctly acknowledged[1006], in this dispute the inquiry that must be conducted under both provisions must focus on the question of whether the amended tuna measure modifies the conditions of competition in the US market to the detriment of Mexican tuna products vis-à-vis US tuna products or tuna products imported from any other country.[1007]

7.339. We recall that, in completing the legal analysis under Article 2.1 of the TBT Agreement, we addressed the question of whether the labelling conditions under the amended tuna measure, taken together, modify the conditions of competition to the detriment of Mexican tuna products in the US market.[1008] We noted that, in the original proceedings, the Appellate Body relied on the original panel's factual findings that, "as the practices of the US and Mexican tuna fleets currently stand, most tuna caught by Mexican vessels … 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 is potentially eligible for the label".[1009] We further took the view that the Panel's factual findings in these compliance proceedings do not go against those original findings. Indeed, we observed that the regulatory distinction between tuna products derived from tuna caught by setting on dolphins and tuna products derived from tuna caught by other fishing methods, which remains unchanged from the original tuna measure, "has the effect of denying" Mexican tuna products access to the dolphin-safe label.[1010] Further, we did not see any Panel findings or uncontested evidence on the record indicating that the positions of tuna products from the United States or other countries in terms of access to the dolphin-safe label have changed as a result of the certification and tracking and verification requirements introduced by the 2013 Final Rule for tuna products derived from tuna caught outside the ETP large purse-seine fishery. Finally, we noted the participants' agreement that the amended tuna measure modifies the conditions of competition to the detriment of Mexican tuna products in a manner similar to the original tuna measure.[1011] In the light of the above, we concluded that, by excluding most Mexican tuna products from access to the dolphin-safe label, while granting conditional access to such label to like products from the United States and other countries, the amended tuna measure modifies the conditions of competition to the detriment of Mexican tuna products.

7.340. In our view, the same considerations apply to the issue of whether the labelling conditions under the amended tuna measure, taken together, discriminate against Mexican tuna products in a manner inconsistent with Articles I:1 and III:4 of the GATT 1994. Accordingly, we find that, by excluding most Mexican tuna products from access to the dolphin-safe label, while granting conditional access to such label to like products from the United States and other countries, the amended tuna measure: (i) provides an "advantage, favour, privilege, or immunity" to tuna products from other countries that is not "accorded immediately and unconditionally" to like products from Mexico, and is therefore inconsistent with Article I:1 of the GATT 1994; and (ii) accords "less favourable treatment" to Mexican tuna products than that accorded to like domestic products, and is therefore inconsistent with Article III:4 of the GATT 1994.

7.3.3.2 Article XX of the GATT 1994

7.341. We now turn to address whether we can complete the legal analysis in respect of the defence of the United States under Article XX of the GATT 1994. A respondent seeking to justify its measure under this provision bears the burden of demonstrating that the measure qualifies under

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[1005] See Appellate Body Reports, *EC – Seal Products*, paras. 5.88 and 5.101.

[1006] See Panel Report, paras. 7.426 and 7.477.

[1007] See e.g. Appellate Body Reports, *EC – Seal Products*, paras. 5.88 and 5.101; *Thailand – Cigarettes (Philippines)*, para. 129; and *Korea – Various Measures on Beef*, para. 137.

[1008] See *supra*, paras. 7.234-7.238.

[1009] Appellate Body Report, *US – Tuna II (Mexico)*, para. 234 (quoting Original Panel Report, para. 7.317).

[1010] Panel Report, para. 7.447. See also para. 7.498.

[1011] See e.g. Mexico's first written submission to the Panel, paras. 223-227 and 231-232; and United States' appellant's submission, para. 329 (referring to Mexico's response to Panel question No. 57, paras. 146 and 155). See also Panel Report, paras. 7.115 and 7.446.

one of the subparagraphs of Article XX, and that it satisfies the requirements of the chapeau.[1012] As we noted, the Panel found that the features of the amended tuna measure that gave rise to violations of Articles I and III "relate to" the goal of conserving dolphins and, accordingly, are provisionally justified under Article XX(g).[1013] Neither participant has appealed this finding by the Panel.

7.342. Regarding the requirements of the chapeau, we focus first on whether the amended tuna measure entails arbitrary or unjustifiable discrimination. The Appellate Body has previously stated that a measure is applied in a manner constituting arbitrary or unjustifiable discrimination when the application of the measure results in discrimination between countries where the same conditions prevail, and such discrimination is arbitrary or unjustifiable.[1014] As we noted, the amended tuna measure excludes most Mexican tuna products from access to the dolphin-safe label by virtue of the disqualification of tuna caught by setting on dolphins, while granting conditional access to such label to tuna products from the United States and other countries. This difference in treatment arises due to the distinction drawn by the amended tuna measure between the treatment accorded to tuna products derived from tuna caught by setting on dolphins in the ETP large purse-seine fishery, and that accorded to tuna products derived from tuna caught by other fishing methods outside that fishery. We therefore consider that the relevant discrimination for purposes of the chapeau of Article XX is that consisting of the distinctions drawn in the measure between these different fishing methods in different areas of the oceans.[1015] As we also found above, the same conditions between countries prevail, namely, the risk of adverse effects on dolphins arising from tuna fishing practices.

7.343. We turn to consider whether the discrimination is arbitrary or unjustifiable. We recall that the analysis of whether discrimination is arbitrary or unjustifiable "should focus on the cause of the discrimination, or the rationale put forward to explain its existence".[1016] Indeed, as the Appellate Body has explained, "[o]ne 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".[1017] However, the relationship of the discrimination to the objective of the measure is not the sole test; depending on the nature of the measure at issue and the circumstances of the case at hand, there could be additional factors that may also be relevant to the overall assessment.[1018]

7.344. In examining the Panel's approach to analysing arbitrary or unjustifiable discrimination under the chapeau of Article XX, we considered relevant the question of whether the requirements of the amended tuna measure are calibrated to any differences in risks to dolphins inside and outside the ETP large purse-seine fishery. According to the United States, any differences in the regulatory requirements of the amended tuna measure are justified by reference to the objective of dolphin protection because such differences are calibrated to reflect the differences in risks in different fisheries.[1019] Given that the United States advanced that rationale to justify the existence of any discrimination in the regulatory requirements of its measure, we must examine that explanation, the design of the measure, as well as any factual findings or uncontested facts relating to its application in order to determine whether these demonstrate that the measure does not result in arbitrary or unjustifiable discrimination.[1020]

[1012] Appellate Body Report, *US – Gasoline*, pp. 22-23, DSR 1996:I, pp. 20-21.

[1013] Panel Report, para. 7.541. The Panel exercised judicial economy in respect of the United States' defence under subparagraph (b) of Article XX. (Ibid., para. 7.545)

[1014] Appellate Body Report, *US – Shrimp*, para. 150.

[1015] The Appellate Body has remarked that the nature and quality of the discrimination relevant under the chapeau is different from that in the treatment of products found to be inconsistent with one of the substantive obligations of the GATT 1994, but that this does not mean that the circumstances that 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. (Appellate Body Reports, *EC – Seal Products*, para. 5.298)

[1016] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226 (referring to Appellate Body Reports, *US – Gasoline*; *US – Shrimp*; and *US – Shrimp (Article 21.5 – Malaysia)*).

[1017] Appellate Body Reports, *EC – Seal Products*, para. 5.306.

[1018] Appellate Body Reports, *EC – Seal Products*, para. 5.321.

[1019] Appellate Body Report, *US – Tuna II (Mexico)*, para. 282.

[1020] Panel Report, para. 7.505.

7.345. We are mindful that there are both similarities and differences between the analyses under the chapeau of Article XX of the GATT 1994 and Article 2.1 of the TBT Agreement. In *EC – Seal Products*, the Appellate Body noted parallels between the two legal standards, in particular, the fact that the concepts of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" is found both in the chapeau of Article XX of the GATT 1994 and in the sixth recital of the preamble of the TBT Agreement.[1021] At the same time, the Appellate Body recognized differences between the analyses required under Article 2.1 and under the chapeau of Article XX, including the fact that the legal standards applicable under the two provisions differ.[1022]

7.346. In these Article 21.5 proceedings, the Panel examined the relationship between Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994.[1023] The Panel considered that, where a panel has found, in the context of Article 2.1, that a measure is not even-handed because it is applied in manner that would constitute a means of arbitrary or unjustifiable discrimination, it will generally be appropriate for that panel to use the reasoning underlying that finding in its analysis under the chapeau. The Panel noted the caution expressed by the Appellate Body in *EC – Seal Products*, and the fact that the Appellate Body faulted that panel for importing its analysis under Article 2.1 into its analysis under the chapeau of Article XX. According to the Panel, 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 in the context of the Article XX chapeau, but rather that it must justify the use of such findings. The Panel thus considered that nothing in the Appellate Body's reasoning precludes a panel from applying 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.

7.347. We agree that, so long as the similarities and differences between Article 2.1 of the TBT Agreement and Article XX of the GATT 1994 are taken into account, it may be permissible to rely on reasoning developed in the context of one agreement for purposes of conducting an analysis under the other. The Panel itself conducted its analyses under Article 2.1 and Article XX on the basis of a legal test developed in the context of assessing arbitrary or unjustifiable discrimination, namely, 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. We note, in this regard, that the United States has consistently maintained that any differences in treatment under the amended tuna measure are justified by reference to the objective of dolphin protection because such differences reflect the differences in, or are calibrated to, the risks arising in different fisheries.

7.348. Moreover, we previously recalled that, as compared to the original tuna measure, the 2013 Final Rule did not alter the disqualification from the dolphin-safe label for tuna products derived from tuna caught by setting on dolphins; rather, it introduced into the amended tuna measure additional requirements that apply exclusively outside the ETP large purse-seine fishery, the principal of which were the new requirements: (i) that captains certify in every area of the ocean, and irrespective of the fishing method used, that no dolphins were killed or seriously injured; and (ii) that all dolphin-safe tuna be segregated from non-dolphin safe tuna from the time of the catch through the entire processing chain.[1024] We further agreed with the Panel's view that the new provisions requiring certification of dolphin mortality or serious injury for all tuna products address the specific concern identified by the Appellate Body and "move[] the amended measure towards compliance with WTO law".[1025] Thus, to the extent that these requirements serve to enhance the capacity of the amended tuna measure to "address adverse effects on dolphins resulting from the use of fishing methods predominantly employed by fishing fleets supplying the United States' and

[1021] Appellate Body Reports, *EC – Seal Products*, para. 5.310 (referring to Appellate Body Reports, *US – Clove Cigarettes*, para. 173; and *US – Tuna II (Mexico)*, para. 213).

[1022] On that basis, the Appellate Body in *EC – Seal Products* found that the Panel erred in applying the same legal test to the chapeau of Article XX as it applied under Article 2.1 of the TBT Agreement. (Appellate Body Reports, *EC – Seal Products*, para. 5.313)

[1023] Panel Report, paras. 7.555-7.560. See also paras. 7.79-7.92.

[1024] As we noted, in fisheries other than the ETP large purse-seine fishery, the amended tuna measure also introduces an observer requirement in the event of a determination by the NMFS Assistant Administrator that observers are qualified and authorized to certify that there are "no dolphins killed or seriously injured", and, in the non-ETP purse-seine fishery, "no setting on dolphins", when such observers are already on board the vessel.

[1025] Panel Report, para. 7.141.

other countries' tuna producers"[1026] outside the ETP large purse-seine fishery, they may be said to respond to the "calibration" of the dolphin-safe labelling regime that the Appellate Body found was lacking in the original tuna measure. In assessing whether the amended tuna measure results in arbitrary or unjustifiable discrimination due to the manner in which it addresses the relative adverse effects on dolphins arising outside the ETP large purse-seine fishery as compared to those inside that fishery, it would be important to examine what Panel findings or undisputed evidence exists on the Panel record regarding the different risk profiles in these different fisheries.

7.349. As we observed in the context of our completion of the legal analysis under Article 2.1 of the TBT Agreement, both the United States and Mexico adduced considerable arguments and evidence in this dispute concerning the nature and scope of the relative harms to dolphins, both observed and unobserved, associated with different fishing methods. In our view, however, the Panel did not examine the *relative* observed harms associated with setting on dolphins in the ETP large purse-seine fishery versus other fishing practices outside that fishery. In fact, the Panel's analysis made clear that its conclusion rested solely on its finding that the *unobserved* harms differed between setting on dolphins and other fishing methods. This approach by the Panel was followed in its analysis under the chapeau of Article XX. In this context, the Panel reiterated its view that fishing methods other than setting on dolphins do not cause the same or similar unobserved harms as setting on dolphins.[1027]

7.350. As we explained, the limited scope of the Panel's conclusion is important in two respects. First, the disagreement between the parties regarding whether the amended tuna measure is properly calibrated rested on fundamentally different premises concerning the risk profiles associated with different fishing practices. The United States asserted that the risks associated with fishing practices other than setting on dolphins produced "nowhere near the observed dolphin mortality or serious injury that setting on dolphins does"[1028], whereas Mexico maintained that the observed mortality or serious injury from fishing practices other than setting on dolphins was "equal to or greater"[1029] than that associated with setting on dolphins. The parties also disagreed regarding the nature and extent of unobserved harms. The United States contended that tuna-dolphin association and related unobserved harms are unique to the ETP large purse-seine fishery[1030], whereas Mexico maintained that such association also occurs outside the ETP, and that unobserved harms also result from fishing methods other than setting on dolphins.[1031] By failing to consider the relative risks posed by different fishing methods in respect of *observed* mortality or serious injury, while focusing solely on the narrower difference in the respective risk profiles attributable to *unobserved* harms, the Panel never resolved the question of the overall levels of risk in the different fisheries, and how they compared to each other, notwithstanding that both parties had addressed such comparative risk profiles in their pleadings in support of their arguments regarding arbitrary or unjustifiable discrimination under the chapeau of Article XX. We note, in this regard, that, at the oral hearing in this appeal, both Mexico and the United States criticized the Panel for focusing on too narrow a range of harms and, in particular, for not dealing with the observed harms.

7.351. Second, arriving at a conclusion in respect of the *relative* risk profiles attributable to different fisheries, including both in respect of observed *and* unobserved harms, was, in our view, particularly important given that the very issue the Panel was seeking to address was whether the new requirements of the amended tuna measure, which apply exclusively to fisheries other than the ETP large purse-seine fishery, adequately address the risks of harm to dolphins arising in such fisheries. Moreover, the principal additional requirements – namely, that a captain must certify that there were no dolphins killed or seriously injured, and that documentary proof that tuna has been segregated into dolphin-safe and non-dolphin safe storage areas must be made available – both seek to enhance the manner in which the measure addresses the risks of observed mortality or serious injury outside the ETP large purse-seine fishery. Yet, the Panel never sought to compare the *relative* harms in respect of *observed* mortality or serious injury. Instead, the Panel reached a conclusion only on the basis of a comparative assessment of *unobserved* harms. On the basis of the foregoing concerns, we do not consider that the Panel put itself in a position to conduct an

[1026] Appellate Body Report, *US – Tuna II (Mexico)*, para. 292.
[1027] Panel Report, para. 7.581.
[1028] United States' second written submission to the Panel, para. 201. See also United States' first written submission to the Panel, para. 236.
[1029] Mexico's first written submission to the Panel, paras. 13, 263, 248, and 306.
[1030] United States' first written submission to the Panel, paras. 85 and 338-339.
[1031] Mexico's first written submission to the Panel, para. 248.

assessment of whether the amended tuna measure is even-handed in addressing the respective risk profiles of setting on dolphins in the ETP large purse-seine fishery versus other fishing methods outside that fishery.

7.352. In our completion of the legal analysis under Article 2.1 of the TBT Agreement, we noted some additional considerations regarding the assessment of different risk profiles that are also relevant here. Noting that the original tuna measure did not require any certification outside the ETP regarding dolphin mortality or serious injury, we recalled the Appellate Body's conclusion that, while the original tuna measure fully addressed the adverse effects on dolphins resulting from setting on dolphins in the ETP, it did "not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP".[1032] We noted that, in these circumstances, it was reasonable to consider that, irrespective of any differences in the relative risks, the original tuna measure did not address the incidence of harms arising from practices other than setting on dolphins. The Appellate Body stated that, "*even accepting* that the fishing technique of setting on dolphins is particularly harmful to dolphins", it was not persuaded that the measure is even-handed as argued by the United States.[1033] We observed, however, that, in these Article 21.5 proceedings, the question as to the relative risks associated with different fishing practices in different areas of the oceans has become more acute. Given that the amended tuna measure introduced a requirement outside the ETP large purse-seine fishery that captains certify that no dolphins were killed or seriously injured, and that, for that purpose, segregation of dolphin-safe and non-dolphin-safe tuna must be maintained, the exercise of gauging whether these new requirements are sufficient to address the risks posed to dolphins outside the ETP large purse-seine fishery requires a more thorough understanding of the relative risk profiles inside and outside that fishery. Moreover, as we have noted, the parties presented conflicting accounts, supported by considerable arguments and evidence, as to why the relative risks of observed mortality or serious injury do or do not justify the differences in regulatory treatment inside and outside the ETP large purse-seine fishery provided for under the amended tuna measure.

7.353. Although we did not discount the difficulty associated with making such an assessment of the respective risks, particularly in the light of the highly contested evidence adduced by the parties, we considered that the Panel's limited analysis did not permit it to gauge properly the overall relative risks or levels of harm arising in different fisheries. In the absence of a proper assessment by the Panel of the relative risks existing inside and outside the ETP large purse-seine fishery, the Panel limited its ability to determine whether the discriminatory aspects of the amended tuna measure can be explained as being properly tailored to, or commensurate with, the differences in such risks in the light of the objective of protecting dolphins from adverse effects arising in different fisheries. For similar reasons, the Panel's limited analysis in respect of the relative risk profiles in turn constrains our ability to complete the legal analysis in this regard.

7.354. In completing the legal analysis under Article 2.1 of the TBT Agreement, we went on to examine other features of the amended tuna measure that are not dependent on an assessment of the relative risks associated with different fishing methods in different areas of the oceans. In particular, we examined the determination provisions, which provide that, outside the ETP large purse-seine fishery, a requirement to provide certifications by observers may be triggered in scenarios where the risks of harm to dolphins in the form of mortality or serious injury would be comparably high to those existing in the ETP large purse-seine fishery. We recalled, in that context, the Panel's finding that the determination provisions are "an integral part" of the "certification system" under the US dolphin-safe labelling regime.[1034] Depending on the category of fishery concerned, when certain determinations have been made by the NMFS Assistant Administrator, then, in addition to the required captain certification(s), the amended tuna measure also conditions access to the dolphin-safe label on the provision of a certification by a qualified and approved observer in respect of the conditions, where applicable, of "no setting on dolphins" and "no dolphins killed or seriously injured". In particular, such observer certification is required if the NMFS Assistant Administrator has made a determination for a specific fishery: (i) within the non-ETP purse-seine fishery, that there is a regular and significant tuna-dolphin association,

[1032] Appellate Body Report, *US – Tuna II (Mexico)*, para. 297 (quoting Original Panel Report, para. 7.544).
[1033] Appellate Body Report, *US – Tuna II (Mexico)*, para. 297. (emphasis added)
[1034] Panel Report, para. 7.257.

similar to the tuna-dolphin association in the ETP; or (ii) within "all other fisheries"[1035], that there is a regular and significant mortality or serious injury of dolphins.[1036]

7.355. Like the Panel, however, we also observed that the determination provisions leave a "gap", in that they do not appear to address other scenarios in which there may be heightened risks of harm to dolphins associated with particular fishing methods outside the ETP large purse-seine fishery.[1037] As noted, the determination provision applicable to the non-ETP purse-seine fishery allows for the addition of a requirement for observer certification when there is a determination of "regular and significant association", but does not provide for a determination of "regular and significant mortality or serious injury" to be made or to trigger a requirement for observer certification in that fishery.[1038] This is difficult to explain given that an observer certification is required in the ETP large purse-seine fishery, and that such a determination on the basis of "regular and significant mortality or serious injury" can be made pursuant to the other relevant determination provision, which is applicable to "all other fisheries".[1039] In our view, this discrimination between the requirements applicable inside and outside the ETP large purse-seine fishery in instances where the harms to dolphins are similar is difficult to reconcile with the objective of protecting dolphins from harm. We recalled, in this regard, the Panel's finding that captains, in comparison to observers, do not necessarily and always have the technical skills required to certify that no dolphins were killed or seriously injured.[1040]

7.356. In that context, we also did not consider convincing the explanations of the United States as to why this determination provision accounts for regular and significant association, but not for regular and significant mortality or serious injury. In particular, we expressed the concern that requiring purse-seine vessels to certify that they have not engaged in setting on dolphins due to the presence of regular and significant association does not address the risks that had been identified by the Appellate Body concerning the use by such vessels of other fishing methods, such as using FADs.[1041] Moreover, the amended tuna measure contemplates the existence of risks of mortality or serious injury in the absence of setting on dolphins, given that the determination provision linked to regular and significant mortality or serious injury applies in "all other fisheries" existing both inside and outside the ETP. We saw no reason that this determination provision should be designed to prevent the possibility of triggering the addition of an observer requirement for non-setting on activities in the non-ETP purse-seine fishery, when such a requirement already exists for non-setting on activities in the ETP large purse-seine fishery and, upon a determination, in "all other fisheries". Moreover, this seemed of special relevance given the Appellate Body's statement that, although adding an observer certification that no dolphins were killed or seriously injured may not be the only way for the United States to calibrate its dolphin-safe labelling provisions to the risks of fishing methods other than setting on dolphins in the ETP large purse-seine fishery, "such a requirement may be appropriate in circumstances in which dolphins face higher risks of mortality or serious injury."[1042]

7.357. As for the determination provision that applies in "all other fisheries", we see some merit in the United States' contention that the more relevant consideration in respect of a tuna-dolphin association is whether there is a vessel that is capable of intentionally targeting and taking advantage of that association, and which would thereby produce the observed and unobserved harms to dolphins that are linked to the fishing method of setting on dolphins. Like the United States, we recognize that the fisheries to which this determination provision applies do not concern the operation of large purse-seine vessels, which are the only vessels that are recognized

[1035] We recall that the category of "all other fisheries" includes non-purse-seine vessels in any fishery and small purse-seine vessels in the ETP.

[1036] We further noted that the amended tuna measure also provides, in fisheries other than the ETP large purse-seine fishery, for an observer certification where observers are determined by the NMFS Assistant Administrator to be qualified and authorized to certify that there are "no dolphins killed or seriously injured", and, for non-ETP purse-seine vessels, "no setting on dolphins", and such observers are already on board the vessel for other reasons.

[1037] Panel Report, para. 7.263. As the Panel explained, by virtue of the determination provisions, "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." (Ibid.)

[1038] Section 1385(d)(1)(B)(i) of the DPCIA; Section 216.91(a)(2)(i) of the implementing regulations.

[1039] Section 1385(d)(1)(D) of the DPCIA; Section 216.91(a)(4)(iii) of the implementing regulations.

[1040] Panel Report, para. 7.233.

[1041] Appellate Body Report, *US – Tuna II (Mexico)*, para. 292.

[1042] Appellate Body Report, *US – Tuna II (Mexico)*, fn 612 to para. 296.

as capable of setting on dolphins. At the same time, we also take note of the Panel's view that, wherever dolphins associate with tuna, "they are more likely to interact with tuna fishing gear, even if such interaction is accidental or unintentional".[1043] For this reason, the Panel considered that, even for fishing methods that do not deliberately target the association of dolphins with tuna, "the risk of mortality or serious injury is necessarily heightened"[1044] where there is association and that, accordingly, "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".[1045] It is also not clear to us whether the association of dolphins and tuna necessarily heightens the risk to dolphins from non-purse-seine fishing methods, nor whether any such heightened risk could be fully addressed by a determination that there is "regular and significant mortality or serious injury". To the extent that there may in fact be a heightened risk to dolphins due to association, comparable to that existing in the ETP large purse-seine fishery, even where the fishing methods employed are not capable of setting on dolphins, and that such risks could not be addressed by a determination of "regular or significant mortality or serious injury", we would consider this to be relevant to an assessment of the even-handedness of the amended tuna measure.

7.358. Finally, we note that our analysis regarding the determination provisions is premised on the existence of risks outside the ETP large purse-seine fishery that are comparably high to the risks existing in the ETP large purse-seine fishery.[1046] As the Panel explained, the determination provisions "appear to be designed to enable the United States to impose conditions on fisheries other than the ETP large purse seine fishery where the conditions in the former approach those of the latter".[1047] We recall from our discussion of the measure at issue that there are differences between the documentation requirements existing inside and outside the ETP large purse-seine fishery in respect of segregation.[1048] We also recall that the Panel found that the differences in the tracking and verification requirements are such that there are differences in the depth, accuracy, and degree of government oversight that is legally required under the amended tuna measure with respect to tuna products derived from tuna caught in the ETP large purse-seine fishery, on the one hand, and from tuna caught in all fisheries other than the ETP large purse-seine fishery, on the other hand.[1049] In such circumstances, we would expect that any determination outside the ETP large purse-seine fishery would entail not only the heightened certification requirements, but also tracking and verification requirements that work together with and reinforce certification in addressing this heightened risk.

7.359. In conclusion, in the absence of a proper assessment by the Panel of the respective risks posed to dolphins inside and outside the ETP large purse-seine fishery, we are unable to complete the legal analysis and assess fully whether all of the regulatory distinctions drawn under the

[1043] Panel Report, para. 7.261. According to the Panel, "the more dolphins there are in the vicinity, the more likely [it is] that one or more dolphins will be killed or seriously injured." (Ibid.)

[1044] Panel Report, para. 7.261.

[1045] Panel Report, para. 7.262.

[1046] We note that the determination provisions may also aim at addressing situations where the risks to dolphins are comparably high to those associated with the other fishing method that is disqualified from access to the dolphin-safe label, namely, large-scale driftnet fishing in the high seas.

[1047] Panel Report, para. 7.263. The panelist who wrote a separate opinion also cited the determination provisions as an example of where the amended tuna measure "enable[s] the United States to impose the same requirements in fisheries where the same degree of risk prevails". (Ibid., para. 7.280)

[1048] We noted in our discussion of the measure at issue that the regime for segregation of tuna caught in the ETP large purse-seine fishery is supported by documentary requirements consisting of separate TTFs, one of which is used to record information regarding each dolphin-safe tuna set, and another to record the same information in respect of non-dolphin-safe sets. All tuna caught by US-flagged large purse-seine vessels fishing in the ETP must be accompanied by these TTFs, and importers of tuna or tuna products containing tuna caught by non-US-flagged ETP large purse-seine vessels must provide the TTF numbers when submitting the required import documents. Moreover, the TTFs or TTF numbers accompany the relevant tuna from the time of catch throughout the fishing and production process. We further noted that all fisheries outside the ETP large purse-seine fishery are required to segregate dolphin-safe and non-dolphin-safe tuna from the time of the catch through the entire processing chain.

[1049] The Panel found, for example, that, for tuna products derived from tuna caught in the ETP large purse-seine fishery, the tuna can be traced back to the particular set in which the tuna was caught and the well in which it was stored, but for tuna products containing tuna caught in other fisheries, the tuna can only be traced back to the vessel and trip on which it was caught. The Panel also highlighted the absence of a mechanism, in respect of tuna caught outside the ETP large purse-seine fishery, to ensure that a particular certification matches and remains attached to a specific batch of tuna throughout the production process. (Panel Report, paras. 7.354-7.368)

amended tuna measure can be explained and justified in the light of differences in the relative risks associated with different methods of fishing for tuna in different areas of the oceans. Nevertheless, we have been able to examine whether or not the labelling conditions applied under the amended tuna measure constitute arbitrary or unjustifiable discrimination in certain scenarios that would present comparably high risks to dolphins inside and outside the ETP large purse-seine fishery. We find, in this respect, that aspects of the design of the amended tuna measure are difficult to reconcile with the objective of protecting dolphins from harm. In particular, we consider that the determination provisions do not provide for the substantive conditions of access to the dolphin-safe label to be reinforced by observer certification in all circumstances of comparably high risk, and that this may also entail different tracking and verification requirements than those that apply inside the ETP large purse-seine fishery. Thus, the United States has not demonstrated that these aspects of the amended tuna measure do not constitute arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX. For all of these reasons, it has not been established that the amended tuna measure is justified under Article XX of the GATT 1994.

7.360. Consequently, in addition to finding that the amended tuna measure is inconsistent with Article I:1, and with Article III:4, of the GATT 1994, we find that it has not been demonstrated that the amended tuna measure is applied in a manner that does not constitute arbitrary or unjustifiable discrimination; and, thus, that the amended tuna measure is not justified under Article XX of the GATT 1994.

8 FINDINGS AND CONCLUSIONS

8.1. For the reasons set out in this Report, the Appellate Body:

a. with respect to Article 2.1 of the TBT Agreement:

i. finds that the Panel erred in the application of Article 2.1 in its analysis of whether the amended tuna measure modifies the conditions of competition to the detriment of Mexican tuna products in the US market;

ii. finds that the United States has not established that the Panel erred in its articulation of the relevant legal standard for the purposes of assessing whether the detrimental impact of the amended tuna measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction;

iii. finds that the Panel erred in finding that, in the original proceedings, the Appellate Body settled the issue of whether the eligibility criteria are even-handed;

iv. finds that the Panel erred in the application of Article 2.1 in its analysis of whether the detrimental impact of the certification requirements and the tracking and verification requirements on Mexican tuna products stems exclusively from a legitimate regulatory distinction;

v. finds that the United States has not established that the Panel erred in its assessment of whether the determination provisions are even-handed;

vi. finds that neither Mexico nor the United States has established that the Panel acted inconsistently with its duty to conduct an objective assessment of the matter pursuant to Article 11 of the DSU in its analyses of the consistency of the eligibility criteria and the certification requirements with Article 2.1 of the TBT Agreement;

vii. reverses the Panel's finding, in paragraph 8.2.a of its Report, that the eligibility criteria do not accord less favourable treatment to Mexican 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, as well as the Panel's discrete findings, in paragraphs 8.2.b and 8.2.c of its Report, that the different certification requirements and the different tracking and verification requirements each accord less favourable treatment to Mexican 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; and

viii. completes the legal analysis and finds: that the amended tuna measure modifies the conditions of competition to the detriment of Mexican tuna products in the US market; that such detrimental impact does not stem exclusively from a legitimate regulatory distinction; and, thus, that the amended tuna measure accords less favourable treatment to Mexican tuna products as compared to like tuna products from the United States and other countries and is therefore inconsistent with Article 2.1 of the TBT Agreement;

b. with respect to Articles I:1 and III:4 of the GATT 1994:

i. finds that the Panel erred in the application of Articles I:1 and III:4 in its analyses of whether the amended tuna measure provides an "advantage, favour, privilege, or immunity" to tuna products from other countries that is not "accorded immediately and unconditionally" to like products from Mexico, in a manner inconsistent with Article I:1 of the GATT 1994, and of whether that measure accords less favourable treatment to Mexican tuna products than that accorded to like domestic products, in a manner inconsistent with Article III:4 of the GATT 1994; and

ii. reverses the Panel's discrete findings, in paragraph 8.3 of its Report, that the eligibility criteria, the different certification requirements, and the different tracking and verification requirements are each inconsistent with Articles I:1 and III:4 of the GATT 1994;

c. with respect to the chapeau of Article XX of the GATT 1994:

i. finds that the Panel erred in the application of the chapeau of Article XX in its analyses of whether the eligibility criteria, the different certification requirements, and the different tracking and verification requirements are each applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail; and

ii. reverses the Panel's finding, in paragraph 8.5.a of its Report, that the eligibility criteria are applied in a manner that meets the requirements of the chapeau of Article XX, as well as the Panel's discrete findings, in paragraphs 8.5.b and 8.5.c of its Report, that the different certification requirements and the different tracking and verification requirements are each applied in a manner that does not meet the requirements of the chapeau of Article XX; and

d. in completing the analysis under the GATT 1994:

i. finds that the amended tuna measure is inconsistent with Article I:1, and with Article III:4, of the GATT 1994; and

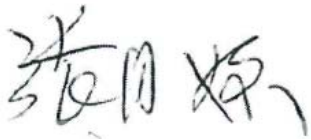
ii. finds that it has not been demonstrated that the amended tuna measure is applied in a manner that does not constitute arbitrary or unjustifiable discrimination and, thus, that the amended tuna measure is not justified under Article XX of the GATT 1994.

8.2. The Appellate Body concludes that the United States has not brought its dolphin-safe labelling regime for tuna products into conformity with the recommendations and rulings of the DSB. The Appellate Body recommends that the DSB request the United States to bring its measure, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the TBT Agreement and the GATT 1994, into conformity with its obligations under those agreements.

Signed in the original in Geneva this 2nd day of November 2015 by:

_____
Shree Baboo Chekitan Servansing
Presiding Member

_____
Ujal Singh Bhatia
Member



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Yuejiao Zhang
Member

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WORLD TRADE ORGANIZATION

WT/DS381/AB/RW/Add.1

20 November 2015

(15-6161)

Page: 1/45

Original: English

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

AB-2015-6

Report of the Appellate Body

Addendum

This Addendum contains Annexes A to D to the Report of the Appellate Body circulated as document WT/DS381/AB/RW.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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LIST OF ANNEXES

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ANNEX A

NOTICES OF APPEAL AND OTHER APPEAL

ANNEX A-1

UNITED STATES' NOTICE OF APPEAL*

1. Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and to Rule 20 of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products: Recourse to Article 21.5 of the DSU by Mexico* (WT/DS381/RW) ("Panel Report") and certain legal interpretations developed by the Panel.

2. The United States seeks review by the Appellate Body of the Panel's findings and conclusion that the amended U.S. dolphin safe labeling measure is inconsistent with Article 2.1 of the *Agreement on Technical Barriers to Trade* (the "TBT Agreement") because it accords less favorable treatment to Mexico's tuna and tuna product exports.[1] This conclusion is in error and is based on erroneous findings on issues of law and legal interpretations, including:

(a) the Panel's finding that the certification requirements of the amended measure modify the conditions of competition in the U.S. market to the detriment of like Mexican tuna and tuna products because they impose a lighter burden on tuna and tuna product caught outside the Eastern Tropical Pacific (ETP) large purse seine fishery than on tuna and tuna product caught within it.[2]

(b) the Panel's finding that the detrimental impact caused by the certification requirements does not stem exclusively from legitimate regulatory distinctions because the requirements for tuna caught outside the ETP large purse seine fishery may result in inaccurate information being passed to consumers.[3]

(c) the Panel's finding that the detrimental impact caused by the certification requirements does not stem exclusively from legitimate regulatory distinctions due to the design of the determination provisions.[4]

(d) the Panel's finding that the tracking and verification requirements of the amended measure modify the conditions of competition in the U.S. market to the detriment of like Mexican tuna and tuna products because they impose a lesser burden on tuna and tuna product caught outside the ETP large purse seine fishery than on tuna and tuna product caught within it.[5]

(e) the Panel's finding that the detrimental impact caused by the tracking and verification requirements does not stem exclusively from legitimate regulatory distinctions.[6]

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* This Notice, dated 5 June 2015, was circulated to Members as document WT/DS381/24.

[1] *See, e.g.*, Panel Report, paras. 7.233, 7.263, 8.2(b) (with respect to the certification requirements); *id.* paras. 7.400, 8.2(c) (with respect to the tracking and verification requirements).

[2] *See, e.g.,* Panel Report, paras. 7.162, 7.170, 7.178-179, 7.454, 7.500, 8.2(b). The United States considers that the Panel erred as a matter of law with respect to this finding. However, to the extent that the Appellate Body considers the question of the meaning of municipal law in this instance to be a question of fact, the Panel acted inconsistently with Article 11 of the DSU in concluding that the certification requirements apply to ***all*** tuna and tuna product.

[3] *See e.g.*, Panel Report, paras. 7.233-7.234, 7.246, 7.598-7.602, 8.2(b).

[4] *See e.g.*, Panel Report, paras. 7.258-263, 7.283, 8.2(b).

[5] *See, e.g.*, Panel Report, paras. 7.369-7.372, 7.382, 7.462-7.463, 7.502, 8.2(c). The United States considers that the Panel erred as a matter of law with respect to this finding. However, to the extent that the Appellate Body considers the question of the meaning of municipal law in this instance to be a question of fact, the Panel acted inconsistently with Article 11 of the DSU in concluding that the tracking and verification requirements apply to ***all*** tuna and tuna product.

[6] *See, e.g.*, Panel Report, paras. 7.392, 7.395, 7.397-7.402, 8.2(c).

3. The United States also seeks review by the Appellate Body of the Panel's findings and conclusions that the amended U.S. dolphin safe labeling measure is inconsistent with Articles I:1 and III:4 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994")[7] and, if the Appellate Body should not reverse the Panel's finding with respect to either Article I:1 or Article III:4, then the United States seeks review of the Panel's findings that the amended measure is not applied consistently with the Article XX chapeau.[8] These conclusions are in error and are based on erroneous findings on issues of law and legal interpretations, including:

(a) the Panel's finding that the certification requirements of the amended measure are inconsistent with Article I:1 of the GATT 1994 because they require observer coverage for purse seine vessels in the ETP but not for vessels in other fisheries.[9]

(b) the Panel's finding that the tracking and verification requirements of the amended measure are inconsistent with Article I:1 of the GATT 1994 because they impose a lesser burden on vessels outside the ETP large purse seine fishery than on vessels within it.[10]

(c) the Panel's finding that the certification requirements of the amended measure are inconsistent with Article III:4 of the GATT 1994 because they impose a lighter burden on tuna caught outside the ETP large purse seine fishery than inside it.[11]

(d) the Panel's finding that the tracking and verification requirements of the amended measure are inconsistent with Article III:4 of the GATT 1994 because they impose a lighter burden on tuna caught outside the ETP large purse seine fishery than inside it.[12]

(e) the Panel's finding that the certification requirements of the amended measure impose "arbitrary and unjustifiable discrimination between countries where the same conditions prevail," contrary to the chapeau of Article XX of the GATT 1994, because the requirements for tuna and tuna product caught outside the ETP large purse seine fishery make it easier for non-dolphin-safe tuna to be incorrectly labeled as dolphin safe.[13]

(f) the Panel's finding that the certification requirements of the amended measure impose "arbitrary and unjustifiable discrimination between countries where the same conditions prevail," contrary to the chapeau of Article XX of the GATT 1994, due to the design of the determination provisions.[14]

(g) the Panel's finding that the tracking and verification requirements impose "arbitrary and unjustifiable discrimination between countries where the same conditions prevail" contrary to the chapeau of Article XX of the GATT 1994 because they impose a lesser burden on tuna caught other than in the ETP large purse seine fishery.[15]

4. The United States also requests the Appellate Body to find that the Panel failed to make an objective assessment of the matter before it, as called for by Article 11 of the DSU, with regard to the so-called "determination provisions."[16] The Panel drew its conclusions with regard to these

[7] *See, e.g.*, Panel Report paras. 7.455-456, 7.500-7.501, 7.504, 8.3(b) (with respect to the certification requirements); *id.* paras. 7.464-465, 7.502-7.504, 8.3(c) (with respect to the tracking and verification requirements).

[8] *See, e.g.*, Panel Report, paras. 7.603-7.605, 8.5(b) (with respect to the certification requirements); *id.* paras. 7.611, 8.5(c) (with respect to the tracking and verification requirements).

[9] *See, e.g.*, Panel Report, paras. 7.455-7.456, 8.3(b).

[10] *See, e.g.*, Panel Report, paras. 7.463-7.465, 8.3(c).

[11] *See, e.g.*, Panel Report, paras. 7.500-7.501, 8.3(b).

[12] *See, e.g.*, Panel Report, paras. 7.502-7.503, 8.3(c).

[13] *See, e.g.*, Panel Report, paras. 7.598-7.603, 7.605, 8.5(b).

[14] *See, e.g.*, Panel Report, paras. 7.604-7.605, 7.607, 8.5(b).

[15] *See, e.g.*, Panel Report, paras. 7.610-7.611, 8.5(c).

[16] *See* Panel Report, paras. 7.258-7.263, 7.604.

provisions based on factual findings that were without a sufficient evidentiary basis, without assessing the totality of the evidence, and without adequate explanation.[17]

5. In the event that Mexico appeals the finding by the Panel that the amended measure, including the three challenged elements, is provisionally justified under subparagraph (g) of Article XX of the GATT 1994 and the Appellate Body reverses the finding with respect to any of the three challenged elements, the United States seeks review of the Panel's exercise of judicial economy with respect to the U.S. defense under Article XX(b) of the GATT 1994.[18] The United States submits that there are sufficient facts on the record for the Appellate Body to complete the analysis of the amended measure, including the three challenged elements, and find that the measure is provisionally justified under Article XX(b).

[17] *See, e.g.*, Panel Report, paras. 7.258-7.263, 7.604.
[18] *See* Panel Report, paras. 7.543-7.545.

ANNEX A-2

MEXICO'S NOTICE OF OTHER APPEAL*

1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and Rule 23(1) of the *Working Procedures for Appellate Review*, the United Mexican States (Mexico) hereby notifies its decision to appeal to the Appellate Body certain issues of law and certain legal interpretations developed by the Panel in *Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Recourse to Article 21.5 of the DSU by Mexico)* (WT/DS386/RW) (Panel Report).

2. Pursuant to Rules 23(1) and 23(3) of the *Working Procedures for Appellate Review*, Mexico is simultaneously filing this Notice of Other Appeal and its Other Appellant Submission with the Appellate Body Secretariat.

3. The measure at issue in this dispute concerns the amended tuna measure which comprises: (i) Section 1385 ("Dolphin Protection Consumer Information Act") (DPCIA), as contained in Subchapter II ("Conservation and Protection of Marine Mammals") of Chapter 31 ("Marine Mammal Protection"), in Title 16 of the U.S. Code; (ii) U.S. Code of Federal Regulations, Title 50, Part 216, Subpart H ("Dolphin Safe Tuna Labeling"), as amended by the 2013 Final Rule; and (iii) the court ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007).

4. Pursuant to Rule 23(2)(c)(ii) of the *Working Procedures for Appellate Review*, this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Mexico's ability to refer to other paragraphs of the Panel Report in the context of this appeal.

I. The Panel Erred in Finding and Concluding that Specific Requirements under the Amended Tuna Measure were Inconsistent with WTO Provisions Rather than the Measure as a Whole

5. Mexico seeks review by the Appellate Body of, and requests the Appellate Body to modify, the findings and conclusions of the Panel that only two of the three elements of the amended tuna measure are inconsistent with Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement) and Articles I:1 and III:4 of the General Agreement on Tariffs and Trade 1994 (GATT 1994).

6. While Mexico agrees with some of the reasoning and findings in the Panel's Report, the Panel should have explicitly concluded that the amended tuna measure as a whole is inconsistent with those provisions rather than limiting its ruling to specific elements.

7. The Panel should have concluded that the amended tuna measure as a whole is inconsistent with Articles 2.1 of the TBT Agreement, I:1 and III:4 of the GATT 1994 and, in the case of the GATT 1994, the inconsistencies were not justifiable under Article XX. The Panel's failure to do so is a legal error.[1]

II. The Panel Erred in its Findings Regarding the Fishing Method Eligibility Criteria when Assessing the Consistency of the Amended Tuna Measure with Article 2.1 of the TBT Agreement

8. Mexico seeks review by the Appellate Body of, and requests the Appellate Body to reverse, the findings and conclusion of the Panel, with respect to the fishing method eligibility criteria when assessing the consistency of the amended tuna measure with Article 2.1 of the TBT Agreement.

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* This document, dated 10 June 2015, was circulated to Members as document WT/DS381/25.

[1] The Panel's errors in law are contained, *inter alia*, in paragraphs 7.97-7.108, 7.179, 7.233, 7.246, 7.258-7.259, 7.283, 7.382, 7.400, 7.428, 7.430, 7.442, 7.451, 7.455-7.456, 7.464-7.465, 7.492, 7.501, 7.503, 7.504, 7.541, 7.605, 7.607, 7.611, 8.2(b), 8.2(c), 8.3(b), 8.3(c), 8.5(b), 8.5(c) of the Panel Report.

The Panel's conclusion is an error and is based on erroneous findings on issues of law and legal interpretation.[2]

9. Particularly, the Panel erred in finding that the Appellate Body previously ruled on this issue. It further erred in finding that the eligibility criteria were applied in an even-handed manner. Instead, it should have found that the eligibility criteria lacked even-handedness and, therefore, by virtue of the eligibility criteria, the detrimental impact of the amended tuna measure does not stem exclusively from a legitimate regulatory distinction.

10. Mexico also requests the Appellate Body to find that the panel failed to make an objective assessment of the matter before it in accordance with Article 11 of the DSU in relation to the following factual findings: (i) changing its factual findings regarding unobserved adverse effects for dolphin sets from the original proceedings without any new evidence to support such a change; (ii) finding that other fishing methods have no unobservable adverse effects and omitting consideration of contrary evidence on the record; and (iii) finding that the Appellate Body found that dolphin sets are particularly more harmful to dolphins than other fishing methods when no such finding was made by the Appellate Body.[3]

11. As a result of these errors, Mexico requests that the Appellate Body modify the reasoning of the Panel, reverse the Panel's finding that the eligibility criteria are applied in an even-handed manner and find, instead, that by virtue of the eligibility criteria, the detrimental impact of the amended tuna measure does not stem exclusively from a legitimate regulatory distinction and, for this additional reason, the amended tuna measure is inconsistent with Article 2.1.

III. The Panel Erred in its Findings Regarding Independent Observers under the Certification Requirements when Assessing the Consistency of the Amended Tuna Measure with Article 2.1 of the TBT Agreement

12. Mexico seeks review by the Appellate Body of, and requests the Appellate Body to reverse, the findings and conclusions of the Panel, with respect to the findings regarding independent observers under the certification requirements when assessing the consistency of the amended tuna measure with Article 2.1 of the TBT Agreement. This conclusion is an error and is based on erroneous findings on issues on law and legal interpretation.[4]

13. Particularly, the Panel erred by not finding that (i) in respect of dolphin-safe certifications, captains in some cases may have an economic conflict of interest, making their certifications less reliable, and (ii) the justification for differing requirements provided by the United States that circumstances in the Eastern Tropical Pacific (ETP) are unique is in fact contradicted by evidence that tuna associate with dolphins in other ocean regions, in particular the Indian Ocean. Mexico requests the Appellate Body to find that the Panel failed to make an objective assessment of the facts, as required by Article 11 of the DSU, with respect to these findings.

14. As a result of these errors, Mexico requests that the Appellate Body modify the reasoning of the Panel and find, for the additional reasons that dolphin sets are made outside of the ETP and captains' self-certifications create gaps in the dolphin-safe designation, that the certification requirements are not applied in an even-handed manner, and accordingly, the detrimental impact of the amended tuna measure does not stem exclusively from a legitimate regulatory distinction, and for this additional reason the amended tuna measure is inconsistent with Article 2.1.

IV. The Panel Erred in its Findings Regarding the Eligibility Criteria when Assessing the Consistency of the Amended Tuna Measure under the Chapeau of Article XX

15. Mexico seeks review by the Appellate Body of, and requests the Appellate Body to reverse, the findings and conclusions of the Panel, with respect to the findings regarding the eligibility criteria when assessing the consistency of the amended tuna measure under the chapeau of

[2] The Panel's errors in law are contained, *inter alia*, in paragraphs 7.117-7.134 and 8.2(a) of the Panel Report.

[3] The Panel's errors in law are contained, *inter alia*, in paragraphs 7.130, 7.135, 7.120, 7.130, 7.132, 7.134 and 7.135 of the Panel Report.

[4] The Panel's errors in law are contained, *inter alia*, in paragraphs 7.208-7.211, 7.241-7.242 and 7.595-7.597 of the Panel Report.

Article XX of the GATT 1994. This conclusion is an error and is based on erroneous findings on issues on law and legal interpretation.[5]

16. As a result of these errors, Mexico requests that the Appellate Body modify the reasoning of the Panel and find that for this additional reason that the eligibility requirements demonstrate that the amended tuna measure is applied in manner that constitutes arbitrary and unjustifiable discrimination between countries where the same conditions prevail and, therefore, the requirements of the chapeau are not met.

_____

[5] The Panel's errors in law are contained, *inter alia*, in paragraphs 7.545, 7.577, 7.581-7.582, 7.584-7.585 and 8.5(a), of the Panel Report.

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

ANNEX B-1

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLANT'S SUBMISSION

1. In the underlying dispute, the Appellate Body found that the U.S. dolphin safe labeling measure was inconsistent with Article 2.1 of the TBT Agreement. The United States took careful note of the concern identified by the Appellate Body and addressed it through the 2013 Final Rule. Specifically, the Appellate Body found that the original measure was inconsistent with Article 2.1 because tuna product produced from the ETP large purse seine fishery was ineligible for the dolphin safe label if a dolphin was killed or seriously injured in the set in which the tuna was caught, but this condition did not apply to tuna product produced from other fisheries.[1] Under the amended measure, this condition applies to all tuna product, regardless of the fishery in which the tuna was caught.[2] Thus the United States considers that the amended measure is consistent with Article 2.1 of the TBT Agreement and with the non-discrimination provisions of the GATT 1994.

2. The Panel disagreed, however, finding that certain aspects of the amended measure – namely the certification and tracking and verification requirements – were inconsistent with Article 2.1 of the TBT Agreement and Articles I:1: and III:4 of the GATT 1994 and not justified under the chapeau of Article XX. As described below, the United States considers that these findings of the Panel are in error and respectfully requests that the Appellate Body reverse the Panel's findings and find that the amended measure is fully consistent with the non-discrimination provisions of the TBT Agreement and the GATT 1994.

3. Section II of this submission sets out the context in which the U.S. measure must be understood and assessed. It explains that the harvest of fish around is governed by numerous national and supranational institutions. One – the AIDCP – was established in response to a unique dolphin mortality crisis specifically to document and mitigate dolphin bycatch due to tuna fishing. The unique requirements and programs that the AIDCP parties imposed on their tuna industries reflect this unique objective. The AIDCP requirements include mandatory on-board observers and a tuna tracking and verification system. No other fisheries management body has faced a situation similar to that in the ETP large purse seine fishery, and no other body has adopted requirements similar to the AIDCP.

4. Sections III through VI then set out the U.S. appeals of the Panel's findings.

1. ARTICLE 2.1 OF THE TBT AGREEMENT

5. In Section III of this submission, the United States explains that the Panel erred in finding the amended measure to be inconsistent with Article 2.1 of the TBT Agreement. Subsections A, B, and C provide an introduction to the U.S. arguments, summarize the legal standard of Article 2.1, and describe the applicable burden of proof in WTO dispute settlement proceedings. Subsections D and E describe the DSB recommendations and rulings in the original proceeding and the U.S. measure taken to comply, the 2013 Final Rule, which directly addressed those recommendations and rulings.

a. The Panel Erred in Finding that the Certification Requirements Are Inconsistent with Article 2.1

6. In Section III.G, the United States explains that the Panel erred in finding that the certification requirements of the amended measure accord less favorable treatment to Mexican tuna product than that accorded to like products from the United States and other Members.

7. In Section III.G.3, the United States explains that the Panel erred in finding that the certification requirements modify the condition of competition in the U.S. market to the detriment of Mexican tuna product. The United States considers that the Panel's findings are in error in three respects. If the Appellate Body were to find in favor of the United States on any one of these three

[1] *US – Tuna II (Mexico) (AB)*, paras. 289-292, 298.
[2] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.142.

appeals, the Appellate Body should consequently reverse the Panel's finding that the certification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product. Such a reversal would mean that the Panel's finding that the certification requirements are inconsistent with of Article 2.1 would also need to be reversed.[3]

8. First, as explained in Section III.G.3.a, the Panel erred in its allocation of the burden of proof. The Appellate Body has been clear that nothing in its Article 2.1 analysis alters the traditional allocation of the burden of proof[4] whereby a complainant must establish a *prima facie* case for all the elements of its claims.[5] Here, Mexico argued that the certification requirements have a detrimental impact on Mexican tuna products due to differences in the *accuracy* of the certifications for tuna caught inside and outside the ETP large purse seine fishery.[6] The Panel made no "definitive finding" on this issue.[7] Instead, the Panel found a detrimental impact based on an entirely different theory, namely a difference in observer-related costs, that Mexico had never asserted or introduced evidence to support. Thus the Panel erred in making an alleged *prima facie* case for Mexico, and the Panel's finding of detrimental impact was in error.

9. Second, as explained in Section III.G.3.b, the Panel erred in finding that any difference in observer-related costs modifies the conditions of competition in the U.S. market to the detriment of Mexican tuna product. A panel may not assume that a measure provides less favorable treatment merely because treatment provided to the imported product is *different* from that accorded to other like products.[8] And, indeed, past panels have actually analyzed whether the conditions of competition in the respondent's market have been altered to the detriment of the imported product. The Panel's analysis represented a significant departure from the Appellate Body's guidance and the approach of previous panels. The Panel neither identified the cost that Mexican producers may incur nor analyzed whether such costs modified the conditions of competition in the U.S. market. Instead, the Panel's analysis derived from potential costs to other countries of establishing an observer program – an inaccurate proxy. Thus, the Panel did not conduct an analysis on which to base a finding that the certification requirements modify the conditions of competition to the detriment of Mexican tuna product. As such, the Panel's finding of detrimental impact was in error.

10. Third, as explained in Section III.G.3.d, the Panel erred in finding that a genuine relationship exists between the amended measure and the detrimental impact. First, because Mexican tuna product is produced using a fishing method that renders the product ineligible for the label, the Panel was wrong to conclude that any differences in observer-related costs incurred by Mexico is "attributable" to the amended measure. In fact, the amended measure does *not* require Mexican tuna products, which are non-dolphin safe, tuna products to be accompanied by proof of an observer certificate *at all*. Second, even aside from this, any difference in observer-related costs is not "attributable" to the amended measure because the requirement to have an observer onboard Mexican ETP large purse seine vessels stems from Mexico's obligations under the AIDCP, not U.S. law. In fact, the U.S. measure does not cause or affect in any way the observer-related costs that different fleets and industries bear. As such, the Panel erred in finding a genuine relationship between the U.S. measure and any preexisting differences in observer-related costs.

11. For these reasons, the Panel's erred in finding that the certification requirements of the amended measure have a detrimental impact on the competitive opportunities of Mexican tuna product, and the United States respectfully requests that this finding and the finding of inconsistency with Article 2.1, which rests on this detrimental impact finding, be reversed.[9]

12. In Section III.G.4, the United States explains that the Panel erred in finding that any detrimental impact caused by the certification requirements does not stem exclusively from legitimate regulatory distinctions. The United States appeals two aspects of the Panel's analysis. Because these two aspects appear to form independent bases for the Panel's finding regarding the even-handedness of the certification requirements, if the Appellate Body were to rule in favor of

[3] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(b).
[4] *US – Tuna II (Mexico) (AB)*, para. 216 (quoting *US – Wool Shirts and Blouses (AB)*, p. 14).
[5] *US – Gambling (AB)*, para. 140.
[6] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.152.
[7] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.169.
[8] *See, e.g.*, *Korea – Various Measures on Beef (AB)*, paras. 141, 144.
[9] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.170, 7.179, 8.2(b).

the United States on both of these appeals, it should, as a consequence, reverse the Panel's finding and, consequently, the Panel's ultimate finding of inconsistency with Article 2.1.[10]

13. First, in Section III.G.4.a, the United States explains that the majority panelists erred in finding that any detrimental impact caused by the certification requirements does not stem exclusively from a legitimate regulatory distinction due to differences in education and training between those that certify that the tuna was harvested in a "dolphin safe" manner in the ETP large purse seine fishery (captains and AIDCP-approved observers) and those that certify in other fisheries (captains). Specifically, the majority applied an incorrect legal standard, asking whether the detrimental treatment is explained by the objectives pursed by the measure at issue," when the question under the second step of Article 2.1 is whether the regulatory distinctions that account for that detrimental impact "are designed and applied in an even-handed manner."[11]

14. Under the correct legal analysis, there are two bases for why any detrimental impact caused by the certification requirements does, in fact, stem exclusively from a legitimate regulatory distinction. First, the majority's own findings prove that the certification requirements are even-handed in that they are "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean. Specifically, the requirements reflect that, as the Panel found, the ETP large purse seine fishery has a different (greater) "risk profile" for dolphin harm than other fisheries, and the certification requirements are calibrated to that different risk profile. Second, the certification requirements are even-handed in that they are explained by a legitimate, non-discriminatory reason: they reflect the fact that the parties to the AIDCP have consented to impose a unique observer program on their tuna industries. The fact that the amended measure requires an observer certificate where an observer is already onboard the vessel *for that very purpose* and does not impose such a requirement where no such certifier is onboard, has a legitimate, non-discriminatory basis, and the majority erred in not finding so.

15. Second, as explained in Section III.G.4.b, the Panel erred in finding that the determination provisions were a further basis to find that the detrimental impact caused by the certification requirements does not stem exclusively from a legitimate regulatory distinction. First, the Panel erred in its allocation of the burden of proof. Mexico did not raise this issue at all – much less set out a *prima facie* case of inconsistency – and the Panel erred in relieving Mexico of its burden. Second, the Panel erred in its reasoning and finding by applying the incorrect legal analysis and acting inconsistently with DSU Article 11. Specifically, the Panel erred by not analyzing whether the determination provisions support a finding that the certification requirements "are designed and applied" in an even-handed manner, and acted inconsistently with Article 11 by arriving at a finding that is unsupported by the evidence in the record. The Panel also erred by applying the incorrect legal analysis and failing to find that the determination provisions can be reconciled with the objectives of the amended measure.

16. In light of the above, the Panel erred in finding that any detrimental impact caused by the certification requirements does not stem exclusively from legitimate regulatory distinctions, and United States respectfully requests that the Appellate Body reverse this finding and the finding of a breach of Article 2.1, which rests on this finding of detrimental impact.[12]

b. The Panel Erred in Finding that the Tracking and Verification Requirements Are Inconsistent with Article 2.1

17. In Section III.H, the United States explains that the Panel erred in finding that the tracking and verification requirements of the amended measure accord less favorable treatment to Mexican tuna product than that accorded to like products from the United States and other Members.

18. In Section III.H.3, the United States explains that the Panel erred in finding that the tracking and verification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product. The United States appeals the Panel's analysis in four respects. If the Appellate Body were to rule in favor of the United States on any one of these four appeals, the Appellate Body should, consequently, reverse the Panel's finding that the tracking and

[10] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(b).

[11] *US – COOL (Article 21.5 – Canada/Mexico) (AB)*, para. 5.92; *see also US – Tuna II (Mexico) (AB)*, n. 461; *US – COOL (AB)*, para. 271.

[12] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.233-234, 7.263, 8.2(b).

verification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna product. Such a reversal would mean that the Panel's ultimate finding that the requirements are inconsistent with Article 2.1 would also need to be reversed.[13]

19. First, Section III.H.3.a explains that, for the same reasons discussed in Section III.G.3.a, the Panel erred in its allocation of the burden of proof. On this issue, Mexico argued that the absence of sufficient record keeping requirements for tuna product produced outside the ETP large purse seine fishery causes Mexican tuna product to lose competitive opportunities to product that may be incorrectly labelled dolphin safe.[14] The Panel made no "definitive finding" with regard to this argument.[15] Rather, the Panel found that a detrimental impact existed based on a *different* theory, *i.e.* that the tracking and verification requirements impose a different "burden" on different tuna product industries that has modified the conditions of competition in the U.S. market to the detriment of Mexican tuna product. Mexico never raised or presented evidence in support of this argument and, therefore, never established a *prima facie* case. The matter should have ended there as a panel may not take it upon itself "to make the case for a complaining party."[16] In raising *sua sponte* an argument that Mexico never argued or proved, the Panel acted inconsistently with the burden of proof in this proceeding. Thus, the Panel's finding of detrimental impact was in error.

20. Second, as explained in Section III.H.3.b, the Panel erred in coming to a finding that is legally unsupportable based on the evidence on the record. The Panel found that the AIDCP and NOAA tracking and verification regimes were different in three respects: "depth, accuracy, and degree of government oversight."[17] The Panel found that these differences proved "modify the conditions of competition," as the NOAA regime is "less burdensome." The Panel never identified what this meant or provided any additional analysis of how this difference in "burden" modifies the conditions of competition in the U.S. market, *equating* any difference in "burden" with detrimental impact. The evidence regarding the differences that the Panel identified does not prove that the NOAA regime is less "burdensome" to adhere to than the AIDCP regime in any way that modifies the conditions of competition to the detriment of Mexican tuna product. Thus the Panel erred in coming to a legal conclusion on burden and detrimental impact for which there is no basis in the record.

21. Third, Section III.H.3.c explains that, for similar reasons to those discussed in Section III.G.3.b, the Panel erred by not applying the correct legal analysis in making its detrimental impact finding. The Panel considered that its finding of a difference in "burden" between the AIDCP and NOAA regimes, *ipso facto*, established a *prima facie* case as to the first step of Article 2.1. In fact, a panel must examine whether any difference it has identified modifies the conditions of competition to the detriment of the group of imported products. The Panel's failure do so was a significant departure from the clear guidance of the Appellate Body and the actual approach of previous panels. The Panel's finding of detrimental impact was in error.

22. Fourth, Section III.H.3.e explains that, for the reasons discussed in Section III.G.3.d, the Panel erred in finding that a genuine relationship exists between the U.S. measure and any detrimental impact. As with the certification requirements, the Panel's finding is in error on two different bases. First, the Panel erred by not taking into account the fact that Mexican tuna product *is not eligible for the dolphin safe label*. As such, the amended measure does not incorporate the AIDCP requirements or create any regulatory distinction with respect to Mexican tuna product. Second, the Panel failed to properly take into account that the regulatory distinction of the amended measure reflects the fact that the parties to the AIDCP have consented to rules regarding the operation of their large purse seine vessels in the ETP that are not replicated in other fisheries. Indeed, if the United States eliminated all references to the AIDCP in the amended measure, the difference in "burden" identified by the Panel *would still exist*.

[13] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(c).
[14] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.288.
[15] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.382; *see also id.* para. 7.372.
[16] *Japan – Agricultural Products II (AB)*, para. 129.
[17] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.354 (emphasis omitted).

23. For these reasons, the Panel's erred in finding that the tracking and verification requirements of the amended measure have a detrimental impact on the competitive opportunities of Mexican tuna product, and the United States respectfully requests that this finding and the related finding of inconsistency with Article 2.1 be reversed.[18]

24. In Section III.H.4, the United States explains that the Panel erred in finding that any detrimental impact caused by the tracking and verification requirements does not stem exclusively from legitimate regulatory distinctions. The Panel erred by applying the incorrect legal standard in its analysis. The second step of the Article 2.1 analysis is not a single-factor test based on whether a "rational connection" exists between the detrimental impact and the objectives of the measure but an analysis of whether the regulatory distinctions that account for the detrimental impact "are designed and applied in an even-handed manner."[19]

25. If the Appellate Body were to find in favor of the United States on this appeal, it should, consequently, reverse the Panel's finding that the detrimental impact does not stem exclusively from a legitimate regulatory distinction. Such a reversal would mean, that the Panel's ultimate finding that the tracking and verification requirements are not consistent with Article 2.1 of the TBT Agreement" would need to be reversed.[20]

26. In Sections III.H.4.a and III.H.4.b, the United States explains the two separate bases for why any detrimental impact caused by the different tracking and verification requirements stems exclusively from a legitimate regulatory distinction.

27. First, as was the case with the certification requirements, the tracking and verification requirements are even-handed because they are "calibrated" to the risks to dolphins from different fishing methods in different fisheries. The Panel *agreed* with the United States that the ETP large purse seine fishery has a different "risk profile" for dolphin harm than other fisheries. In light of that fact, it is entirely appropriate for the United States to set different requirements for tuna produced in the ETP large purse seine fishery than for tuna produced in other fisheries. Thus the fact that the AIDCP and NOAA regimes *are* different – and *may* have different rates of accuracy – cannot, standing alone, be a basis on which to find that the difference in the regimes is not even-handed where the risk profiles between the ETP large purse seine fishery and all other fisheries are so different.

28. Second, as explained with respect to the certification requirements in Section III.H.3.e, the tracking and verification requirements are even-handed because they reflect the fact that the parties to the AIDCP have consented to impose a unique tracking and verification regime on their own tuna industries. By "incorporating" the AIDCP requirements, the amended measure appropriately recognizes the utility of the AIDCP regime for the purposes of the amended measure. They Panel's analysis, by contrast, suggests that having done so, the United States is now required to impose the *same* regime on all tuna product, even though no other RFMO has created a parallel regime. In short, the AIDCP requirements form the "floor" of requirements below which the United States may not go. But that is certainly not true – the United States, and Mexico's international legal obligations, sets the level of protection it considers "appropriate."

29. In light of the above, the Panel erred in finding that any detrimental impact caused by the tracking and verification requirements does not stem exclusively from legitimate regulatory distinctions, and United States respectfully requests that the Appellate Body reverse this finding and the related finding of a breach of Article 2.1.[21]

30. And for all the above reasons, the United States respectfully requests the Appellate Body to reverse the Panel's finding that the amended measure is inconsistent with Article 2.1 of the TBT Agreement.[22]

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[18] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.372, 7.382, 8.2(c).
[19] *US – COOL (Article 21.5 – Canada/Mexico) (AB)*, para. 5.92; *US – COOL (AB)*, para. 271.
[20] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(c).
[21] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.392, 7.400, 8.2(c).
[22] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.2(b)-(c).

2. THE GATT 1994

31. In Sections IV and V of this submission, the United States explains that, for all the reasons discussed in terms of Article 2.1 of the TBT Agreement in III.G.3 and III.H.3, the Panel erred in finding that the certification requirements and the tracking and verification requirements modify the conditions of competition in the U.S. market to the detriment of Mexican tuna and tuna products. Accordingly, the United States respectfully requests the Appellate Body to reverse the Panel's findings that the certification and tracking and verification requirements of the amended measure are inconsistent with Articles I:1 and III:4 of the GATT 1994.[23]

32. In Section VI, the United States explains its conditional appeal of the Panel's finding that the amended dolphin safe labeling measure is not justified under Article XX of the GATT 1994.

33. In Section VI.B, the United States explains that the Panel erred in finding that amended measure does not meet the requirements of the Article XX chapeau. The United States considers that, with respect to both the certification requirements and the tracking and verification requirements, the Panel erred in two independent respects – in finding that these elements of the amended measure discriminate under the chapeau and in finding that any such discrimination is "arbitrary and unjustifiable." If the Appellate Body were to rule in favor of the United States on one of these appeals, the Appellate Body should consequently reverse the Panel's finding that the certification or tracking and verification requirements, as relevant, are not consistent with the Article XX chapeau.[24]

34. In Section VI.B.1, the United States explains that the Panel erred in applying the incorrect legal analysis in examining whether the certification requirements and the tracking and verification requirements "discriminate" for purposes of the chapeau. It is well established that "discrimination within the meaning of the chapeau of Article XX 'results . . . when countries in which the same conditions prevail are differently treated.'"[25] The Panel's analysis, however, deviated significantly from this principle and from the Appellate Body's application of it. Specifically, with regard to both the certification requirements and the tracking and verification requirements, the Panel did not conduct the appropriate analysis of whether the relevant "conditions" are the same across countries and did not appear to consider that the examination of whether discrimination under the chapeau *existed* was a separate analysis from whether such discrimination is "arbitrary or unjustifiable."

35. Section VI.B.1.a explains that the Panel applied the incorrect legal analysis in examining whether the certification requirements discriminate for purposes of the chapeau. The Appellate Body has considered that the most pertinent guidepost for determining the relevant "conditions" is "the particular policy objective under the applicable subparagraph," although the GATT 1994 provision with which the measure was found inconsistent "may also provide useful guidance."[26] The certification requirements were justified under Article XX(g) as relating to the protection of dolphins. In light of this objective, the relevant "condition" for purposes of the chapeau analysis is *the relative harm* (both observed and unobserved) suffered by dolphins from different fishing methods in different fisheries. And the findings of the Appellate Body in the original proceeding and the Panel in this dispute affirm that this "condition" is *not* the same in the ETP large purse seine fishery and all other fisheries. As such, no "discrimination" – as the term is understood for purposes of the chapeau – exists with respect to the certification requirements.

36. Furthermore, the Panel erred in seeming find that the certification requirements discriminated under the chapeau due to any difference in the accuracy of the dolphin safe certifications for tuna caught inside and outside the ETP large purse seine fishery. The Panel made no "definitive finding" as to whether any difference in accuracy discriminates against Mexican tuna product for purposes of Articles I:1 and III:4, noting in its Article 2.1 analysis that to do so would have required "a complex and detailed analysis of all of the various factors that may lead to tuna being inaccurately labelled."[27] As such, even under the Panel's own view, there was insufficient evidence on the record to prove that the certification requirements discriminate on the grounds

[23] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 8.3(b), 8.3(c).
[24] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 8.5(b)-(c).
[25] *EC – Seal Products (AB)*, para. 5.303 (quoting *US – Shrimp (AB)*, para. 165).
[26] *EC – Seal Products (AB)*, para. 5.300; *see also id.* para. 5.317.
[27] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.169.

that tuna product produced outside the ETP large purse seine fishery without an observer onboard has a "competitive advantage" over Mexican tuna product. Indeed, as discussed above in section III.G.3.c, the evidence on the record suggests just the opposite. The quantitatively and qualitatively different nature of dolphin interactions in the ETP large purse seine fishery is such that it is far more difficult to make an accurate certification in the ETP large purse seine fishery than in other fisheries. And there is no evidence on the record to suggest that any advantages in education and training that an AIDCP-approved observer may have over a captain fully compensate for this increased level of difficulty.

37. Section VI.B.1.b then explains that the Panel applied the incorrect legal analysis in examining whether the tracking and verification requirements discriminate for purposes of the chapeau. The Panel did not even mention the analysis of whether this aspect of the measure discriminated between countries where "the same conditions prevail" or make a finding in this regard. For the same reasons discussed with regard to the certification requirements, the tracking and verification requirements do not discriminate for purposes of the chapeau. Again, the United States considers that the relevant "condition" is *the relative harm* to dolphins caused by different fishing methods in different fisheries, and, as such, in light of the Panel's own factual findings the tracking and verification requirements do not treat countries differently where the prevailing conditions are the same.

38. In light of the above, the Panel erred in (implicitly) finding that the certification requirements and tracking and verification requirements discriminate "where the same conditions prevail" under the Article XX chapeau.[28] In the absence of any discrimination under the chapeau, the Panel's findings that the amended measure is not consistent with the Article XX chapeau should be reversed.[29]

39. Second, in Section VI.B.2, the United States explains that, even if the certification requirements and the tracking and verification requirements discriminate for purposes of the chapeau, the Panel erred in finding any such discrimination to be "arbitrary and unjustifiable."

40. In section VI.B.2.a, the United States explains that the Panel erred in finding the certification requirements impose "arbitrary or unjustifiable discrimination" under the chapeau. The United States appeals two aspects of the Panel's analysis. Because these two aspects appear to form independent bases for the Panel's finding regarding arbitrary and unjustifiable discrimination, if the Appellate Body were to rule in favor of the United States on both of these appeals, it should reverse the Panel's finding and, consequently, the Panel's ultimate finding that the certification requirements do not meet the chapeau requirements.[30]

41. First, the majority erred in finding that the certification requirements impose arbitrary or unjustifiable discrimination in light of the differences in education and training between captains and AIDCP-approved observers. To begin with, the Panel applied the wrong legal analysis as to whether the discrimination is "arbitrary or unjustifiable." Additionally, the majority erred because, in fact, the certification requirements do not impose arbitrary or unjustifiable discrimination because they are "calibrated to the risks to dolphins from different fishing methods in different fisheries." Finally, the certification requirements reflect the fact that the parties to the AIDCP consented to impose a unique observer program on their tuna industries.

42. Second, the Panel erred in finding that the determination provisions prove that the certification requirements impose arbitrary or unjustifiable discrimination. The Panel again applied the wrong legal analysis, considering it to be a single-factor test, rather than a cumulative test in which one element is the relationship of the discrimination to the measure's objective. Additionally, the Panel erred in finding that the design of the provisions is not reconcilable with the objective of dolphin protection. The Panel also erred because it improperly raised this argument in rebuttal to the U.S. *prima facie* case that the certification requirements were consistent with the chapeau. Mexico had not argued that the determination provisions rendered the certification requirements inconsistent with the chapeau. Thus the Panel's considering the determination provisions at all was contrary to the burden of proof in this proceeding. Also, for the reasons discussed in the context of

[28] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.605, 7.610-611.
[29] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 8.5(b)-(c).
[30] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 8.5(b).

Article 2.1, the Panel erred in finding that the design of the determination provisions are not rationally connected to the objective of dolphin protection.

43. In section VI.B.2.b, the United States explains that the Panel erred in finding the tracking and verification requirements impose "arbitrary or unjustifiable discrimination" under the chapeau. The United States considers that the Panel's analysis and finding are in error for many of the same reasons the United States has discussed with regard to the certification requirements: (1) the Panel applied the incorrect legal analysis; (2) the Panel erred in its application of the burden of proof; (2) the Panel erred in finding that the tracking and verification requirements impose arbitrary or unjustifiable discrimination because the different requirements are "calibrated" to the risks to dolphins from different fishing methods in different fisheries, and (4) the Panel erred in finding that the tracking and verification requirements impose arbitrary or unjustifiable discrimination because the different requirements reflect the consent of the AIDCP Parties to impose a unique regime on their own tuna industries.

44. In light of the above, the Panel erred in finding that the certification requirements and tracking and verification requirements impose "arbitrary or unjustifiable discrimination" under the Article XX chapeau[31] and respectfully requests that the Panel's findings that the amended measure is not consistent with the Article XX chapeau should be reversed.[32]

[31] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.605, 7.610-611.
[32] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 8.5(b)-(c).

ANNEX B-2

EXECUTIVE SUMMARY OF MEXICO'S OTHER APPELLANT'S SUBMISSION

1. The United States continues to highlight outdated information about the ETP to divert attention from the significant progress in reducing dolphin mortality in the ETP and the tremendous harm to dolphins taking place in other ocean regions, where there are no comparable measures for the protection or sustainability of dolphins. This is a genuine tragedy for the world's environment and also undermines the consumer information objectives that the United States purports to achieve.

2. In these compliance proceedings, Mexico's challenge focuses on the improper granting of access to the dolphin-safe label to products containing tuna caught by the fleets of other countries using fishing methods other than setting on dolphins in an AIDCP-compliant manner and fishing in oceans other than the ETP. These proceedings can be distinguished from the original proceedings on this basis. The difference is highlighted by the fact that, under the amended tuna measure, even if Mexican tuna products were granted the right to use the dolphin-safe label, there would still be a violation of the non-discrimination provisions raised in this dispute. This is because Mexican dolphin-safe tuna products would be losing competitive opportunities to like products from the United States and other countries under circumstances where the dolphin-safe status of those like products cannot be assured.

3. The measure at issue in this dispute is the "amended tuna measure", which comprises: (i) Section 1385 ("Dolphin Protection Consumer Information Act") (DPCIA), as contained in Subchapter II ("Conservation and Protection of Marine Mammals") of Chapter 31 ("Marine Mammal Protection"), in Title 16 of the U.S. Code; (ii) U.S. Code of Federal Regulations, Title 50, Part 216, Subpart H ("Dolphin Safe Tuna Labeling"), as amended by the 2013 Final Rule; and (iii) the court ruling in Earth Island Institute v. Hogarth, 494 F.3d 757 (9th Cir. 2007).

4. In its argument that the detrimental impact of the amended tuna measure on Mexican tuna and tuna products did not stem exclusively from a legitimate regulatory distinction under Article 2.1 of the TBT Agreement, Mexico identified three aspects of the amended tuna measure – i.e., three "labelling conditions and requirements" evidencing regulatory differences 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 – that are designed and applied in a manner that lacks even-handedness:

- Mexico's AIDCP-compliant fishing method is disqualified as a method for catching dolphin-safe tuna when other fishing methods are qualified for catching dolphin-safe tuna even though they have adverse effects on dolphins that are equal to or greater than Mexico's method (referred to by the Panel as the "eligibility criteria");

- the record-keeping and verification requirements (referred to by the Panel as the "tracking and verification requirements") for tuna caught inside the ETP are comprehensive, reliable and accurate, whereas there are no comparable requirements for tuna caught outside the ETP, which makes the information on the dolphin-safe status of that tuna unreliable and inaccurate; and

- in the ETP, the initial designation of the dolphin-safe status of tuna at the time of capture (referred to by the Panel as the "certification requirements") is reliable and accurate because it is done by an independent, specially-trained, AIDCP-approved observer on board the fishing vessel, whereas outside the ETP, the initial designation is unreliable and inaccurate because it is done by the captain of the vessel, who is not qualified to make the designation, may not be directly involved in the setting of nets and capturing of fish, and has financial and other incentives not to declare non-dolphin-safe sets.

5. Mexico raised the same three labelling conditions and requirements in its argument that the requirements of the chapeau of Article XX of the GATT 1994 had not been met, therefore, the general exceptions did not apply to the inconsistencies of the amended tuna measure with Articles I:1 and III:4 of the GATT 1994.

6. The Panel concluded that the different certification requirements and the different tracking and verification requirements in the amended tuna measure are inconsistent with Article 2.1 of the TBT Agreement. It also concluded that the different certification requirements and different tracking and verification requirements are inconsistent with Articles I:1 and III:4 of the GATT 1994, and do not meet the requirements of Article XX of the GATT 1994. The Panel also found that the eligibility criteria of the amended tuna measure are consistent with Article 2.1 of the TBT Agreement and that, although they are inconsistent with Articles I:1 and III:4 of the GATT 1994, they are justifiable under Article XX of the GATT 1994.

7. Mexico requests the Appellate Body to reverse certain findings and conclusions of the Panel, with respect to the errors of law and legal interpretation discussed in this submission.

I. THE PANEL ERRED IN FINDING AND CONCLUDING THAT SPECIFIC REQUIREMENTS UNDER THE AMENDED TUNA MEASURE WERE INCONSISTENT WITH WTO PROVISIONS RATHER THAN THE MEASURE AS A WHOLE

8. Notwithstanding that Mexico challenged the amended tuna measure as a whole, and that the Appellate Body in the original proceedings found the original tuna measure as a whole to be WTO-inconsistent, the Panel did not specifically conclude that the amended tuna measure as a whole is inconsistent with Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994. Rather, it concluded that two of the three elements that Mexico identified in its arguments were WTO-inconsistent, while claiming that the other element had purportedly already been found by the Appellate Body in the original proceedings to be even-handed and not WTO-inconsistent.[1] While Mexico agrees with some of the reasoning and findings in the Panel's Report, the Panel should have explicitly concluded that the amended tuna measure as a whole is inconsistent with those provisions rather than ruling on some of its elements. The Panel's error is reflected, in part, in its finding that the amended tuna measure's modification of the competitive opportunities in the U.S. market to the detriment of Mexican tuna and tuna products comprises two "distinct type[s] of detrimental impact", such that "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".[2] In its analysis the Panel confuses the "detrimental impact" of the amended tuna measure that is the focus of the first part of the test under Article 2.1 with the identification of the "relevant" regulatory distinction in the second part of the test, i.e., the regulatory distinction that accounts for the detrimental impact.[3] The Panel should have explicitly found that the amended tuna measure has a detrimental impact on the competitive opportunities for Mexican tuna products in the US market, and that the differences in the labelling conditions and requirements identified by Mexico demonstrate that the measure's relevant regulatory distinction is designed and applied in a manner that lacks even-handedness, such that the detrimental impact does not stem exclusively from a legitimate regulatory distinction. On this basis, the Panel should have concluded that the amended tuna measure is inconsistent with Article 2.1 of the TBT Agreement.

9. Similarly, the Panel should have found that the amended tuna measure is inconsistent with Articles I:1 and III:4 of the GATT 1994, and the inconsistencies were not justifiable under Article XX. The Panel's failure to do so is a legal error. As a result of this error, Mexico requests the Appellate Body to modify the conclusions of the Panel in respect of Article 2.1 of the TBT Agreement and Articles I:1, III:4 and XX of the GATT 1994 and conclude that the amended tuna measure is inconsistent with these provisions.

[1] Panel Report, *US – Tuna II (Article 21.5 – Mexico)*, paras. 8.2, 8.3.
[2] Panel Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.105.
[3] See, e.g., Appellate Body Report, *US – Tuna II (Mexico)*, para. 286.

II. THE PANEL ERRED IN ITS FINDINGS REGARDING THE ELIGIBILITY CRITERIA WHEN ASSESSING THE CONSISTENCY OF THE AMENDED TUNA MEASURE WITH ARTICLE 2.1 OF THE TBT AGREEMENT

10. Mexico argued that it was not even-handed for the amended tuna measure to completely disqualify the dolphin set fishing method from access to the dolphin-safe label, while allowing other fishing methods to be eligible, when it has been established that other fishing methods kill and seriously injure dolphins. In the context of Article 2.1 of the TBT Agreement, the fishing method eligibility criteria are relevant to assessing whether the detrimental impact on Mexican tuna caused by the amended tuna measure stems exclusively from a legitimate regulatory distinction. The eligibility criteria are included in the relevant regulatory distinction (i.e., the difference in labelling conditions and requirements). The Panel had to determine, based on the particular circumstances of this dispute, whether this regulatory distinction is designed and applied in an even-handed manner.

11. The Panel erred in finding that the Appellate Body previously made factual and legal findings on this issue.[4] Moreover, the Panel in effect applied the arbitrary benchmark for adverse effects on dolphins urged by the United States, rather than the "zero tolerance" benchmark actually incorporated into the amended tuna measure and its objectives. It further erred in finding that the eligibility criteria were applied in an even-handed manner. Instead, it should have found that the eligibility criteria lacked even-handedness and, therefore, by virtue of the eligibility criteria, the detrimental impact of the amended tuna measure does not stem exclusively from a legitimate regulatory distinction. These deficiencies were legal errors.

12. The Panel also acted inconsistently with Article 11 of the DSU in relation to the following factual findings: (i) changing its factual findings regarding unobserved adverse effects for dolphin sets from the original proceedings without any new evidence to support such a change; and (ii) finding that other fishing methods have no unobservable adverse effects and omitting consideration of contrary evidence on the record; (iii) finding that the Appellate Body found that dolphin sets are particularly more harmful to dolphins than other fishing methods when no such finding was made by the Appellate Body. These factual findings, once corrected, support Mexico's position that the eligibility criteria are applied in a manner that is not even-handed.

13. As a result of this error, Mexico requests that the Appellate Body modify the legal reasoning of the Panel, reverse the Panel's finding that the eligibility criteria are applied in an even-handed manner and find, instead, that by virtue of the lack of even-handedness in the eligibility criteria, the detrimental impact of the amended tuna measure does not stem exclusively from a legitimate regulatory distinction and, for this additional reason, the amended tuna measure is inconsistent with Article 2.1.

III. THE PANEL ERRED IN ITS FINDINGS REGARDING INDEPENDENT OBSERVERS UNDER THE CERTIFICATION REQUIREMENTS WHEN ASSESSING THE CONSISTENCY OF THE AMENDED TUNA MEASURE WITH ARTICLE 2.1 OF THE TBT AGREEMENT

14. In assessing Mexico's arguments that it was not even-handed for the amended tuna measure not to require independent observers to support dolphin-safe certifications outside the ETP, the Panel disagreed with Mexico's arguments that (i) in respect of dolphin-safe certifications specifically, captains in some cases may have an economic conflict of interest, making their certifications less reliable, and (ii) the justification for differing requirements provided by the United States that circumstances in the ETP are unique is in fact contradicted by evidence that tuna associate with dolphins in other ocean regions, in particular the Indian Ocean.

15. In rejecting Mexico's evidence regarding captains' economic self-interest, the Panel found that certifications by vessel captains are generally reliable "in a variety of fishing and environmental areas".[5] In doing so, the Panel acted inconsistently with Article 11 of the DSU. While Mexico does not suggest that fishing vessel captains are generally unreliable, the evidence on the record establishes that the inherent unreliability of captains' self-certifications specifically respecting the "dolphin-safe" status of the tuna caught by their own vessels means that in some instances the dolphin-safe designation will be inaccurate. This creates gaps in the accuracy of the

[4] Panel Report, *US – Tuna II (Article 21.5 – Mexico)*, paras. 7.118-7.126, 7.130.
[5] Panel Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.208.

dolphin-safe label for tuna caught outside the ETP by fishing methods other than AIDCP-compliant setting on dolphins.

16. In finding that dolphin sets are only made in the ETP, the Panel acted inconsistently with Article 11 of the DSU. Mexico presented evidence that the situation in the ETP is not unique or different in any way that could justify different treatment of the ETP purse seine fishery from other fisheries, and in particular presented a recent and comprehensive report on tuna-dolphin association in the Indian Ocean. The Panel rejected Mexico's position, stating 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.'"[6] The failure of the Panel to even mention, let along address, the evidence Mexico submitted that dolphins associate with tuna and are intentionally set upon in the Indian Ocean was inconsistent with the Panel's obligations under DSU Article 11.

17. As a result of this error, Mexico requests that the Appellate Body modify the reasoning of the Panel and find, for the additional reasons that dolphin sets are made outside of the ETP and captains' self-certifications create gaps in the dolphin-safe designation, that the certification requirements are not applied in an even-handed manner and, therefore, the detrimental impact of the amended tuna measure does not stem exclusively from a legitimate regulatory distinction, and the amended tuna measure is inconsistent with Article 2.1.

IV. THE PANEL ERRED IN ITS FINDINGS REGARDING THE ELIGIBILITY CRITERIA WHEN ASSESSING THE CONSISTENCY OF THE AMENDED TUNA MEASURE UNDER THE CHAPEAU OF ARTICLE XX

18. The Panel found that the fishing method eligibility criteria in the amended tuna measure (i.e., the disqualification of the dolphin set and allowance of other methods) are applied in a manner that meets the requirements of the chapeau of Article XX. In making this finding, the Panel erred when it found that the conditions in the countries between which there was arbitrary and unjustifiable discrimination were not the same and it erred when it found that the application of the measure did not result in arbitrary or unjustifiable discrimination. In particular, the Panel erred when it found that the eligibility criteria are directly related to the objective of the amended measure and any discrimination that they (i.e. the eligibility criteria) cause is directly connected to the main goal of the amended tuna measure (i.e. to contribute to the protection of dolphins).

19. As a result of this error, Mexico requests that the Appellate Body modify the reasoning of the Panel and find, for the additional reason that the eligibility requirements demonstrate that the amended tuna measure is applied in manner that constitutes arbitrary and unjustifiable discrimination between countries where the same conditions prevail, that the amended tuna measure does not meet the requirements of the chapeau.

[6] Panel Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.242.

ANNEX B-3

EXECUTIVE SUMMARY OF MEXICO'S APPELLEE'S SUBMISSION

1. The foundation of the United States' appeal is its insistence that the amended tuna measure is "calibrated" to risks of harm to dolphins outside the Eastern Tropical Pacific (ETP) large purse seine fishery. But it has been established – both in the original proceedings and in the compliance proceedings – that dolphins are at significant risk in tuna fisheries outside the ETP, from a variety of different fishing methods. Moreover, the United States does not contest the Panel's factual findings that vessel captains outside the ETP are not sufficiently trained to make reliable dolphin-safe certifications, and that the amended tuna measure does not require tracking and verification systems outside the ETP that can reliably ensure that a certification is legitimately matched to the tuna with which it is associated. In essence, therefore, the United States' position is that consumers do not need to know with any certainty whether non-ETP tuna products bearing the dolphin-safe label actually contain tuna that was caught without killing or seriously injuring a dolphin, or in a manner that does not adversely affect dolphins. There is no legitimate legal or policy justification for that position. The United States must apply the same standard to non-ETP tuna products as it does to ETP tuna products, including those from Mexico.

2. Mexico's AIDCP-compliant tuna fishing method protects dolphins, tuna fisheries stocks and the oceanic environment in a manner that is vastly superior to the alternative tuna fishing methods that are being promoted by the amended tuna measure. Nonetheless, Mexico acknowledges the rights of WTO Members to establish their own levels of protection. In this light, the findings of the Panel and the claims raised in Mexico's other appeal hold the United States to the standard that it has set for itself. Due to its gaps, deficiencies, lack of even-handedness and arbitrariness, the amended tuna measure is modifying the conditions of competition in the U.S. market to the detriment of Mexican tuna products in a WTO-inconsistent manner. The measure does not ensure that accurate information is provided to U.S. consumers and, accordingly, it does not meet the strict standard that the United States has set for itself or accomplish the measure's stated objectives.

I. MEASURE AS A WHOLE

3. The Panel should have explicitly concluded that the amended tuna measure as a whole is inconsistent with the WTO provisions in question rather than making separate findings and conclusions in respect of specific requirements of the measure. The eligibility criteria, the certification requirements and the tracking and verification requirements relate to elements of the legal tests necessary to establish the WTO-inconsistency of the amended tuna measure as a whole. Specifically, they relate to the second part of the legal test in Article 2.1 of the TBT Agreement and to the legal test under the chapeau of Article XX of the GATT 1994. Mexico did not challenge these requirements independently as three separate measures and did not have to establish an independent prima facie case for each. This error of the Panel is replicated in the arguments of the United States.

II. ERRONEOUS ARGUMENTS THAT FORM THE FOUNDATION OF THE APPEAL

A. Modification of Conditions of Competition & Detrimental Impact

4. In the original proceedings, the Appellate Body found in the context of Article 2.1 that the tuna measure modified the conditions of competition in the U.S. market to the detriment of Mexican tuna products. The Appellate Body stated that the detrimental impact of the measure on Mexican tuna products is caused by the fact that most Mexican tuna products contain tuna caught by setting on dolphins in the ETP and are therefore not eligible for a dolphin-safe label, whereas most tuna products from the United States and other countries that are sold in the U.S. market contain tuna caught by other fishing methods outside the ETP and are therefore eligible for a dolphin-safe label. The aspect of the measure that causes the detrimental impact is 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. This detrimental impact is caused by the measure itself and therefore has a genuine relationship with the measure.

5. This is unchanged in the amended tuna measure and, therefore, the measure continues to deny competitive opportunities to Mexican tuna products. This conclusion under the first part of the legal test under Article 2.1 is sufficient, in the circumstances of this dispute, to establish that the amended tuna measure is inconsistent with Articles I:1 and III:4 of the GATT 1994.

6. The amended measure's labelling conditions and requirements operate together to modify the conditions of competition to the detriment of imported Mexican tuna products. The detrimental impact involves not only the denial of the dolphin-safe label to Mexican tuna products, but also — at the same time — the granting of the label to tuna products from the United States and other countries that potentially may contain tuna caught in a manner that adversely affects dolphins, and therefore is not dolphin-safe. Like in EC – Seal Products, it is the combined operation of the prohibitive and permissive aspects of the measure that leads to the de facto discrimination in question. By focusing on the fact that the label is denied to Mexican tuna products, the United States is missing the important permissive aspects of the amended tuna measure which, in addition to their contribution to the detrimental impact, result in inaccurate labelling information being passed to U.S. consumers due to their deficiencies and gaps.

B. "Calibration" to Risks to Dolphins

7. The United States argues that the certification requirements and tracking and verification requirements are "calibrated" to the risks to dolphins from different fishing methods in different fisheries and, for that reason, are even-handed under Article 2.1 and do not impose arbitrary or unjustifiable discrimination on Mexican products under the chapeau of GATT Article XX. These arguments are flawed.

8. The jurisprudence developed by the Appellate Body in interpreting Article 2.1 of the TBT Agreement and Article XX of the GATT 1994 does not include a "calibration test" that can override the even-handedness and arbitrary discrimination tests. Moreover, it is insufficient simply to assert, as the United States does, that a distinction reflects a Member's chosen level of protection in order to establish even-handedness or a lack of arbitrariness.

9. Tuna is either "dolphin-safe" or it is not. Eligibility for the dolphin-safe label cannot be viewed as a relative assessment. The United States' argument implies that the label means "probably dolphin-safe" or "might be dolphin-safe", rather than "dolphin-safe". A "zero tolerance" benchmark is incorporated in the design, architecture, revealing structure, operation, and application of the measure. The measure's objectives are in no way qualified to allow some level of "acceptable" mortality or serious injury or any "margin of error"; rather, the objectives are asserted in terms that are absolute in the goal of avoiding misleading consumers about whether the tuna they purchase was caught in a manner that adversely affects dolphins. Complete precision is required for both the certification process and the tracking and verification of tuna. Under these circumstances, a purported comparison of the magnitude or nature of dolphin harms caused by different fishing methods is not relevant.

10. Even if "calibration" were somehow permitted, in light of the adverse effects on dolphins from almost all fishing methods in all fisheries, the purported differences between the ETP and other tuna fisheries cited by the United States could not justify a difference in the regulatory requirements, such that untrained captains are allowed to make certifications and tuna cannot be accurately tracked back to the vessel well in which it was stored after capture.

C. Absence of a Rational Connection to the Objective

11. The Panel correctly interpreted and applied the law. Although the rational connection is "one of the most important factors" in assessing whether there is arbitrary or unjustifiable discrimination under Article XX and therefore even-handedness under Article 2.1, depending on the nature of the measure at issue and the circumstances of the case at hand, there could be additional factors that may also be relevant to the overall assessment. Contrary to the U.S. "single factor" argument, the Panel provided the United States with the opportunity to explain why other factors establish that the measure is even-handed and not arbitrary and the United States was unable to do so.

D. Amended Tuna Measure Not the AIDCP

12. The United States incorrectly suggests that the tracking, verification and observer requirements imposed with respect to Mexican tuna products are exclusively the result of the AIDCP, and would exist without the amended tuna measure. To the contrary, the amended tuna measure expressly incorporates the AIDCP and other requirements for the purpose of conditioning access to the U.S. dolphin-safe label in the U.S. market. Moreover, the measure establishes requirements that apply to tuna caught in fisheries outside the scope of the AIDCP. The United States also repeatedly and incorrectly refers to the differences in the certification requirements and the tracking and verification requirements between the "AIDCP and NOAA" regimes. The relevant comparison is between the different ways in which the amended tuna measure conditions access to the dolphin-safe label under the different labelling conditions and requirements 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.

E. Unnecessary to Prove Mislabelling

13. For the purposes of establishing a lack of even-handedness under the second part of the legal test in Article 2.1 and arbitrary discrimination under the chapeau of Article XX, the Appellate Body made clear in *EC – Seal Products* that Mexico is only required to establish a *prima facie* case that, under the circumstances related to the design and application of the Amended Tuna Measure's labelling conditions and requirements, tuna products containing non-dolphin-safe tuna caught outside the ETP could potentially enter the U.S. market inaccurately labelled as dolphin-safe. The burden then shifts to the United States to sufficiently explain how such instances can be prevented in the application of the Amended Tuna Measure's labelling conditions and requirements. Mexico has met its burden. That burden shifted to the United States, which was unable to rebut Mexico's *prima facie* case.

III. ARTICLE 2.1 – CERTIFICATION REQUIREMENTS

A. Detrimental Impact

14. As explained above, there was no need for the Panel to make an independent finding with respect to the certification requirements because the amended tuna measure as a whole has a detrimental impact on Mexican imports. Thus, even if the United States is correct in its arguments, they have no bearing on the first part of the legal test under Article 2.1. In the context of analyzing the denial of competitive opportunities, it is not necessary to demonstrate actual trade effects. If the Appellate Body finds that the differences in costs and burdens are relevant to the determination, it is sufficient that the Panel found that it is clear that the difference between having observers on-board large purse seine vessels in the ETP and not having observers on-board other vessels imposes a lighter burden on tuna products made from tuna caught other than by large purse seine vessels in the ETP, as observer coverage involves the expenditure of significant resources. The detailed cost and burden analysis put forward by the United States is not necessary in the circumstances of this dispute. Finally, there is a genuine relationship between the measure, which contains all of the prohibitive and permissive requirements, and the detrimental impact.

B. Whether Detrimental Impact Stems Exclusively from a Legitimate Regulatory Distinction

1. Lack of Even-Handedness

15. The Panel was correct to consider that the different certification requirements are designed in a manner that "may result in inaccurate information being passed to consumers, in contradiction with the objectives of the amended tuna measure" (i.e., because "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 to find, on this basis, that the "the different certification requirements are not even-handed," such that the detrimental impact cannot be said to stem exclusively from a legitimate regulatory distinction.[1] The Panel provided the United States

[1] Panel Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.233.

with an opportunity to justify the regulatory distinction, and the United States was unable to do so. Thus, there are no additional relevant factors that could outweigh the Panel's finding. As explained above, the U.S. arguments regarding "calibration" and the "AIDCP rather than the measure" have no merit.

2. The Panel's Findings Regarding the Determination Provisions Further Support Mexico's Case

16. Mexico agrees with the United States that Mexico did not argue that the determination provisions themselves directly result in detrimental impact. There was no need for Mexico to do so. In determining whether the regulatory distinctions of the measure are even-handed, the Panel was required to assess the design, architecture, revealing structure, operation, and application of the measure, and the determination provisions are an integral part of the amended tuna measure. There was considerable evidence in the record to support the Panel's findings. Moreover, the Panel was fully justified to apply the same logical deductions to tuna fishing outside the ETP that the United States applies to tuna fishing inside the ETP. It was both reasonable and appropriate for the Panel to conclude that dolphin association with fishing methods other than purse seine nets could be harmful to dolphins, and that purse seine fishing could cause dolphin mortalities even if an ocean region did not feature tuna-dolphin association similar to the ETP. The design of the determination provisions is completely at odds with the objective of the amended tuna measure, and the Panel was correct in unanimously finding that the regulatory distinction is arbitrary.

IV. ARTICLE 2.1 – TRACKING AND VERIFICATION REQUIREMENTS

A. Detrimental Impact

17. The above points regarding the detrimental impact associated with the certification requirements apply equally to the detrimental impact associated with the tracking and verification requirements.

B. The Panel Correctly Found that the Detrimental Impact Does Not Stem Exclusively from a Legitimate Regulatory Distinction

18. Contrary to the arguments of the United States, the Panel was correct that Mexico had established *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. The Panel correctly ruled that Mexico could establish a *prima facie* case that tuna products containing non-dolphin-safe tuna caught outside the ETP could potentially enter the U.S. market inaccurately labelled as dolphin-safe on the basis of evidence and arguments going to the design, architecture, and revealing structure of the amended tuna measure. The Panel made a number of factual findings in its assessment of the different tracking and verification requirements which demonstrate "major gaps in coverage" that could potentially contribute to inaccurate labelling of tuna caught outside the ETP large purse seine fishery. These factual findings, together with the Panel's overall findings are sufficient to support the Panel's legitimate regulatory distinction analysis and its conclusion in the second step of the Article 2.1 legal test. However, in the event that the Appellate Body finds that the Panel erred in declining to make a definitive finding on the question of whether the different labelling conditions and requirements may permit non-dolphin-safe tuna harvested in fisheries outside the ETP to be inaccurately and unjustifiably granted the competitive advantage of the dolphin-safe label in the U.S. market, Mexico respectfully requests that the Appellate Body complete the analysis using the applicable standard of proof, as correctly found by the Panel, and the Panel's findings of fact.

19. Contrary to the arguments of the United States, the Panel committed no error in resolving the legitimate regulatory distinction analysis on the basis of the rational connection. There are no additional relevant factors in the present dispute that could outweigh the Panel's finding that the relevant regulatory distinction is designed and applied in a manner that permits inaccurate labelling. This is because incorrect labelling results in inaccurate and misleading information being provided to consumers who choose to purchase and consume tuna products which they believe have been produced in a dolphin-safe manner, which directly contradicts the objectives of the amended tuna measure.

20. For the same reasons discussed above for the certification requirements, the Panel committed no error as alleged by the United States in finding that the different tracking and verification requirements evidence that the detrimental impact caused by the amended tuna measure cannot be explained or justified on the basis of "calibration" to different risk profiles in different fisheries. In addition, tuna is either dolphin-safe or non-dolphin-safe at the point of capture. After the tuna has been harvested and stored aboard a fishing vessel, the risk profile of harm to dolphins is no longer a relevant consideration with respect to that tuna. It is only this post-harvest tuna — the storage, transportation and processing of which poses no risk of harm to dolphins — to which the different tracking and verification requirements apply. Therefore, there is no nexus or relationship at all between the tracking and verification of the dolphin-safe status of harvested tuna and the allegedly different risk profiles of harm to dolphins from different fishing methods in different areas of the ocean.

21. Finally, Mexico's claims are concerned with the amended tuna measure's differential regulatory treatment under the different labelling conditions and requirements that condition access to the competitive advantage of the "dolphin-safe" label in the U.S. market. The Panel expressly explained that it is the design and structure of the amended tuna measure, and not the AIDCP, that sets up the relevant regulatory distinction in two sets of rules that condition access to the dolphin safe label under a single regulatory framework. The AIDCP is not relevant to the determination of consistency with Article 2.1.

V. ARTICLES I:1 AND III:4 OF THE GATT 1994

22. The amended tuna measure conditions the extension of an advantage – namely, the "dolphin-safe" label – in a manner that modifies the conditions of competition between like imported tuna products in the U.S. market to the detriment of Mexican tuna products and therefore violates Article I:1. Moreover, the measure has a detrimental impact on the conditions of competition in the U.S. market to the detriment of Mexican tuna products *vis-à-vis* U.S. tuna products and therefore violates Article III:4. There is no merit to the United States' arguments that the Panel erred in finding that these provisions were violated.

VI. CHAPEAU OF ARTICLE XX OF THE GATT 1994

23. The Panel correctly set out the three elements of the legal test under the chapeau of Article XX and correctly concluded that, in the circumstances of this dispute, it was appropriate for it to rely on the reasoning and findings that it developed in the context of Article 2.1 in the course of its analysis under the chapeau of Article XX.

A. The Amended Tuna Measure Discriminates between Countries in which the Same Conditions Prevail

24. Contrary to the United States' arguments, it is clear from the Panel's reasoning under Article XX, read in conjunction with its reasoning under Article 2.1, that the Panel conducted an analysis of whether discrimination exists and it found that it does exist. Similar to *EU – Seal Products*, the causes of discrimination found to exist under Articles I:1 and III:4 are the same as those to be examined under the chapeau. Moreover, the Panel correctly found that this discrimination occurs between countries where the same conditions prevail. The same conditions exist in Mexico, the United States and other countries because dolphins may be killed or seriously injured by all fishing methods in all oceans, and accordingly accurate certification and tracking and verification is necessary regardless of the particular fishery in which tuna is caught.

B. The Amended Tuna Measure is Applied in a Manner that Constitutes a Means of Arbitrary or Unjustifiable Discrimination

25. Contrary to the United States' arguments, it is sufficient that the Panel elaborated upon the relationship between the chapeau of Article XX and Article 2.1 and explained why it was appropriate, in the circumstances of this dispute, to rely on the reasoning it had developed in the context of Article 2.1 in the course of its analysis under the chapeau of Article XX.

26. The Panel did not err, as the United States alleges, by merely applying a "single-factor" test to determine arbitrary or unjustifiable discrimination under the chapeau. Mexico acknowledges that, in principle, the chapeau analysis is not necessarily a single-factor test. In the present dispute, however, there are no additional relevant factors that could outweigh the Panel's finding that the different certification requirements and different tracking and verification requirements are applied in a manner that is arbitrarily or unjustifiably discriminatory because they permit inaccurate information to be passed to consumers with respect to the dolphin-safe status of the tuna in the products which consumers choose to purchase, contrary to the policy objective of conserving dolphins through informed consumer choice. The Panel also did not err in finding that the determination provisions are arbitrary.

27. For the same reasons explained above, the Panel also did not err in rejecting the United States' argument that the differences in the requirements are "calibrated" to the risks to dolphins arising from different fishing methods in different ocean areas and rejecting the argument that the differences reflect the fact that the parties to the AIDCP agreed to unique requirements.

ANNEX B-4

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLEE'S SUBMISSION

1. As described below, Mexico's legal and factual appeals of the Panel's findings are without merit. Accordingly, the United States respectfully requests the Appellate Body to reject Mexico's appeals in their entirety.

2. Section II of this submission addresses one particular incorrect characterization of fact that Mexico set out in the opening sections of its Other Appeal Submission. Specifically, it demonstrates that, at the time of signing the AIDCP, the parties *knew* that the United States had made any change to the standard dolphin safe label subject to the fulfillment of a particular condition, namely that setting on dolphins in the ETP was not having a significant adverse impact on depleted dolphin populations. As the original panel found, this condition was not fulfilled. Thus, Mexico is wrong to assert that the parties to the AIDCP agreed to impose the unique requirements on their tuna industries in exchange for the United States allowing access to its dolphin safe label for tuna product produced by setting on dolphins.

3. Sections III, IV, and V set out the U.S. response to Mexico's specific appeals.

1. THE THREE CHALLENGED ASPECTS OF THE AMENDED MEASURE

4. In Section III of this submission, the United States explains that Mexico's claim that the Panel erred in making separate findings as to the specific aspects of the amended measure challenged by Mexico and should have found the amended measure *as a whole* inconsistent with the covered agreements is in error. Subsections A and B provide an overview of Mexico's appeal and of the Panel's relevant analysis.

5. In Section III.C, the United States explains the several reasons why Mexico's appeal is in error. First, Mexico cites no basis for its assertion that the Panel's findings regarding the detrimental impact caused by the certification and tracking and verification requirements constituted *legal error*, in that Mexico puts forward no reason why it was not reasonable for the Panel to consider Mexico's claims of discrimination by interpreting Mexico's arguments as Mexico did. Second, the factual premise of Mexico's argument – that Mexico did not argue that the certification and tracking and verification requirements cause a "distinct" detrimental impact from the eligibility criteria – is in error. Third, it is unclear why Mexico's appeal, if accepted, would have any substantive effect on this proceeding.

2. ARTICLE 2.1 OF THE TBT AGREEMENT

6. In Section IV of this submission, the United States explains that Mexico's other appeals of the Panel's analysis and findings regarding Article 2.1 of the TBT Agreement should be rejected. In Section IV.A, the United States explains that Mexico's appeals regarding the eligibility criteria should fail. In Section IV.B, the United States explains that Mexico's appeals regarding the certification requirements should also fail.

a. The Eligibility Criteria

7. In Section IV.A, the United States explains that the Panel did not err in finding that the eligibility criteria are consistent with Article 2.1 of the TBT Agreement. Mexico makes several legal and factual appeals regarding the Panel's finding. Each of these appeals is without merit.

8. As explained in Section IV.A.1, Mexico's appeal of the Panel's finding that the Appellate Body had "definitively settled" that the eligibility criteria are even-handed should fail. Mexico is wrong to argue that the Appellate Body's even-handedness analysis was limited to the disqualification of tuna caught by setting on dolphins and did not cover the eligibility of tuna caught by other fishing methods. To the contrary, the issue of whether the United States could deny access to the label for tuna product produced from setting on dolphins while allowing other tuna product to be potentially eligible for the label *was squarely before* the Appellate Body. And the Panel did not err in finding that the Appellate Body "definitively settled" the issue. Mexico is also wrong to minimize the

importance of one of the statements of the Appellate Body on which the Panel relied, as that statement was made in response to a U.S. argument and offered guidance on how the United States could come into compliance with the covered agreements.

9. As explained in Section IV.A.2, Mexico's appeal of the Panel's legal analysis of whether the eligibility criteria are even-handed should fail.

10. First, Mexico's appeal is premised on an incorrect legal test. The Appellate Body has explained that, to analyze whether "detrimental impact stems exclusively from legitimate regulatory distinctions" a panel must examine whether the distinctions that account for the detrimental impact "are designed and applied in an even-handed manner such that they may be considered 'legitimate' for the purposes of Article 2.1."[1] For this dispute, the Appellate Body has been clear that this answer will depend on whether the regulatory distinction "is even-handed in the manner in which it addresses the risks to dolphins arising from different fishing methods in different areas of the ocean."[2] Mexico is wrong to argue that whether the eligibility criteria are calibrated to the different risks in different fisheries is irrelevant.

11. Second, Mexico's proposed "benchmarks" for purposes of an even-handedness analysis are in error. Under Mexico's "zero tolerance" benchmark, Article 2.1 would prohibit the United States from drawing *any* distinctions between fishing methods and Mexico's approach would prohibit the United States from labeling tuna product as dolphin safe even where no dolphin was harmed in producing that tuna. Such a position is *inconsistent* with the Appellate Body's even-handed analysis, and Mexico errs in arguing for such an approach. Mexico's alternate formulation of the "zero tolerance benchmark" (focused on whether a particular fishing method causes "systematic" adverse effects) was never presented to the Panel. As such, the Panel made no assessment of this issue, and the statements that Mexico references cannot be understood in this new context. And Mexico's other proposed benchmark (a comparison of fishery-specific Potential Biological Removal (PBR) levels) is both impossible to implement and not consistent with the objectives of the amended measure.

12. Third, the eligibility criteria are even-handed under the correct legal test. Setting on dolphins is the *only* fishing method in the world *that intentionally targets dolphins*. As such, it is *inherently* dangerous to dolphins, putting hundreds of dolphins in danger of sustaining both direct and unobservable harms in each and every set. The same cannot be said of other fishing methods, where "the nature and degree of the interaction is different in quantitative and qualitative terms."[3] Numerous factual findings of the Panel, as well as uncontested facts on the record, support the conclusion that the eligibility criteria are even-handed. The factual findings of the Panel establish that the ETP large purse seine fishery has a different, and greater, risk profile for dolphins – in terms of both direct and unobservable harms – than other fisheries. In addition, numerous uncontested facts on the record support this conclusion. Specifically, the United States has submitted fishery-by-fishery data, generated by RFMOs, national governments, and scientists, showing the clear difference between the ETP large purse seine fishery and other fisheries. Mexico has not refuted or challenged the accuracy of this data.

13. As explained in Section IV.A.3, Mexico's Article 11 claims also lack merit.

14. First, the Panel did not improperly change from the original proceeding its finding concerning the unobserved harms of dolphin sets. As an initial matter, Mexico does not explain how the Panel's alleged error in this regard is "so material" that it undermines the objectivity of the Panel's assessment of Mexico's claim, and, on this basis, Mexico's claim does not meet the standard for a proper Article 11 appeal.[4] Additionally, the Panel's characterization of the original panel as having made definitive findings concerning the "various adverse impacts [that] can arise from setting on dolphins, beyond observed mortalities" was accurate, as the Appellate Body's analysis in the original proceeding confirmed. Further, Mexico's suggestion that it introduced new evidence concerning exhibits on which the original panel relied is incorrect.

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[1] *US – COOL (Article 21.5 – Canada/Mexico) (AB)*, para. 5.92; *see also US – Tuna II (Mexico) (AB)*, n. 461; *US – COOL (AB)*, para. 271.

[2] *US – Tuna II (Mexico) (AB)*, para. 232.

[3] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.240 (maj. op.).

[4] *See China – Rare Earths (AB)*, para. 5.179; *EC – Fasteners (AB)*, para. 499.

15. Second, the Panel did not err in finding that other fishing methods do not have unobservable effects similar to those associated with setting on dolphin in the ETP. Contrary to Mexico's assertion that the Panel ignored certain evidence, the Panel conducted a detailed analysis of the evidence on the record, including discussing the paragraphs of Mexico's submissions that Mexico asserts the Panel ignored. Further, the Panel's finding was amply supported by evidence on the record and reflected a weighing and balancing of that evidence of the sort committed to a panel's discretion.[5] In making this appeal, Mexico fails to confront the fact that the Panel was right that Mexico produced no evidence that fishing methods other than setting on dolphins cause unobservable harms that occur independently from direct, observable mortalities and whose existence "cannot be certified because it leaves no observable evidence."[6]

16. Third, the Panel did not err in its characterization of the Appellate Body's finding concerning setting on dolphins. First, the original proceeding clearly resolved that setting on dolphins, including under the AIDCP regime, causes "various adverse impacts … beyond observed mortalities," as the Appellate Body incorporated the original panel's finding in this regard.[7] Second, it is clear from the Appellate Body report that the finding that setting on dolphins is "particularly harmful to dolphins" was not limited to setting on dolphins other than under the AIDCP regime. Rather, what makes setting on dolphins "particularly harmful" includes the "various unobserved effects" that occur as a result of the chase itself and thus are not addressed by the AIDCP requirements, as well as the "substantial amount of dolphin mortalities and injuries" that continue to occur under the AIDCP regime.

b. The Certification Requirements

17. In Section IV.B, the United States explains that Mexico's appeals regarding the certification requirements of the amended measure should be rejected.

18. As explained in Section IV.B.1, Mexico's appeal of the Panel's finding regarding the reliability of captain's statements should fail. Mexico's explanation of this appeal is improperly vague in that Mexico does not specify whether it is making a legal or an Article 11 appeal, despite the Appellate Body's guidance that parties must do so.[8] Regardless of how one interprets Mexico's argument, however, the Panel's analysis and finding were not in error.

19. First, the Panel's finding regarding the reliability of captains' certifications was not inconsistent with Article 11. Mexico is wrong in arguing that the Panel failed to understand or address its argument that the "specific circumstances" associated with dolphin safe certifications render captains' certifications inherently unreliable or any evidence related to that argument. To the contrary, the Panel simply did not agree that Mexico had proven its case. Mexico is also wrong to argue that the Panel erred by finding that Mexico had not established that captains' statements were unreliable. In fact, the Panel's finding was supported by a significant amount of evidence on the record, which Mexico fails to confront in making this appeal. Further, Mexico does not even allege that the Panel's treatment of the evidence undermined its objectivity, as is required to meet the standard for a successful Article 11 claim.[9]

20. Second, the Panel did not err as a matter of law in its finding regarding the reliability of captains' certifications. Mexico has not identified a legal finding that it seeks reversal of, nor has it identified a legal error that the Panel has allegedly committed. However, to the extent that Mexico is alleging that the Panel committed a legal error, Mexico's appeal fails. In particular, any legal finding that Mexico would appeal is amply supported by the evidence on the record, and it cannot be said that the Panel's finding has *no* basis in the record. Mexico's complaint is, rather, that the Panel failed to accord to the evidence the weight that Mexico preferred and to make the factual and legal findings that Mexico sought. However, this does not constitute grounds for a legal appeal any more than it does for an Article 11 appeal.

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[5] *See Korea – Dairy (AB)*, para. 137.
[6] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.132, 7.134.
[7] *See US – Tuna II (Mexico) (AB)*, para. 251; *see also id.* para. 287.
[8] *See China – Rare Earths (AB)*, para. 5.173.
[9] *See China – Rare Earths (AB)*, para. 5.179; *EC – Fasteners (AB)*, para. 499.

21. As explained in Section VI.B.2, Mexico's appeal of the Panel's finding concerning the geographic distribution of dolphin sets should be rejected. First, the Panel *did* analyze Mexico's evidence and arguments concerning the existence of dolphin sets outside the ETP. However, the Panel had discretion to choose "which evidence . . . to utilize in making findings" and the fact that it did not rely on one of Mexico's exhibits in a particular place does not establish a failure under Article 11.[10] Second, the Panel's finding certainly had a "proper basis" in the evidence on the record, as the record contained no evidence *at all* that dolphins are *chased* to catch tuna anywhere other than the ETP large purse seine fishery, let alone on a routine basis. Third, the exhibit that Mexico asserts the Panel did not address in no way undermines the Panel's finding.

3. ARTICLE XX OF THE GATT 1994

22. In Section V, the United States explains that Mexico's appeals regarding Article XX of the GATT 1994 should be rejected. Subsections A and B provide an overview of the Panel's relevant analysis and Mexico's appeal. In Subsection V.C, the United States explains that Mexico's appeal is in error.

23. In Section V.C.1, the United States addresses Mexico's argument regarding whether the application of the measure results in discrimination. Mexico does not appear to allege that the Panel erred in this section, and Mexico does not make explicit why this section is relevant to its appeals under the chapeau. It does appear, however, that Mexico is asserting that the "discrimination" found to exist for purposes of positive GATT 1994 obligations must be the same for purposes of the chapeau. But that is not necessarily the case, as the Appellate Body has noted.[11] Rather, whether discrimination exists requires examination of "whether the 'conditions' prevailing in the countries between which the measure allegedly discriminates are 'the same.'"[12] Mexico also appears to argue that the Panel should have found that the same set of "conditions" are relevant for the analysis of all three aspects of the amended measure challenged by Mexico.

24. In Section V.C.2, the United States explains that Mexico's argument that the Panel erred in finding that the relevant "conditions" are the "same" is in error. As discussed elsewhere, the objectives of the measure – which the Panel found to have a close nexus with the policy objective of subparagraph (g) – relate to all adverse effects on dolphin due to commercial fishing practices inside and outside the ETP. As such, the relevant "conditions" relate to all adverse effects suffered by dolphins, including mortality and serious injuries and those unobservable harms that dolphins incur from being chased. And the *harm* to dolphins in the ETP large purse seine fishery and other fisheries *is different*, in terms of dolphin mortalities and serious injuries and unobservable harms. As the relevant "conditions" are not the "same," no discrimination exists for purposes of the chapeau and the eligibility criteria are thus justified under Article XX.

25. In Section V.C.3, the United States explains that Mexico's argument regarding whether the amended measure imposes arbitrary or unjustifiable discrimination is in error. Mexico is wrong to assert that it is arbitrary or unjustifiable to distinguish between setting on dolphins and other methods. This distinction is, in fact, reconcilable with, and rationally related to, the policy objective of protecting dolphins. Setting on dolphins is the *only* fishing method that intentionally targets dolphins. As such, every dolphin set must involve a sustained interaction with a school of dolphins and must pose significant risk of observed and unobserved harm to those animals. This *inherent* danger is simply not present in other fishing methods. This difference is borne out by the factual findings of the Panel, as well as RFMO and national government data and scientific studies. And Mexico is wrong that Article XX(g) *prohibits* Members from applying measures that are "calibrated" to different risks. Indeed, surely *the opposite* is true.[13]

26. For the foregoing reasons, the United States respectfully requests the Appellate Body to reject in their entirety Mexico's appeals of the Panel's report.

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[10] *China – Rare Earths (AB)*, para. 5.178.
[11] *See, e.g.*, *EC – Seal Products (AB)*, para. 5.298.
[12] *EC – Seal Products (AB)*, para. 5.317.
[13] *See US – Shrimp (AB)*, para. 165; *US – Shrimp (Article 21.5 – Malaysia) (AB)*, paras. 140-143.

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

ANNEX C-1

EXECUTIVE SUMMARY OF CANADA'S THIRD PARTICIPANT'S SUBMISSION

I. INTRODUCTION

1. Canada addresses: the scope of review under Article 21.5 of the DSU; the allocation of the burden of proof under Article 2.1 of the TBT Agreement; and the interpretation of the chapeau under Article XX of GATT 1994.

II. SCOPE OF REVIEW UNDER ARTICLE 21.5 OF THE DSU

2. Canada considers that a review under Article 21.5 allows a compliance panel to consider unchanged aspects of the amended measure because the amended measure, viewed as a whole, may alter the legal import of those unchanged aspects in the context of the amended measure.

3. Canada is of the view that it is unclear whether the Appellate Body found that the eligibility criteria are consistent with Article 2.1. It should clarify this point.

III. THE ALLOCATION OF THE BURDEN OF PROOF UNDER ARTICLE 2.1

4. The United States asserts that the complainant must demonstrate that the measure at issue satisfies both elements of the "less favourable treatment" test in Article 2.1. Canada disagrees.

5. The burden should lie on the *respondent* to demonstrate that the LRD element is satisfied once the complainant has demonstrated that the measure has caused such an impact. This allocation reflects the balance found in GATT 1994. Further, given the parallel nature of the LRD test under Article 2.1 and the chapeau of Article XX, it is reasonable and logical to conclude that the LRD test also functions as an exception and a defence.

IV. ARTICLE XX OF THE CHAPEAU

6. Canada agrees with the United States that the Compliance Panel erred in collapsing the separate analyses of whether there is discrimination and whether it is arbitrary or unjustifiable into one, and by considering the arbitrary and unjustifiable discrimination element before determining whether there was discrimination between countries where the same conditions prevail.

7. The Compliance Panel also failed to conduct the appropriate analysis of whether the relevant conditions were the same across *countries*. With respect to the eligibility requirements, instead of examining different fishing methods, it should have analysed whether these conditions occurred in countries.

8. Canada disagrees with the United States' characterization of the test for arbitrary or unjustifiable discrimination. The scope of the test to determine whether there is arbitrary and unjustifiable discrimination is dictated by the particular facts of the dispute. The rational connection test is particularly important and may be the only test needed, depending on circumstances.

ANNEX C-2

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION

I. ARTICLE 2.1 TBT

A. US claims

1. Certification

1. Whether or not there is a detrimental impact is assessed by considering what the measure causes. The measure is the set of relevant *regulatory distinctions*. The increased certification requirements do not change this aspect of the assessment and thus do not bear on the question of detrimental impact.

2. Members must ensure that their SPS measures are adapted to the characteristics of the area from which the product originates. The issue of calibration arises in this case, in a particular way, in light of the argument Mexico is making. That argument is conceptually similar to the rule in Article 5.5 SPS, which requires comparable regulatory responses to comparable risks. We only get to these arguments because recognising the concept of *de facto* discrimination opens up the discussion to include all facts. Hence the US point that what Mexico is arguing for would mean that the US would have to impose the AIDCP standards on all its trading partners, who would no doubt argue that is unnecessary.

3. It is the private choice of the Mexican tuna fleet to continue setting on dolphins. The concept of *de facto* discrimination demands some consideration of this issue. Further, recalling that the covered agreements may encourage but do not mandate international harmonisation; and recalling that there is no pure proportionality test (no trade-off between the appropriate level of protection and trade-restrictiveness), because judges are neither mandated nor qualified to make political decisions – we think that there is such a thing as regulatory space. We have said in all the recent TBT cases that regulatory autonomy is as much a pillar of the WTO as MFN or national treatment. Regulatory space cannot be subjected to judicial scrutiny without limitation. Beyond the threshold of regulatory space, regulating Members have the right to choose: that is, there is some margin of appreciation. The chapeau of Article XX does not preclude this: it precludes arbitrary *discrimination*.

4. A cost-benefit analysis does not necessarily identify the only measure that can reasonably be adopted. It tests a measure for rationality by assessing whether its benefits outweigh its costs. This means that there may be more than one measure that satisfies a cost-benefit analysis. This is consistent with the concept of regulatory space, within which Members have a margin of appreciation. We do not think that, in order to be WTO consistent, a measure must be based on a cost-benefit analysis that takes into account the costs of a measure for trading partners, but this would be a strong indication that it falls within the concept of regulatory space. We would expect a cost-benefit analysis to take into account the welfare loss to consumers resulting from higher import prices. We recognise that some caution should be exercised when looking at these issues through the prism of costs and benefits, in the sense that it may be problematic when the benefits accrue to the domestic industry, whilst the costs are borne by the imported product. We do not, however, see this case in those terms.

5. We note that another way of looking at the kinds of issues that arise in this case is in terms of regulatory competition. Different Members have different regulations. Some are more burdensome than others. This can affect trade, and Members can disagree about whether the regulatory burden imposed by another Member is necessary. However, we again draw attention to the fact that Mexico's case is not directed at the removal of additional costs resulting from the US measure. Rather, Mexico's complaint is that the same costs should be imposed on everyone else. In this kind of situation, we wonder if it is not relevant, for the purposes of assessing such arguments, whether or not the complaining Member *itself* imposes such costs on everyone else.

2. Tracking and verification

6. The EU refers to the comments that it has already made with respect to the certification requirements. Our ability to comment more precisely is significantly hampered by the fact that the version of the Panel Report that has been circulated to the Members contains many instances in which allegedly confidential information has been extensively deleted. Furthermore, we situate this issue in the broader context of third party rights in the panel proceedings. We specifically request the Appellate Body to address this point in its Report.

7. Turning to the substance of the matter, we note that the Panel considers that the explanations provided by the US do not disclose any "rational connection" between the objective of the measure and the tracking and verification requirements. At the same time, the Panel states that it is not suggesting that there could not be a reason for such differences. We consider that the existence of a reasonable cost-benefit analysis could support the proposition that a measure is even-handed, particularly if such analysis would account for costs to foreign and domestic trade interests in an even-handed way, as well as the costs to US consumers resulting from the higher price of dolphin-safe tuna.

B. Mexico's claims

1. Whole measure

8. The measure and the set of regulatory distinctions complained of (viewed in the context of the measure as a whole) are conceptually the same thing. In this case Mexico complained about three regulatory distinctions: eligibility; certification; and tracking and verification. We agree with Mexico that a panel must determine whether or not the measure (that is, the set of regulatory distinctions complained of, not one of them considered in isolation) causes a detrimental impact. We also agree with Mexico that, in this particular case, the three factors on which the original finding of detrimental impact was based have not changed. We also agree with Mexico that, if a panel finds detrimental impact, it must go on to consider whether or not the measure is even-handed. We agree that, in this respect, a panel is entitled to consider the regulatory distinctions one at a time and/or collectively.

9. However, if a panel finds that one of the regulatory distinctions (in this case, eligibility) does not demonstrate a lack of even-handedness, then we think that that regulatory distinction is no longer problematic from a WTO law point of view, and should not be caught by the findings and conclusions of the panel. Therefore, if the Panel was correct to find that the eligibility criteria do not demonstrate a lack of even-handedness (a point that we address below), then we think that it is correct that the eligibility criteria should not be part of the final adverse ruling. Another way of saying the same thing is that the measure found to be WTO inconsistent consists of the second (certification) and third (tracking and verification) regulatory distinctions. We take note of Mexico's attempt to sweep up the eligibility criteria into the concept of the measure, *even if* the eligibility regulatory distinction would ultimately be found to be even-handed. We do not agree with that proposition.

2. Eligibility

10. We do not consider that Members are jurisdictionally "precluded" from making particular claims and arguments in compliance proceedings, as a function of what happened in the original proceedings. At the same time, we do consider that compliance adjudicators are expected to take into account the findings from the original proceedings. We do not agree with Mexico's assertion that "it is not possible to compare the raw numbers of dolphins killed [or injured] in different fisheries". We believe that a measure can and indeed must be calibrated or adapted to the characteristics of the area from which the product originates. Furthermore, we do not agree with Mexico's assertion that the burden of *generating* conclusive evidence in this respect falls on the regulating authority. We find contextual support for these propositions in Article 5.7 of the SPS Agreement and in Article 2.3 of the TBT Agreement.

3. Certification

11. In our experience, captain's certifications are one pillar of the overall system. Some infringements are *reported*, but they would appear to be the exception rather than the rule. In this respect, the Panel's assessment appears reasonable to us. Like the Panel, we would be hesitant about the "significant implications" of encroaching on Members' regulatory space based on the assumption that captain's certifications are inherently unreliable.

ANNEX C-3

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION

I. Legal Test Under the Second Step of TBT Article 2.1

1. Rather than following the test articulated by the Appellate Body, the Panel majority focused its inquiry on whether the detrimental impact can be reconciled with, or is rationally related to, the policy pursued by the measure.[1] Japan believes that whether the regulatory distinctions causing detrimental impacts are calibrated to the risks they address is a critical question to determine even-handedness under Article 2.1. Japan encourages the Appellate Body to identify what risks each of the regulatory distinctions in the amended measure addresses, and to examine whether each regulatory distinction is "calibrated" to those risks.

II. The "Sufficient Flexibility" Criteria Under the Second Step of TBT Article 2.1 and the GATT Article XX Chapeau

2. The measure at issue involves a process or production method (PPM) like in *US – Shrimp*. Japan therefore considers that "arbitrary or unjustifiable discrimination" under the Article XX chapeau and the second step of the TBT Article 2.1 analysis in this case could have followed the approach taken for "arbitrary and unjustifiable discrimination" under the Article XX chapeau in *US – Shrimp*, where the Appellate Body agreed that "conditioning market access on the adoption of a programme *comparable in effectiveness*, allows for sufficient flexibility in the application of the measure so as to avoid 'arbitrary or unjustifiable discrimination'."[2]

III. Interpretation of "Where The Same Conditions Prevail" in the GATT Article XX Chapeau

3. Regarding the eligibility criteria, the Panel and the United States appear to be of the same view that the "type of harm" caused by the two different fishing methods is the relevant "condition."[3] Japan believes that the relevant "conditions" are what would make the distinction or discrimination "comparable" for the purpose of the inquiry under the chapeau. Therefore, the presence, and not the degree, of risks addressed by the measures in question, should be the relevant "condition." Furthermore, conflating the cause of the regulatory distinction with the relevant "condition" will always result in a finding of dissimilar conditions.

IV. Legal Test Under GATT Article III:4

4. Japan continues to believe that the assessment of *de facto* less favourable treatment under GATT Article III:4 should proceed along the lines of the two-step test developed by the Appellate Body in the context of Article 2.1 of the TBT Agreement. The application of different tests gives rise to incongruous outcomes.

[1] Panel Report, paras. 7.91 and 7.390.
[2] Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 144.
[3] Panel Report, para. 7.584.

ANNEX C-4

EXECUTIVE SUMMARY OF NEW ZEALAND'S THIRD PARTICIPANT'S SUBMISSION

New Zealand welcomes this opportunity to provide its views on matters at issue in the appeal of the Compliance Panel's report. In this submission, New Zealand draws attention to three matters concerning this appeal. First, in determining compliance of an implementing measure under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), a panel is required to consider the measure "as a whole". Second, in relation to the approach to "treatment no less favourable" in Article 2.1 of the Agreement on Technical Barriers To Trade (TBT Agreement), New Zealand considers that the so-called "calibration test" is simply part of the assessment of whether the regulatory distinction is even-handed and not a 'separate test'. Third, in New Zealand's view it would be unreasonable for the United States to impose observer requirements on other countries involved in tuna fisheries in other parts of the world where there is a different risk of dolphin mortality as a result of different fishing methods than occurs in the Eastern Tropical Pacific (ETP).

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ANNEX D

PROCEDURAL RULING

ANNEX D

PROCEDURAL RULING OF 21 JULY 2015

1.1. On 13 July 2015, the Division hearing this appeal informed the participants and the third participants that the oral hearing would take place on 7-8 September 2015. The scheduling of the oral hearing in this appeal was coordinated with the working schedules in the other proceedings simultaneously before the Appellate Body, in particular, in *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan* (DS454) *and from the European Union* (DS460).

1.2. On 15 July 2015, the Division received a letter from Mexico requesting that the oral hearing not be scheduled on 7-8 September 2015 because a key member of Mexico's litigation team would not be available on those dates. Mexico submitted that attending the hearing with a reduced legal team would have an impact on its ability to present adequately its arguments before the Appellate Body. Mexico requested the Division to modify the date of the oral hearing to a date either before, or after, 7-8 September 2015. Mexico further requested the Division to take into consideration the fact that the same legal team will represent Mexico in the oral hearing in *United States – Certain Country of Origin Labelling (COOL) Requirements (Recourse by the United States to Article 22.6 of the DSU)* (DS386), scheduled for 15-16 September 2015. Mexico thus suggested that the Division reschedule the oral hearing in this appeal and hold it on, for instance, 3-4 September or 21-22 September 2015.

1.3. On 16 July 2015, the Division wrote to the United States and to the third participants soliciting their views on Mexico's request. On 16 July, comments were received from the European Union, and, on 17 July, comments were received from Japan and the United States.

1.4. In their comments, neither the United States nor any of the third participants objected to Mexico's request, at least with respect to the proposed dates of 21-22 September. Similar to Mexico, the United States wished to avoid a hearing during the week starting 14 September 2015, as it also has members of the same legal team engaged in both the current proceedings and those in *US – COOL (Article 22.6 – US)*. The United States indicated that, if it were not possible to move the hearing dates to the week starting 21 September 2015, then it would prefer to retain the currently scheduled dates of 7-8 September. The United States did not favour holding the oral hearing on 3-4 September, due to its own scheduling concerns.

1.5. The European Union indicated its flexibility with respect to the alternative dates proposed by Mexico, while stating that it would prefer to avoid a hearing on 14-17 September 2015, as its lawyers in the current appeal are due to participate in hearings in two other cases on those dates. The European Union expressed the view that requests to change dates in a working schedule should be approached on a case-by-case basis, and identified the following elements as potentially relevant to the decision as to whether to accept or reject such requests: (i) how far in advance the dates of the oral hearing have been known; (ii) the nature of the scheduling conflict; (iii) the capacity of Members, including developing country Members, to deal with several disputes at the same time; and (iv) the Appellate Body's own resource constraints and scheduling requirements. The European Union considered the Appellate Body best placed to weigh and balance these competing considerations.

1.6. Japan did not comment on the specific dates proposed by Mexico. Japan noted, however, that the hearing dates communicated by the Appellate Body, as well as the alternative dates suggested by Mexico, all fall outside the time-period stipulated in Article 17.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Rule 27 of the Working Procedures for Appellate Review (Working Procedures). Japan expressed its understanding that the Division would, in any event, provide sufficient explanation for its determination of any hearing dates.

1.7. In considering Mexico's request, we recall that Rule 16(2) of the Working Procedures provides:

> In exceptional circumstances, where strict adherence to a time-period set out in these Rules would result in a manifest unfairness, a party to the dispute, a participant, a third party or a third participant may request that a division modify a time-period set out in these Rules for the filing of documents or the date set out in the working schedule for the oral hearing. Where such a request is granted by a division, any modification of time shall be notified to the parties to the dispute, participants, third parties and third participants in a revised working schedule.

1.8. Mexico submits that attending the hearing with a reduced legal team would adversely impact its ability to present adequately its arguments before the Appellate Body. We recognize that, as a general principle, a Member's right to defend properly its case is instrumental to the exercise of its rights under the DSU.

1.9. We further observe that the WTO dispute settlement system is currently experiencing a high level of activity, which can be onerous for WTO Members engaged in multiple, parallel proceedings. In such circumstances, a Member's ability to engage effectively in all such proceedings may be impaired, especially if that Member is a developing country. Moreover, Members' capacity to manage limited resources across multiple disputes may be rendered all the more difficult given that the timeframes in appellate proceedings are set independently from those in other phases of WTO dispute settlement proceedings in other disputes.

1.10. In the circumstances of this appeal, we consider relevant the fact that at least some members of the legal teams representing the participants in this appeal are also representing the parties in *US – COOL (Article 22.6 – US)*, and that an oral hearing in those arbitral proceedings is scheduled for 15-16 September 2015. We further note that neither the United States nor any third participant in these proceedings has expressed any opposition to Mexico's request to reschedule the oral hearing for 21-22 September 2015, or suggested that holding the oral hearing on those days would prejudice its due process rights.

1.11. Taking account of the particular circumstances of this appeal, and in the light of the above considerations, taken together, we consider that Mexico has identified exceptional circumstances warranting modification of the dates for the oral hearing. We, therefore, decide to modify the Working Schedule in this appeal and to hold the oral hearing on 21-22 September 2015.

1.12. A revised Working Schedule is attached to this ruling.

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